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# THE JURISPRUDENT.

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## MERCANTILE LAW.—No. I.

Municipal jurisprudence may be classified under two general heads; that which is purely conventional, and that which is founded on generally received principles of natural equity. Now it is evident, we think, that this latter division possesses more interest than the other. An exquisitely artificial system, like that which regulates the course of real property in this country, has indeed charms for the antiquarian and the lawyer; but to the general reader it necessarily presents an aspect not only unattractive, but, we fear, absolutely forbidding. We would not be understood, however, to disparage the study of this part of our law, or to deny that occasionally it takes strong hold upon the imagination. It may be, and no doubt is, amusing enough to a man of curious and speculative turn to trace the machinery from its original structure, simple but compact, rude yet effective, down to the ingenious and elaborate apparatus, which has at length become too complicated for the management of any but the most scientific practitioner. Nor is the investigation without this further interest, that the successive additions and modifications, which the system has undergone in its progress, illustrate and are illustrated by the manners, customs, state of knowledge, and history in general, of the different periods through which it is deduced. To a mind, therefore, constituted like that of Butler, such a study is remarkably congenial, and may be supposed to convey a proportionate enjoyment. But there are not many, who have either the taste to relish such inquiries, or the industry to prosecute them with effect.

Again, we can readily conceive that it must be an intellectual exercise of a very pleasing kind, and one exactly resembling that of the geometrician or algebraist, to obtain from a few general axioms, first, the leading propositions, and from these again, by regular deduction, the whole body of subordinate rules with their corollaries, which make up the law of real property; to work out the intricate problems which the occasions of a state of society like ours continually give rise to; and to apply the general *formulæ* to cases and circumstances to which, at first sight, they seem but ill-adapted. It is precisely this sort of gratification, which we can suppose to have been enjoyed in an eminent degree by the subtle and ingenious Fearne. But this also, as well as the other, evidently presupposes a peculiar aptitude, either natural or acquired. In all probability the great majority even of those, who may honor us by becoming readers, are neither antiquarians, nor black-letter-lawyers, nor mathematicians; are not absolutely enamoured of Lord Coke; nor would quite forget to dine, in their eagerness to settle the almost invisible boundary, which separates a conditional limitation from a contingent remainder. We may, therefore, safely revert to our original position, that the study of that branch of law, which is arbitrary in its principles, and artificial in its structure, has no great claim to general interest.

But the case is very different with that which has its foundation in reason and equity. There is no man with a well ordered mind, by whom the distinctions of right and wrong, even with all their niceties of shade and gradation, can be contemplated with indifference. There is no man to whom the practical application of admitted principles in the distribution of justice, or rather in the correction of injustice, can fail to be directly interesting. Here every decision may be referred to a standard recognised and adopted by all. Every man is in himself a test of its soundness. It is no longer authority, but reason; it is no longer mere law; it is truth, and nature, and morality. The further, therefore, we recede from regulations merely technical, the nearer we approach to the fountain head of natural justice, the more generally interesting does the inquiry become. Some mixture of positive rules there must and will be in every part of the system; but if there be any which is peculiarly exempt from artificial subtleties, and more directly referrible to equitable principles than another, it is unquestionably that which relates to commercial transactions.

Indeed, this branch of our law may be considered rather as the accessary than the principal. It merely comes in aid of what is already established. It rarely originates anything; but simply enforces the obligations of conscience, and sanctions the regulations which, in the practice and course of trade, have been found beneficial. In its details it refers to usage, and in its precepts to common honesty. It is consequently neither abstruse in the matter, nor technical in the form. Its language is not made up of

> 'Phrase which time has thrown away,
> Uncouth words in disarray,
> Tricked in antique ruff and bonnet.'

It is the dialect in common use—the ordinary speech of men of business. It requires therefore no previous study to understand it, no painful effort to bring the mind to bear upon it.

In an age and a country like this, it is needless to [illegible] upon the importance of competent acquaintance with mercantile law. What is it which has caused, in late years, so immense an addition to the judicial business of this country? What are the great majority of cases in the decision of which our courts of law are almost incessantly occupied? Are not three fourths of them mercantile questions? Let any one consider for a moment, the vast and complicated scheme of our foreign and domestic trade—let him reflect upon the multitude of hands through which the several commodities pass—on the thousand modes which are in operation, for advancing the separate interests of all concerned—on the amazing stimulus which luxury has given to competition, and the countless schemes and speculations thence resulting; let him endeavor to reckon up the various classes of men who derive, not subsistence only, but opulence, from trade—the hosts of manufacturers, merchants, brokers, factors, ship-owners, wharfingers, carriers, bankers, money-jobbers, and insurers—and lastly, let him contemplate the confusion introduced among all these by a bankruptcy, and he will readily conceive that the maintaining a just equilibrium in all the parts of such a system as this, may well engross a large share of the labors both of the legislature and the bench.

Yet though so multifarious in its details, and so extensive in its application, the mercantile code of this country is by no means intricate or confused. On the contrary, it is remarkably simple and harmonious. Indeed it is a system of sudden and comparatively modern growth, having been begun, matured, and perfected within the limits of the last half century. It has therefore passed through few hands, and is the work of a succession of judges as vigorous in understanding, and of as enlightened and comprehensive views, as any that have adorned the bench,—of Mansfield, Kenyon, Ellenborough, and Tenterden. But though from this circumstance it has derived a more than ordinary unity and consistence, it has nevertheless the disadvantage, in consequence, of remaining still in a great measure an undigested heap of particulars. It is not many ages since England became decidedly a trading country. In the old text books of the law, therefore, little is to be found on the subject of mercantile dealings. It is evidently considered a matter of minor importance; and whilst unwearied labor is bestowed in digesting, illustrating and commenting upon every part of the law which concerns the realty, whatever relates to the mere personalty, that unsubstantial, ever-changing property, which was almost beneath the regard of the lordly proprietor of lands and manors, is either altogether passed over or dismissed with an occasional notice. Unfortunately, in modern times, the labor manifested in the compilations of Comyn, Viner and Bacon has not been fashionable, and hence it has happened, that there is not a single treatise in which this part of our law has been reduced into one general code. Particular sections have, it is true, been handled with great ability, and some by persons now deservedly at the summit of the profession. The work of the learned Chief Justice of the King's Bench on Shipping, that of Mr Justice Park on Insurance, and that of Mr Justice Bayley on Bills of Exchange, are all excellent in their kind. Again, there is a short Treatise on the Law of Principal and Agent by Mr Paley, and a few others which will readily occur to the memory of the reader, well deserving the attention of the student. Still, in all these treatises there is this disadvantage, that each is the work of a separate individual, and confined with reference to some only peculiar class of cases, there wants that unity of design, that co-relation between the different parts making up the whole, without which we conceive there can be no perfect understanding either of this or any other system. To judge of a system, as of a building, to ascertain its bearings and proportions, it must be viewed altogether, and with one sweep of the eye. The parts of which it consists, being all referrible to common principles, and directed to a common end, necessarily illustrate each other.

Granting, however, to these works all the merit to which they are entitled, still so long a time has elapsed since their appearance, that great and important changes have taken place. The very principles on which many of the decisions were founded have been shaken—the commercial policy of ages has been overturned, and positions of law, deemed incontrovertible, may be, and indeed have been, drawn into question. Again, innumerable cases have since come under the cognizance of the courts, doubtful points have been settled, and many distinctions and qualifications of general rules have been admitted to meet particular exigencies. It is evident, therefore, that some correction and more addition will be needed. But, besides all this, there are several important heads of mercantile law which have never yet been the subject of any methodical treatise; and there is a multitude of cases relating to them, which are only to be found scattered through volumes of reports, or, at best, collected under general titles without order, method, or connexion. Now this may be a matter of little consequence to those in whom long practice supplies the place of study or research; but it is a formidable obstacle to the progress of the novitiate.

[To be continued.]

## TRIALS.

### MASSACHUSETTS.

*Supreme Judicial Court, Boston, June 25th*, 1830.
Chief Justice PARKER Presiding.

COMMONWEALTH *vs.* SELDEN BRAYNARD Appellant from a judgment of the Municipal Court rendered in May, 1829.

J. T. AUSTIN and DANIEL DAVIS, Esqrs. for Commonwealth.

S. D. PARKER and DANIEL WEBSTER, Esqrs. for Defendant.

The indictment charged the defendant with the forging of an accountable receipt for money, which was set out in the words following, viz.

Boston, March 11, 1829. This may certify that S. Braynard has paid two more of his notes of Five Hundred and fifty dollars each on account of my mortgage on his place at Jamaica Plains.

H. G. OTIS.

Hon. H. G. Otis testified that the paper produced in evidence and conforming to the above was not his signature—was a forgery.

James W. Fosdick testified that he was in the employment of Messrs Yates and McIntire, dealers in Lottery Tickets at their licensed lottery office, Providence. He had received orders to deliver the defendant in tickets whatever amount he should pay to Mr Otis in discharge of a mortgage of an estate at Jamaica Plains made by defendant to Mr Ritchie, and by him assigned to Mr Otis, on which Messrs Yates and McIntire had a subsequent mortgage. On 11th of March, 1829, defendant applied to witness at Providence to deliver him a quantity of tickets, saying he had a certificate of such payment. Witness had then shut up the office and was at his house, and refused to transact the business that night, but agreed to meet the defendant as early as he pleased the next morning. After daylight and before sunrise on the 12th, the witness and defendant met at the office, where the defer[illegible]ness the above paper purpo[illegible]y Mr Otis, and the witness [illegible]nt a quantity of Lottery Tick[illegible]alue of $1137. The forged p[illegible]hew in a letter to Messrs Peabody & Watts, of this city. Witness saw it enclosed, and deposited the letter containing it in the Post Office. The paper produced is the same that the defendant passed to him.

F. O. Watts, Esq. received a letter purporting to be signed by Mr Chew, containing the forged paper. The letter was produced. Had no doubt the forged paper is the one that he so received.

William F. Otis, Esq. testified that his father was assignee of a mortgage made by defendant to A. Ritchie, Esq. The money not being paid, an arrangement was effected by which defendant gave six promissory notes for $550 each, with an endorser, as collateral security to said mortgage, and the terms of this arrangement were reduced to writing by witness, and signed by Mr Otis and defendant. The instruments were prepared in duplicate. One was kept by him as Attorney for his father. The other delivered defendant. They were both written on paper, which witness had procured to be ruled and cross lined at the margin, but by some mistake in ruling, it did not answer the purpose for which it was intended. The instrument which he retained was on a whole sheet covering two pages, the other two being blank, and he had no doubt the other was so likewise. One of the notes was paid, and at the request of defendant he wrote a letter to Yates & McIntire, stating that fact. The other five notes were not paid. Witness produced them in Court.

Mortgages to Yates & McIntire, of the same property subject to the mortgage held by Mr Otis, were read to the jury.

Benjamin Eaton. Defendant kept an office in State Street, Boston. The witness had some concern there, and saw defendant every day or nearly every day, but could not remember any day in particular. On his cross examination he said the defendant's office consisted of two rooms, both very public. Loungers and readers of papers were too frequently there, and it contained no place where a person could write without being observed or be liable to interruption.

Samuel Byrt kept with defendant in his office, and lived with him at his house in Jamaica Plains. About the middle of March, 1829, he rode with defendant from Jamaica Plains to Boston. After a short period, which might be half an hour, the defendant started for Providence in his own horse and chaise, and returned the next afternoon near night. The witness did not know of defendant's intention to go to Providence, till after they had arrived in Boston, and just before defendant ordered his horse and chaise.

On cross examination, the counterpart of the contract produced by Mr Wm F. Otis was shown to witness, who said he got it from the defendant's trunk at Jamaica Plains by defendant's order, when defendant was in prison after the trial in the Court below.

The Counsel for the respondent objected to the paper produced going to the Jury, it not being an accountable Receipt, as the Instrument said to be forged is described in the indictment. It could, in no sense, be considered an *accountable* Receipt within the meaning of the Statute. The Statute must be construed strictly.

Upon this point Mr Parker cited the following authorities. 2 East, 977—2 East, Pleas of the Crown, 985. Foster, Crown Law, 119. 1 Leach's Cases in Crown Law, 134. The King *vs* George Williams, 363. The King *vs* Ellor. 2 Leach, 612. Clinch's Case. Same 711. King *vs* Hunter. 2 Douglass, 301. The King *vs* Jones. 2 East, 927. Harrison's Case. 2 do. 952. He referred also to 17 Mass. R. 49.

The Statute has the words release—discharge. An accountable Receipt for the payment of money or delivery of goods, means an original undertaking to pay the money or deliver the goods. It raises the contract—imposes an obligation—recognises a right to the money or goods in some other person—not merely a right to retain. It is something different from a release of a debt, or an acknowledgment of satisfaction. It is different from that kind of evidence which is used to show a pre-existent debt paid in full or in part.

Mr Webster contended that the words used in the Statute were equivalent to the words in the English Statute 'for the payment of money or the delivery of goods,' that this Receipt was for neither.

The Judge thought the question was one of some difficulty, and a proper one for the consideration of the full Court. He should, therefore, rule the paper in, and the respondent might except if he thought proper. The paper was accordingly submitted to the Jury.

The Counsel for the Government here stopped, and—

S. D. PARKER, Esq. opened the defence. He remarked that the case was of great consequence to the respondent; that the penalty of the Statute was highly severe. The Government should be held to strict proof. The time and place should be alleged and proved. The allegation in the Indictment is that the offence charged was committed in the County of Suffolk. That allegation should be proved. The Jury were not to guess at the place, it must be made out with all reasonable certainty. They were not to suffer themselves to be led away by prejudice. The question as to variance between the paper alleged to be forged in the Indictment and the one here produced is saved for the whole Court; the Jury have nothing to do with it on this trial. He then read the following authorities to show that the Court sitting here had jurisdiction only over offences committed within the County.

2 Hale's P. C. 163—Mass. Laws, Act of 1812, chap. 133—Hawkins' Pleas of Cr. Book 2. ch. 25 sect. 35. Indict. 4 vol. p. 19. Comyn's Dig. Action iv. 9. vol. 1. p. 262.—Parke's and Brown's Case, 2d East, 992.—Seven Bishops Case—12 Howard's State Trials, 344, 336, 317—Ch. J. and Justices Powel and Holloway said they would not allow the Jury to *guess*.

4 Barnewell and Alderson 149. King *vs* Burdett. 'In order to warrant a presumption a *prima facie* case must be made out.' In same case Ch. J. Abbot says, 'A fact must not be inferred without premises that will warrant the inference'—161.

Rex *vs* Crocker, 5 Bos. & Pul. 91—(2d New Repts.) The date of a forged Instrument is not much to be relied on. The venue is material, and must be proved by prosecutor.

2 Mason Reports, 469—United States *vs* Britton. 'The rule is that the place where a forged instrument is found, or offered in a forged state, is *prima facie* evidence that it was forged there, unless disproved by some other fact in the case.'

The Government will probably rely on Dr Hensey's case in 1. Burr. But the date there is of a *genuine* paper—having a *true date* at the *domicil* and *residence* of the prisoner; and where his *other* papers were found. This is a *false* paper. It is necessarily dated at a particular place. It must have been dated at Boston, let it have been made elsewhere or anywhere. And the paper or remnant of the paper on which it was written was found at his *domicil* in Norfolk, not in Suffolk.

We deny that the respondent committed the offence charged anywhere. There is no evidence that he did it in Boston.

The Solicitor here cited from 2 East and 2 Russell, and commented on the case in Mason.

Mr WEBSTER, in closing the defence, remarked, that, in the present posture of the case, they might properly call upon the Court for instruction. It was necessary for the Government to give some evidence to satisfy the Jury that the crime alleged was committed within this jurisdiction. He could see none. The prosecutors thought otherwise, and it became his duty to make such suggestions upon the respondent's case as occurred to him.

The Indictment was of great consequence to the defendant. It was a charge of forgery. No charge could be of more importance to him. It draws after it great consequences.

It was not his habit, on any occasion, and he trusted he should not be inclined on this, to draw off the attention of the Jury from the issue before them, by considerations that did not belong to the case.

The paper alleged to be forged was produced. It corresponded with the one set forth in the Indictment. Mr Otis denies the signature to be his. Somebody had forged it. It was first seen in the respondent's possession. He had an interest to make it. He did not attempt to conceal these facts. The Jury might be of the opinion that the paper was false, and that it was made by the respondent. Suppose it to be so. They were called upon to decide another point as material. *Was the paper made within the County of Suffolk?* They were as much bound to try that question as anything else in the case. It was as necessary to prove that the paper was made in Boston as that it was made at all. The Government must make this out. The respondent need not show where it was made. There must have been a breach of the peace within the County of Suffolk. No offence out of the State can be shown—nor can any offence committed without the body of this County be tried here. The Jury would not suffer themselves to be carried away by any impressions, which they might have of the guilt of the respondent, and pass over all other points in the case. They were as much bound to try the issue submitted to them, as if life were depending. They were bound by their duty and their oaths so to do, without regard to the guilt or honesty of the respondent.

It was (he remarked) a humble virtue to protect the innocent. I. met the sentiment of every honest person in the community to acquit such. But it required independence and firmness to shield the guilty. They owed a higher duty to themselves and the community in such cases, than to secure the victims of the law. They were bound to uphold the rules of evidence, to surrender their convictions of guilt to the claims of the law of the land.

There are three places where this paper might have been made.—In the County of Suffolk, in Norfolk, or in the State of Rhode Island. The Government contended that it was made here. They must prove it. If it was made in the County of Norfolk or in Rhode Island, they had nothing to do with it. If upon the evidence they now had, they could convict the respondent in Rhode Island or in Norfolk, they could not convict him here. He could not be convicted in two states or counties for the same offence. If he were to be indicted in Rhode Island for making this paper, then, your verdict here would be no bar. He might suffer twice for the same offence.

He would ask their attention to the evidence. What was the proof that it was made in Norfolk, if there were no evidence actual or legal that it was written elsewhere?

The evidence offered goes to rebut the presumption which the law raises, that it was written elsewhere. No witness saw the paper here. It was first seen in Rhode Island. In absence of proof, the law presumes it was forged where it was used. Such is the result of all the cases in the Books.

The Government itself had offered evidence which is *prima facie*, that the offence charged in this indictment was committed in Rhode Island. The prosecutors have produced evidence which shows that the prosecution cannot be sustained, unless there be something to change the legal presumption. What had they offered for that purpose? What were the circumstances on which they relied? They had not told them. He was left to conjecture what they might be. From some intimations which had been given by the Counsel for the Government, in the course of the trial, he inferred that the date of the paper was to be relied on for that purpose. There was not a case in the books which sustained that position. It is nowhere relied upon as a circumstance to change the legal presumption, or to prove the place of making. The case in Burrows does not support the position of the Government. There is not a case in the Books where the date of a forged paper is relied on to prove the locality. Mr Otis lived in Boston. The person who made the instrument wished to give it the appearance of a *genuine* paper. It must, therefore, be dated here. It was necessary that it should be so, to effect the fraud. The date is, therefore, no evidence of the paper having been written in Boston. How is it with one who forges a Bank Bill on a Boston Bank? Does he not date it at Boston? or does he date it at Northampton, or Plymouth, or wherever he happens to use it? The date is not then even a circumstance to rebut the legal presumption.

It is said also that the paper on which the Receipt was written was peculiar; that it came from Wm F. Otis' office, and was taken from the sheet on which the Agreement between Mr Otis and the respondent was written; that that paper was, probably, kept in respondent's office in Boston. Is it likely that the respondent would go to his trunk or pigeon hole in his office, and in the place of his business, in open day, make this paper? It must have been the result of repeated trials. He must have compared the signing with the name of Mr Otis on the Agreement. It could not have been done in haste. He would not have used such a scrap of paper at his house or office, where paper was plenty. He probably went to Providence on the business of the mortgage—left his house in the morning—found that he could make no other arrangement of his business, then wrote the receipt there on this strip of paper taken from the sheet in his pocket. There was no reason why he should wish to use this kind of paper. Yates & McIntire had received no such paper from him before with Mr Otis' name on it. This is not all. Where was the paper first found? At his residence in Norfolk. His important papers would be most likely to be kept there. So is the evidence as far as it goes. He was arrested and imprisoned. He did not return to his house till after the trial in the Municipal Court. His clerk found the paper there. This is a strong circumstance. It derives strength from the case in Burrows. His other papers were found in Norfolk; and not only his other papers, but part of the same paper with the one offered in evidence.

As far as these circumstances go to show that he should be convicted there, they show that he ought not to be convicted here.

If he wrote this paper in Boston, when did he do it? Not the day he went to Providence. He was in his office not more than ten minutes. It was not a place he would be likely to select for such business. It was uncommonly exposed. There was no hiding place — no place of privacy. The case required all these. It was, besides, the work of time. Would he be most likely to do it in State Street, at home, or on his journey? Another thing. When do we first hear of his intention of going to Providence? Not till the morning he left. He said not a word about it even to his confidential clerk. He went away in haste. He must have made it, if at all, at his house in Norfolk, on the way to Providence, or after he arrived there. In either case the jury could not find him guilty here.

He had submitted all the remarks he had to make upon the subject. He believed the Government had not made out a case upon which they could feel justified to find a verdict against the respondent. He would make no appeal in his behalf. He would let him stand upon the law and the evidence. The Jury were sensible and just men, and would give him the benefits of both. If so, he had no fears as to the result.

The Solicitor contended that the only question about which there could be any doubt, in this case, was as to the place where the offence was committed. The charge as alleged in the indictment was clearly proved. He thought the Jury would come to the conclusion that it was committed in the County of Suffolk. He denied the position of the respondent's Counsel, that the place of uttering is presumptive proof of the place of making. The case in the Circuit Court did not sustain it.

Circumstances, at any rate, would control that presumption. The circumstances in this case did so. They were strong, and, in his opinion, conclusive.

The Respondent's place of business is in Boston; and the prosumption is a fair one, that the instrument was made there. It could not have been made in Providence. The respondent arrived there late, and was anxious to get his business done immediately — said he had the receipt with him. He finished his business early the next morning. It must have been the work of time to make the paper. He must have compared the false signature with Mr Otis' real name on the Agreement in his hands. This Agreement was most likely to be at his place of business. He could not have made this paper on the way to Providence. He had no materials, and would hardly undertake to do it with such as he could find at a public house. The Counsel for the respondent, in fact, admit his guilt, and ask the verdict of the Jury upon a mere mattter of form. They were bound to adhere to these forms; but they would not require very strong evidence to satisfy them that the offence charged was committed within this County — at the respondent's place of business; — and that he ought to be convicted. He will be convicted nowhere if not here. It is enough that the weight of evidence is on that side of the case. It could not be made certain. They owed a duty to the respondent and his family; but they owed a higher duty to themselves and the Commonwealth.

In charging the Jury, the Judge remarked, that they were called upon in the case before them, to exercise a great degree of intelligence and candor. They must give the respondent the benefit of a principle of law, which has long been settled, and which had its origin in sound reasons — that every offence should be tried in the County where it was committed. The Government had established this principle, and it should be bound by it. They might have no doubt of the guilt of the respondent; but yet, if they were not satisfied, upon the evidence in the case, that the crime was committed within this County, they were bound to acquit him.

The Government, among other things, relied upon the date of the instrument and the circumstance that the respondent's place of business was in Boston. There was but little, if anything, to be inferred from the date. It was necessary that it should bear that date to effect the object. And as to the circumstance that the respondent's place of business was in Boston, there might be a fair presumption from that, that his usual business was done there — but it afforded less evidence that extraordinary and unusual business was done there. It was proved that the respondent did business there and at his house in Norfolk. If the presumption that he committed the offence in Norfolk was as great as that he did it here, that circumstance amounted to nothing, one presumption destroyed the other. If upon the presumption that he committed it in Norfolk, the jury might convict him there, they could not, upon a similar presumption, find him guilty here. These circumstances, with others, they were bound to weigh, and as they found that fact, so would be their verdict.

The Jury retired and returned a verdict, *Not Guilty in the County of Suffolk*, and the defendant was discharged.

## ENGLISH CASES.

### PREROGATIVE COURT—MAY.

Before Sir John Nicholl.

*Simpson vs. Choppin and Skelton.*

Sir John Nicholl gave judgment in this case. It was a suit to determine as to the validity of the will of the late Mr Charles Frederick Schweitzer, which was opposed by the relatives on the ground of the insanity of the testator. When the case was before the Court on the arguments, we stated the facts so fully that it is unnecessary to do more at present than to allude to a few of those which were the most prominent.

The testator was a man of most eccentric habits from his childhood. His father sent him abroad for his education, but he behaved in such an extraordinary manner in several of the continental cities, and uttered his sentiments on religion and politics so freely, that he was continually getting into scrapes with the authorities. Upon his return to this country, his father purchased a commission for him in the 27th regiment, which he soon after quitted without leave, and his commission was superseded. When his father died, the property came in equal shares between the testator and his brother, being about 1,000*l* a year to each. The brother ran through his share in the speculations of 1825. The testator lent him 1,000*l*, but, upon his spending that also, he would lend him no more, saying, that he deserved to suffer. From this period he continued residing at one coffeehouse or another until his death. He had made several wills, one in favor of a lady whom he had seen at a party only once, and whom he declared to be the finest woman in England. Another will gave his property to a Miss Morris, but this will he revoked, because Miss Morris had gone unattended in the evening from her father's house to a house a few doors off. The will in question was in favor of a child of three or four years of age, named Elizabeth Huggins, the grand-daughter of

Mr Simpson, the proprietor of Simpson's coffee-house, Cornhill, at which place he frequently took up his residence. He had in former wills left legacies to the children of Mrs Choppin and Mrs Skelton, but in this will he had wholly omitted their names. He had taken, at an early period, to excessive drinking, and this habit increased on him towards the close of his life, and though he committed various irregularities yet still he kept an account at the Bank, and transacted all his pecuniary matters there, without any assistance, up to the period of his death. He was in the habit of wearing solid gold buttons in his coat, and he carried his money in something similar to a shot-belt. On one occasion he wrote to old Mr Skelton a letter, which he addressed 'To old Skelton,' and dated it, 'This day of our LORD JESUS CHRIST the carpenter's son.' He was a professed atheist, and was in the habit when intoxicated, of swearing oaths of the most horrible description. He also carried blasphemous prints in his hat, to assist him in his irreligious arguments.

Sir JOHN NICHOLL, after adverting to the principal facts adduced in evidence, said that the question for the Court was whether the testator was of unsound mind, or the contrary. The facts in support of either view of the case were pretty strong, and it appeared almost as if the relatives themselves appeared to think him sane, for they left to him the sole management of himself and of his property up to the period of his death. It had, however, been proved in some instances that persons who had always conducted themselves and their property well were nevertheless insane, and this was done by taking a view of the whole course of their lives. The partition between eccentricity and insanity was so thin, that it was difficult to say where the former terminated, and where the latter began. He was certainly both odd and eccentric, and had latterly given way to habits of intoxication to such a degree, that he would take nothing but champaigne or brandy for breakfast. He was irritable, passionate, malicious, violent, suspicious, and given to groundless aversions. The combination of all these feelings had generally been taken as indicative of insanity. With respect to his atheism, he did not think that that necessarily indicated insanity, and he would not give judgment upon such a ground; but he did think the manner in which it existed in the mind of the testator, and the extraordinary mode which he took in communicating it to others, did indicate unsoundness of mind. Under all the circumstances of the case, he must come to the conclusion that the deceased was not only an eccentric man, but that he was insane, and the will therefore must be set aside, and Mr Schweitzer be taken to have died intestate. The Court, however, would order the costs to be paid out of the estate.

*. Kerr vs. Phillips and others.*

This was a question as to the testamentary intentions of Mrs Charlotte Phillips, the lady whose sudden death at Finchley excited so much public attention a short time since.

Dr LUSHINGTON supported an allegation praying the Court to admit two unfinished papers to probate, as they contained the intentions of the deceased with respect to her property. The deceased, under her mother's will, became entitled to a sum of 5,000*l*, and she had executed a regular will on the 31st July, 1829, disposing of this sum in a particular manner. Five days afterwards she drew up another paper of instructions, containing a different disposition of her property, which she placed in the hands of a Mrs Vesset, requesting they might be given to Mr Scott, her attorney, to be put into a legal form. Before this was accomplished Mrs Phillips died, and the admission of these papers to probate was opposed by her next relative, Mr Atkinson, who would have been entitled to the property had she died intestate.

The KING'S ADVOCATE appeared on behalf of Mr Atkinson, and contended that this paper ought not legally to operate, as the probability was, she had not finally made up her mind as to the ultimate disposal of her property.

Dr ADAMS appeared for the husband, Mr H. Phillips, and contended that the will of July, 1829, was not procured by undue influence of the husband, as had been asserted. With respect to the allegation, he declared that it was a matter of indifference to his party whether it was admitted or not. The only important difference between them appeared to be a bequest of 500*l* to Mr Phillips's natural daughter, and a different disposition of the moiety of 2,500*l* to her husband.

The JUDGE said it was evident that the intentions of the deceased were contained in the will of 1829, and the instructions now propounded; and, he should, therefore, direct the allegation to be admitted.

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COURT OF KING'S BENCH.

*Rex vs. Knight.*

The defendant was a servant to a tea-dealer in the county of Worcester, who had been sent about the country by his master, showing samples and collecting orders, and afterwards carrying the parcels about for delivery, according to the orders. The question was whether this was hawking and peddling, so as to require a license under the Act of the 50th Geo. III.

The COURT was of opinion that the Act applied only to those who carried about the goods to be sold and delivered immediately, and not to those who carried about the goods for delivery pursuant to previous order and contract, otherwise a license would be necessary to legalise the transactions of travellers for London houses.

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ROLLS COURT—MAY.

*Robarts vs. Jefferies.*

This case occupied the attention of the Court during the whole day, but possessed little matter of public interest. It was a bill filed to obtain from the defendant, a solicitor, the title-deeds of an estate which had been mortgaged, and the equity of redemption of which had been purchased by the plaintiff, Abraham Wildey Robarts, the Member for Maidstone. The defendant grounded his case on the points that the deeds had been deposited with him partly as a security for a debt due to him as a banker by the person who had owned the estates, and had sold her equity to the plaintiff; and also that he had a legal lien on these deeds for his bill of costs, as solicitor to the same individual. The first point he was unable to establish sufficiently by evidence; with respect to the second, it appeared that he had taken a promissory note, payable on demand, as a security for his costs.

His HONOR decided that as such a promissory note bore interest from the day of payment having been demanded, while an attorney cannot charge interest on his bill of costs, the defendant had accepted a description of security which superseded his lien on the deeds. As his Honor considered the defendant to have been to blame in the retention of these deeds, he gave his decree against him, with costs.

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WORSHIP STREET.

Mr Amos Petett, a respectable looking man, was yesterday brought to this office, charged by Mrs Martha Bacon, a widow lady, and proprietress of a public house in St Luke's, with annoying her in the public streets, she having repeatedly desired him to desist.

The complainant, who appeared to be about forty years of age, and possessed of very considerable property, stated that the prisoner had for some time past visited her house, and repeatedly made proposals of marriage, which she always refused listening to. On the previous evening he became so annoying and intrusive, and also abusive, declaring he would not leave her house, that she was compelled to give him into custody. Four men were employed in ejecting him from the house.

Mr BENETT—(To the prisoner)—You have no right to force this lady against her will. Will you promise not to annoy her again?

Prisoner—No, if she is determined not to have me.

Mr BENETT—Well, if you will promise not to go to her house again I will discharge you.

Complainant—Will you promise——

Mr BENETT—Madam, if you interrupt I shall have done with the case altogether.

The prisoner, in reply, said he would not make any promise; but, when the Magistrate informed him he should hold him to bail, he said, after some hesitation, he would not, and was discharged.

The complainant enjoys a property of £1,300 per annum, independent of her business.

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UNION HALL.

Yesterday a Mr Emmerson appeared to answer a summons, granted at the instance of Miss Benson, an artist, for refusing to deliver up a miniature likeness of himself, executed by that lady.

The complainant said that having been introduced to Mr Emmerson, she expressed a wish to take his miniature, in order to exhibit it as a specimen of her abilities in that line of drawing. He assented, and when the likeness was finished, requested that it might be left in his possession for the purpose of showing to his friends, adding at the same time, that it would probably be the means of recommending her to several of his acquaintances. It was expressly understood, however, at the time, that the miniature was to be returned to her in due time after its exhibition. It remained in the hands of the complainant for the last seven months, and at the expiration of that period, conceiving that he had had it quite a sufficient time for the purposes he required it, she applied for it, but he peremptorily refused to pay eight guineas, the sum she demanded, or to restore the miniature.

Mr Emmerson said that the lady who had brought him there that day, had actually solicited him to sit for his likeness, and he acquiesced, at much personal inconvenience to himself; that when it was finished, owing to his not having engaged her to execute it, he, of course, considered that he was entitled to it; and therefore, retained it in his possession.

Mr CHAMBERS — If you pay eight guineas, the complainant will have no objection to permit you to retain it; but it is too much for you to suppose that she would have gone to the pains and labor of taking your miniature, merely for the purpose of bestowing it on you, whom she has represented as almost a total stranger to her.

Mr Emmerson — Really, it was under the impression that I was to have had the miniature for nothing, that I went to the labor and inconvenience of sitting like a poker, and fearful of stirring a muscle while it was painting.

The Magistrate remarked that he saw nothing at all striking in the countenance of the gentleman, to excite a desire on the part of an artist, to execute his likeness gratis. It may be well to state that Mr Emmerson possesses what might be termed a good-natured countenance; or, in Ireland, a potato face; that is, plump rosy cheeks, eyes wide apart, and a crooked nose!

After some further discussion about the title to the picture, the Magistrates decided the case, by compelling Mr Emmerson to deliver it up to the right owner, and the parties retired.

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Mr Justice ——— actually broke off a summing-up, upon one occasion, with — 'Mr Undersheriff, I should like to know what that fat man means by pressing against those two young women in the third row of the gallery' — and on another, 'Really, Mr Foreman, I am exhausted, worn out, with the outrageous conduct of that witness in the box,' (who, amongst other profanities, kept on saying, that what he deposed to was 'as sure as God made apples.'

THE JURISPRUDENT.

BOSTON, SATURDAY, JULY 10, 1830.

We offer to the public, this week, the first number of the *Jurisprudent*. It exhibits the general outlines of the plan of the publication. Should our subscription authorise it, we shall issue another number in the course of a few weeks, and, after that, the paper will be published regularly every Saturday. We believe nothing like the proposed periodical has ever been undertaken in this country.

The Profession of Law in England is furnished, through the daily papers, with full reports of all proceedings of the Courts, on the Circuits, at Nisi Prius, and in Banc. Many cases, in that way, are brought before the public, which would otherwise never be heard of out of the purlieus of the courts. Decisions are often made, points ruled, and questions investigated, in the civil and criminal courts, which are of interest to the public, as well as to the members of the Profession, and which can never be introduced into the regular Reports. Those are already multiplying to such an extent, in England, and in this country, as to impose a burthen upon practitioners heavy and grievous to be borne.

'The multiplication of books,' says the late Judge Howe, 'is an evil that falls more heavily upon the Profession of Law, than any other. It was an evil complained of in the time of Coke, and if it existed then, what must it be now. There are more than ten tribunals in England, whose decisions are constantly published, each sending out one volume a year. And there are not less than twenty courts in this country, whose decisions are constantly reported. We have already more than two hundred and fifty volumes of regular Reports.' And Essays, Compilations, Digests, and Treatises are alarmingly increasing under the exuberant productiveness of steam presses and professional leisure. As it seems no longer possible for any one, with ordinary length of days, to run over the whole field of legal knowledge, the inquiry now is, how the most information can be got in the shortest way. No practitioner, who values his own reputation and regards the safety of his clients, is willing to be wholly ignorant of any department of his profession. He must not only be thoroughly imbued with its elementary principles, but he must pursue them out in all their channels and applications, and follow after the dim and doubtful, as well as brilliant lights of the law. He must know the old cases and the new ones — the *jus antiquum, jus novum et jus novissimum*.

The number of points in a modern library of five hundred volumes is said to be, at least, 2,625,000. Well could George the Third say, 'I have had occasion to consult the best lawyers in my dominions, and not a man of them can do more than refer.'

It is said that there is no *royal road* to the law. There is no royal road to any science. No remark can be more just when applied to elementary knowledge — to first principles. But we must either find such a road to the cases in the books — to Reports and Digests — or give up the journey altogether. No one can hope to follow every path, which private gentlemen or industrious travellers have found it convenient or amusing to lay open. The most we can do is to learn the guides and monuments by the way, and to fix the landmarks of our territory. The great matter is to know where to find the law — to know where to go for the shield of the innocent and the sword for the guilty — for the words of encouragement and persuasion to the timid and honest, and of subduing and coercive eloquence to the corrupt and oppressive judge; — to find the means to defend the persecuted, to protect the laws against abuse, and to hold up the broad shield of the Constitution between the citizens and the corruption and oppression of power. These are some of the highest duties of the Profession. The advocate need not always have his sword drawn and glittering, and his armor upon him. The humble attorney need not commit to memory all the precedents in his Wentworth or carry his Natura Brevium in his pocket. He need not bear a camel's load of technicalities about him, or be ready, at a moment's warning, to dictate a bill in chancery by the wayside. It is enough that he knows when to lay his *venue* and fix his *locus in quo*. He should be able to *allege* his *scienter* when necessary, but need not always be ready to *prove* it.

It will be the humble effort of the conductors of The Jurisprudent, to give as full references to cases decided here, and in England, as their limits and means will allow.

We shall hope to receive occasional aid, in our advertising department, from gentlemen of the Trade, and, in return, we will speak as well of their books as we think they deserve.

If we succeed in our undertaking, as we hope to do, we shall take particular pains to get early information of all interesting legal events in the several states — to give a list of their judicial officers, and of the lawyers in them; and, more especially, the *respectable* ones, who may send us their names.

We might appeal with confidence, for support, to the liberal members of a liberal profession — who, by the way, patronise every body better than one another; — but we make no appeals. We have no belief that the Profession or the country will be ruined, if we don't get a thousand subscribers for our paper, and we hope they won't be if we do. If those to whom we send it, like the plan, they will take it; and if they do not, why then the *Jurisprudent* will fail for want of subscribers — that's all. Our terms are certainly moderate, and as lawyers never make any other than such, so they never complain of *reasonable* charges.

## QUARTERLY REVIEW OF JURISPRUDENCE.

We would call the attention of our readers to our first page, which contains the first No. of a series of articles from the above named work, under the head of *Mercantile Law*. We intend to continue the publication of them, with the hope that they may prove interesting to our patrons. We know of no periodical in this country, or in England, which bears the marks of more talent and industry than the Review of Jurisprudence.

It is issued quarterly, and has now been published about two years, with great success, under the management of nearly twenty Barristers of eminence at the English bar. Many of the elementary articles are written with great ability, and cannot fail to interest the reading part of the Profession in this country. It contains besides, a great variety of useful intelligence, and the incidents and *on dits* of the legal world, under the head of 'Events of the Quarter.'

It is our design to republish, in the Jurisprudent, all the articles which are of general interest. By devoting to that object two of our pages weekly, we shall be able to present to our readers, in the course of the year, almost the entire contents of that useful periodical. If we should accomplish nothing further in our undertaking, our patrons will be amply compensated for the expense of their subscription. We hope, however, to do much more.

## AMERICAN DIGEST.

We have before us the proposals of William Hilliard, Jr. Esquire, of this city, for publishing an *Analytical Digest of American Reports*. We are glad such a work is in progress. But Mr Hilliard will probably meet with less encouragement, by way of *subscription*, than he anticipates, if he anticipates much.

Judges, benchers, barristers and attorneys, *omne genus*, involuntarily sigh and shudder at the sight of a subscription paper. They have hardly yet recovered from the panic occasioned by the appearance of the *Digest of American Law*, which now sells for something less than a *guinea* a page.

Mr H. now proposes to serve up to them, at a single meal, somewhere about 5000 *pages* more, *royal octavo, on a fine small type*, by the way of helping their *Digest*-ion!

He must not be disappointed or discouraged, if his professional brethren manifest a wish to *see* his work before they determine to *buy* it.

We have no doubt, that the proposed work, executed with the ability and fidelity, which we have good reason to believe Mr H., and know Mr Rand, who is to assist him, possesses, will ultimately succeed. And should it be continued, it will supersede, in a great measure, the necessity of getting up, every year or two, separate Digests of State Reports, — and in the end, we hope, 'like Aaron's serpent swallow up the rest.'

We hold most feelingly, in this regard, to the doctrine of *consolidation;* and hope the *Analytical Digest* may have the effect of *nullifying*, if not state *rights*, at least all further combinations of state *authorities*, against the peace and to the manifest detriment of the Profession.

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'*We are a forgiving people*,' said a worthy magistrate in Court the other day, while one of the '*truly lucky*' gentlemen was shaking in the wind, and hanging in mid-air, by the slender thread of a *venue*, which would have been cut if the sword of *justice* could have been used.

No remark can be more true. Our whole population to a man, will turn out and join the chase to hunt down a rogue, and when he is caught, and safely lodged in limbo, one half the men and all the women would vote him out by acclamation, if, peradventure, he happens to be a *genteel* defaulter.

Fuller, who was so careless as to put into his own pocket some fifty or sixty thousand dollars of other people's money, and so unlucky as not to get away with it, has been in the *poor debtor's* house, in Leverett Street, hardly long enough to get rested; and we begin to talk about the *locus penitentiæ* and the *honorable intentions* of the *unfortunate man*.

It would be no marvel if we were called upon, ere a se'nnight has passed, to *subscribe* him out of jail. And if he should be so unlucky as to be put into the *safe* at Charlestown, ten to one, he will be *pardoned* out, before half the less *genteel* rogues, who have *mis-taken* a gilding or *mis-placed* a lady's indispensable, have got through their ninety days *solitary*. Any one who chanced to pass through Court Street yesterday, while Fuller was under examination, might have supposed the good people, even then, were gathering to the *rescue*.

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## SUPREME JUDICIAL COURT.

*Adjourned Law Term — June*, 1830.

The court adjourned on Tuesday, the 22d ult., after a laborious Term, during which a great number of cases have been argued, and a very considerable number determined. At the March and adjourned June Term, opinions have been given in upwards of forty cases. Several were continued *Nisi for advisement* to Salem this month.

We give, below, the names of some of the cases determined in Berkshire county, September Term, 1829, and the points decided in them.

We shall give, in our next, the cases decided in Worcester county, at the September Term of the same year; and those of the succeeding law Terms will follow as fast as our limits will permit.

No one, who attends upon a law term of the court in this county, can entertain any doubt of the ability and industry of the Bar, or of the learning and diligence of the Court.

We much doubt whether any portion of our country sends forth to the world more sound and practical law, more ably and faithfully discussed questions, or better reported Cases, than come from the Supreme Court of this State. New England industry, practical tact, and freedom of thought and inquiry, are admirably adapted 'to elicit the fair and lovely forms of Justice and Equity from technical imprisonment — to dig the ore of principle from the rubbish of the practice — to polish the severity and decorate the nakedness of the law — to call in the feelings of the heart to the aid of the understanding bewildered by professional intricacy' — and nowhere, in this land of business men and unfettered intellects, have professional industry and learning been more successfully applied to these purposes than here. The present Chief Justice of that court, when he shall retire from the Bench, will leave behind him, not only a name which will be long remembered and treasured up with the proud memorials of the Commonwealth, but a body of law, which would do honor to the brightest periods of English Jurisprudence.

## AMERICAN CASES.

### MASSACHUSETTS.

BERKSHIRE CO.—S. J. COURT—SEPT. TERM, 1829.

*A. H. Woodruff vs. N. Halsey et al.*

A mortgagee of personal property mortgaged to secure a debt, may maintain trespass against a stranger, who takes it from the possession of the mortgager, although the trespass be committed before the debt becomes due.

A mortgager of a building standing, not on land of the mortgager, but on that of a third person, may maintain trespass against a stranger, who pulls down and carries away the building, the building being unoccupied at the time of the trespass, and the mortgager not having taken actual possession.

Trespass may be maintained against a person, who carries away the materials of a building, which has been pulled down by a trespasser, though the person carrying them away was not engaged in the pulling down.—*Parker, Chief Justice.*

*Commonwealth vs. the County Commissioners of Berkshire.*

A notice of a meeting of the Commissioners of Highways, for the purpose of viewing the route of a highway, signed, 'By order of the Commissioners, A. B. Chairman,' was held to be sufficient, notwithstanding the objection that it did not appear that the notice was issued at a meeting of three or more of the commissioners. Where, upon a petition for the alteration of a 'County road,' as it was called, though in fact it was a Town road, or the location of a new road between two other county roads, the commissioners of highways laid out a new road between the termini; it was held that their describing the new road as an alteration, did not vitiate their proceedings.

When the commissioners, after notice to the persons interested, viewed the route for a highway, and adjourned to a certain time and place for the purpose of locating the way, and assessing the damages to individuals; it was held that it was not necessary to give notice of the time and place so appointed.

*Seth Jenkins vs. Moses Hopkins.*

The defendant in 1799 conveyed to the plaintiff land in New York, with covenants of warranty and freedom from incumbrances; a judgment had been recovered in 1786, against the defendant's grantor, which constituted a lien on the land, and in 1801 upon a *scire facias* to revive the judgment, an execution was issued, by virtue of which the land was sold by the sheriff, and a deed given by him to the purchaser. Held, that as the plaintiff's title was entirely defeated, there was a breach of the covenant against incumbrances; and that the damages were the amount of the consideration and interest.

The testimony of witnesses, that they were in possession of the land under a grantee of such purchaser, without proof of a conveyance by deed to such supposed grantee, was held not to be sufficient evidence, upon actual eviction under a paramount title, to allow the plaintiff to recover on the covenant of warranty.—*Parker, Chief Justice.*

*Joseph Farnum vs. A. Platt.*

The owner of land, having leased a marble quarry thereon for 10 years, conveyed the land, 'reserving the use of the quarry until the expiration of the lease.' The lease was cancelled within the 10 years with the consent of the parties; held that the reservation was not thereby extinguished, but that it would continue in force till the end of the 10 years.

Where one has a right of way over another's land, and the way is not defined, if the owner of the land stops up the way which is in use, the other party will be justified in going over another part of the land.—*Parker, Chief Justice.*

*D. Barret vs. M. Barret.*

A judgment in favor of the Judge of Probate in a suit upon a Probate Bond, brought in his name, for the benefit of a legatee, against an Executor and his sureties, may be set off against a judgment recovered by the Executor, in his individual capacity, against the legatee.

The Court, in their discretion, refused to set off the costs in such actions.

*Joshua West vs. John Chamberlain.*

Taking possession of a mortgage estate, for the purpose of foreclosure, does not operate as a payment of the mortgage money; for the land still remains only as security for the money.

S. having mortgaged an estate to W. to secure the payment of several notes, W. assigned the notes and mortgage to C. taking from C. a written agreement with regard to one of the notes, which was for $500; that he, C., would pay $500 to W. as soon as it could be collected on the note of S. C. received $30 of S. on account of this note and took possession of the mortgaged premises for the purpose of foreclosure, and S. occupied the estate for some time afterwards as tenant to C.; but S. being insolvent, never paid C. anything for rent.

In an action brought by W. *vs* C. on his contract before the three years for foreclosure had expired, the declaration also containing a Count for money had and received; it was held, that the taking possession of the mortgaged premises did not amount to payment of the mortgage, and therefore that C. was not liable on his contract; that C. was not liable to pay the $30 until the whole sum was collected, without notice from the plaintiff before bringing a suit for it; and that C., in this action, was not liable for rent, which he had not actually received.

*Henry B. Boynton vs. Isaac M. Rees.*

1. Where a grant was made of a right to erect and maintain a dam, from the grantee's land, on one side of a stream to the grantor's land, on the other, at about 60 rods below certain mills of the grantor, and a dam was built more than 60 rods below the mills, and, afterwards, without any objection on the part of the grantor, was removed 20 rods higher up the stream, but was still below the 60 rods, such removal was presumed to be within the intent of the parties to the conveyance.

2. It was also held, that the grant was not invalid, because no consideration was mentioned in the deed; and that to avoid it as a voluntary conveyance fraudulent as against subsequent purchasers, the party objecting to it, must prove that no consideration was given.

3. The erection of the dam and the occupation of it, six months in the year, by the grantee, it being occupied the other six by a third person, were held not to be conclusive evidence of notice of the grant as against a subsequent purchaser of the grantee's land.

4. A purchaser of land without notice of an incumbrance, may convey the same, free of incumbrance, to a purchaser who has notice.

5. Where a witness who assisted in erecting and maintaining a mill dam, and had used it long enough to create the presumption of a grant of an easement in the stream, stated that his right was derived from a written agreement, it was held that his testimony of the terms of the agreement was inadmissible, without evidence of the loss of the instrument, to prove the title to the easement.

### NEW HAMPSHIRE.

SUPERIOR COURT OF JUDICATURE.

Vol. 4 contains the cases decided from January, 1827, to May, 1829

*Prichard vs. Atkinson.*

In a writ of entry judgment was rendered in favor of the demandant, and the tenant having sued out a writ of review, died pending the review—it was held that the writ of review was abated by the death of the tenant.

*Nelson vs. Swett.*

When the goods or estate of a defendant are attached, it is a good cause to abate the writ, that no summons has been left with the defendant for his appearance at the time and place, when and where the writ was returnable.

*Ela vs. Rand.*

In an action of assumpsit against a secret partner it is a good plea in abatement that there are other secret partners not named in the writ.

*Clindenin vs. Allen.*

A writ does not abate by the death of either party, between the time when the writ is served and the time of entering the action, provided the cause of action by law survives.

*Woods vs. N. M. Company.*

It is a good plea in abatement that the action is misconceived.

*Waldron vs. Tuttle.*

Where an individual delivered to a constable a warrant in the name of the State requiring him to arrest an individual, and promise to pay the constable for the service of the process, it was held that an action might be maintained on such promise although there is no statute which prescribes the fees to be taken by a constable for such services.

*Woods vs. N. M. Company.*

When the legislature authorizes an act, the necessary consequence of which is damage to the property of another, and at the same time prescribes the particular mode in which the damage shall be ascertained and compensated, he who does the act cannot be liable as a wrong doer.

*Parker vs. Holmes.*

When a contract not to sue is to be construed as a release.

*Buel vs. Miller.*

An executory agreement in writing, not under seal, may, before breach, be discharged and abandoned by a subsequent unwritten agreement, even in cases where the original contract to be binding is required by the statute of frauds to be in writing.

*Roby vs. West*

When an illegal contract is made between parties who are in *pari delicto*, the contract is void, and neither party

can maintain any action which requires for its support the aid of such illegal contract. Where A. & W. employed R. to sell for them on commission tickets in a lottery not authorised by law, under an agreement that R. should be considered as the purchaser of all the tickets he did not sell or return by a particular day, it was held that although the purchase of the tickets by R. was not illegal, yet as the agreement with respect to the purchase was only a part of an entire contract, which was illegal, the whole was void.

*Goodwin vs. Smith.*

In *scire facias* against bail the plaintiff was refused leave to amend, it appearing that the principal was, from the time of judgment against him, until his death, so sick that he could not safely be surrendered.

*Chamberlain vs. Crane.*

Where a judgment had been entered upon a wrong count at May term, 1817, the court at May term, 1827, gave leave to amend the record, with a saving of the right of third persons acquired under the judgment.

*Edgerly vs. Emerson.*

A new ground of action cannot be introduced into a cause, by way of amendment, upon a review; but matters of form may be amended.

*Pickett vs. King.*

The court will not permit a writ of entry to be amended by striking out the name of one of the demandants.

*Rand vs. Rand.*

On an appeal from the decision of commissioners upon an insolvent estate by a creditor, an attested copy of the declaration filed in the register's office was delivered to a deputy sheriff, who returned thereon that he had served the same by giving a copy of the copy with a copy of his return thereon, it was held that the service was sufficient.

*Buckman vs. Buckman.*

An appeal lies to this court from an order of the court of Common Pleas to stay all proceedings in a cause.

*Bean vs. Burleigh.*

When an appeal from a decree of a judge of probate is granted by this court, upon a petition for that purpose, under the statute of July 2, 1822, nothing is open to objection in the proceedings of the court below, upon the hearing here, except the grievances alleged in the petition as the reasons of the appeal.

*Atwood vs. York.*

Where parties having a controversy of less value than two hundred dollars entered into an agreement under their hands to submit the same to referees, but did not acknowledge the agreement before the justice of the peace to whom the report was agreed to be returned—a report of the referees made in pursuance of the agreement was held not to be a legal foundation for a judgment rendered by the justice.

And whenever a report is made returnable to a justice of the peace, the rule of submission must name a day certain when the report shall be returnable; and the report must be returned accordingly; otherwise the judgment will be erroneous.

*Greenough vs. Rolfe.*

If, under an unqualified submission, referees take upon themselves the whole responsibility, and decide a question of law, otherwise than the court would have done; or, if in such a case, knowing what the law is, they choose to disregard it, and decide according to what they consider the equity and good conscience of the case, the parties are bound by the decision.

So if a distinct question of law is referred, under circumstances that show an intention in the parties that the law of the referees shall be the law of the case, the parties will be bound by the decision, however erroneous.

An erroneous judgment of the referees, when their judgment has been fairly exercised, is not alone, a sufficient ground to set aside an award.

It will be presumed, that referees intend to decide according to law, where it was agreed by the parties that they should decide according to the law and justice of the case.

*George vs. Harris.*

Where several individuals put their names to a subscription paper, and promise to contribute each a certain sum to an object which all are desirous to accomplish, the promise of each may be considered as made in consideration of the promises of the rest; and if one refuse to pay, the others, having accomplished the object, may recover of the one who refuses to pay the sum by him subscribed.

And parol evidence is inadmissible to vary the terms of such a promise.

*Goodwin vs. Smith.*

The officer who makes the return of *non est inventus* upon the execution against the principal, must state particularly in his return, what notice he gave to the bail; otherwise the bail cannot be charged.

## New Publications.

ENGLISH.

Fulbeck on the Study of the Law.

Peake's Additional Cases at Nisi Prius.

A new Law Dictionary, containing a concise exposition of the mere terms of art and obsolete words.

Wilkinson on Limitations of Actions, as affecting Mercantile and other Contracts.

Maule and Selwin Reports, vol. vi. part ii. being the completion of these Reports, filling the chasm between them and Barnewall and Alderson.

Crabb's History of English Law.

A Commentary on the Tenures of Littleton, written prior to the publication of Coke upon Littleton. Edited from a copy of the Harleian collection of MS., by Henry Cary, Esq., of Lincoln's Inn.

Burns' Justice, 25th edition.

Palmer's Practice in the House of Lords.

Comyn's Law of Landlord and Tenant. By G. Chilton, Jr. Esq.

The Life of a Lawyer, written by himself.

AMERICAN.

Reports of Cases in the Court of Chancery, N. York. By A. C. Paige. Vol. 1.

Law of Fixtures and other Property, partaking both of a real and personal nature. By A. Amos and J. Ferald. First American edition, with Notes, &c.

Vol. 7 of Pickering's Reports, and Part 1 of Vol. 8.

Case of Charles River and Warren Bridge. By O. Pickering.

Vol. 9 of Cowen's Reports.

Vol. 4 of Kent's Commentaries.

Halstead's Digest of New Jersey Decisions.

Treatise on the Equity Jurisdiction of the Chancery Court. By Geo. Jeremy. First American, from last London edition. Published by Hilliard, Gray and Co.

Vol. 3 of Peters' Reports.

Vol. 3 of Wendell's Reports.

Vol. 4 of N. Hampshire Reports.

J. Willard's Address to the Worcester Bar.

IN PRESS,

Digest of 6 last vols. of the Massachusetts Reports. Richardson, Lord and Holbrook.

Bigelow's Digest of Pickering's Reports, being a continuation of his Digest of Massachusetts Reports.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, AUGUST 7, 1830. NO. II.

## MERCANTILE LAW.—No. I.

[Continued.]

There are not many capable of either generalizing or distinguishing correctly. At all events the study becomes a work of much greater time and difficulty, than it would be if a clear and comprehensive notion were first obtained of the principles which override and govern the whole. And, after all the pains which the most persevering industry can bestow, the mere case-lawyer will be liable to continual error from trusting to fancied and incorrect analogies. In short, no sound lawyer ever was or ever will be made by the study of particulars. The only way to know accurately, is to make sure of the principle—the only way to judge truly, is to consider the matter in question with reference to that principle, and then, by way of guidance, help, or confirmation, to ascertain whether the same or a like point has before arisen, and in what way it has been determined.

To supply, as far as in our power, these several imperfections; to connect the disjointed parts of the system, and embody all which belongs to it; to fill up what is defective, correct what is erroneous, and fix what is floating, is the object we have now in view; and in order to this, we propose to give in successive numbers of this magazine a series of plain, concise, and popular treatises on the mercantile law of England. In the prosecution of this design it is our intention first to shape out a general outline of the whole system of foreign and domestic trade, commencing with the simplest contract of sale, and tracing, in somewhat historical order, its gradual progression to the vast and complex operations of modern commerce. Having given this view of the whole, in order to the better understanding of the parts, we shall then retrace the sketch, and endeavor to fill it up with greater accuracy of detail. Nor are we without a hope, that in the way proposed, the student may be led by a gradual and easy ascent to a vantage-ground, from whence the entire plan may be seen, as it were, mapped out before him. It will then be found that the several districts into which it is parcelled out, however distinct in their boundaries, all partake of the same general properties, and are governed by the same general rules. The only difficulty then remaining will be the assigning of the particular case to its own specific class; a difficulty which will be infinitely lessened by the commanding view thus obtained. It has been urged before, and it cannot be too often repeated, that no art, no science, no system of any kind ever was or ever can be thoroughly learnt by the mere investigation of the separate parts. Who ever became, we will not say a good physician, but even a good oculist, by attending solely to the eye? Who can understand the working of a compound machine, if he confine his view to a single wheel? It is by observing the relation of the parts to each other, and to the whole that truth is to be obtained.

Each case also must be carfully analyzed, so as to elicit the principle. The same principles which regulate the simplest and most direct bargain between two individuals, will then be found to apply equally to the most intricate commercial dealing. The mind, however, is frequently puzzled by the introduction of a number of circumstances, altogether immaterial to the real question in issue; nor is there any habit more valuable, in order to correct and ready judgment, than that of separating immediately what is essential from what is merely accidental, and then confining the view solely and exclusively to the former. Thus, in a question as to the precise interpretation of the terms of a contract of sale, what matters it, for this purpose, whether the real buyer and seller dealt directly with each other, or by the intervention of a broker—whether both resided in England or one abroad—or whether the goods were to be handed over immediately, or to be delivered through the agency of a carrier? Our notion in this respect will be illustrated by the work itself. For the present, therefore, a single example will suffice. A mercantile house in England commissions one of the partners who transacts the business abroad, to buy and ship off to them a certain quantity of foreign produce. He employs a broker to effect the purchase, who makes a bargain with the grower, manufacturer or warehouseman of the goods, and stipulates for the delivery of them on a specified day at a particular place, to be thence shipped to England. The seller gives the broker three months' credit for the price; and he draws a bill of exchange on his principal for the amount, which is accepted by him payable at his banker's abroad. In order to provide funds for the payment of this bill when due, the partner draws on the house in England in favor of the bank, by whom this 2nd bill is discounted, and the cash placed to the credit of the drawer, so as to meet his acccceptance;—the 2d bill is then indorsed over by the bank to a bill broker, who sells it for value to be ultimately paid by the house in England on account of the goods so purchased for them. Now this, stripped of the machinery, is neither more nor less than a simple sale between A. and B. of goods to be delivered on a day fixed, and paid for in three months' time. It is evident, however, that out of a transaction so complicated a great variety of questions may arise. Thus, the goods may neither be of the quality, nor quantity contracted for—they may have been damaged in the carriage either by land or water—they may have been altogether lost—the broker may have deviated from his authority in making the purchase—he may have become bankrupt before the three months were expired—the firm in England also may be insolvent, either before the goods are shipped—and they may consequently be stopped *in transitu*—or after their arrival the wharfinger may detain them for his general balance. These and many other cases may occur, and the first consideration, therefore, ought always to be, on what particular part of the transaction does the matter in dispute depend? If it be on the legal construction of the contract of sale, then everything may be dismissed, except what relates to the mere bargain, as between A. and B. If it arise out of the relation of principal and broker, or of the partner abroad to the firm at home, then let it be viewed solely with reference to those several relations; the other particulars being taken into account only so far as they are necessary to the elucidation of that which is the real question.

All this may seem, and certainly is, very obvious; yet however true and simple in theory, there is scarcely any rule less regarded in practice. It is the great fault of modern reports, that they set out indiscriminately all the facts of the case, without considering or caring whether they have any immediate bearing upon the point to be decided. This may be very useful for swelling the bulk of a volume, and enhancing its price; but it is attended with a serious inconvenience to the reader. He is obliged to wade through the whole, because he is ignorant what and how much of it is material—and thus the memory is fatigued, the attention dissipated, and the mind distracted by a variety of minute circumstances, which have no more to do with the matter really in dispute than the adventures of Tom Thumb, or Jack the giant-killer. This error we shall at least endeavor to avoid in the present work. Indeed, to give a lengthened detail of particular facts, is manifestly inconsistent with its design. Where so much is to be comprehended, the limits assigned to each portion must necessarily be very narrow, and we shall therefore merely lay down general propositions, and illustrate them severally and in order, by a brief statement of the most important cases, which properly belong to them. We are at the same time far from supposing that it will be possible to proceed strictly in an arrangement so purely philosophical as that each case shall be assigned exactly to the class under which it falls. Such a method, however excellent in theory, would be found exceedingly inconvenient, if not altogether impracticable. An exception to one rule is an example of another, and it may be proper to consider it sometimes as the one, and sometimes as the other. But with this and such other qualifications as are absolutely necessary, the rule of philosophical classification will be carefully observed. If, for instance, the case be one of partnership, it will be ranged under the head of partnership, even though the subject-matter should happen to be a bill of exchange, or a charter-party of affreightment. Under the title of bill of exchange, the properties and incidents of a bill, as such, will be considered, and they only, and so with the rest. The advantages of such a method are so obvious, that on this head we shall say no more, but shall conclude these prefatory observations by reminding our readers, that if a faithful exposition of the law and principles of trade be at all times useful in a country depending in a great measure for its subsistence on trade, it must be so in a more especial manner at a period like the pre-

sent. A revolution has lately taken place both in the maxims and practice of commerce. True principles have gained ground, and a better policy is both understood and acted upon; a spirit of free unfettered enterprise has gone abroad, and speculations are embarked in of a magnitude unknown to former times. The legislature also has recently interfered by many important enactments in the regulation of mercantile dealings, and the disposition of the property of defaulters; and, lastly, the code of international law has in these days been settled on a solid basis by a judge, whose enlightened decisions are recognised as authority by all the civilized nations of the world. Under these circumstances, we may perhaps be pardoned for hoping that the subject proposed will be found neither unimportant nor uninteresting.

## No. II.

In pursuance of the plan marked out in our introductory article, we proceed to give a rapid sketch of the rise and progress of trade, together with a brief notice of its existing state in this country; avoiding, unless necessary for the clear development of a legal principle, all such topics as belong more properly to the province of political economy.

Division of labor, which is the first step towards civilization, is necessarily attended with an interchange of commodities. This, at first, is a direct barter in kind of the superfluity of one individual, for the superfluity, in some different article, of another. The inconvenience of this method, and the restrictions which it imposes on traffic, soon, however, suggest the introduction of a conventional medium of exchange, for which purpose choice has generally been made of some one or more of the scarcer metals, both for their durability and their little variation in value. Money, which is the name it has received with us, is valuable, not so much for its intrinsic worth (for silver and gold, however precious, are commodities which we seldom want), but as the means of procuring other commodities which we do want. It is a token indicating that the possessor has bestowed on others goods of his own of a certain value, and empowering him to receive, by the transfer of the token, an equivalent in such other goods, as may better suit his wishes or necessities. It serves, at the same time, as the *measure* of this value; for the metal, of which it consists, being divided into small portions of a size, weight, and quality fixed by authority, and of a value which may for all practical purposes be considered as constant, it furnishes a common third, in aliquot parts of which the value of all other commodities may be reckoned.

From the introduction of money may be dated the origin of trade, the limited transactions of barter being scarcely entitled to the name. It should, however, be borne in mind, that, though greatly extended as well as facilitated in its operation by the interposition of this machinery, the exchange of commodities remains in substance the same. The difference is this—that A, instead of receiving immediately the commodity of B in return for his own, receives that which will procure him, either now or at any future time, whatever commodity he may want, of equal value with his own. The principle is still reciprocity of actual benefit. The name only, not the character of the transaction, is changed: what was before a *barter*, is now called a *sale;* and A is said to *sell*, and B to *buy* the goods.

All objections on the part of the proprietor to dispose of his surplus stock being thus removed, there would naturally be a resort of sellers wherever there was a probability of a demand; and mutual convenience would quickly lead to the adoption of a stated time and place of meeting for the purposes of traffic. Hence the establishment, in some central and populous part of each district, of *markets*, for the sale of commodities in ordinary request; and of *fairs*, at greater intervals, for dealings of a more extensive kind. The transactions at these public marts, as they are among the earliest, so are they in general the simplest operations of traffic, being, for the most part, bargains for the sale of goods, carried into immediate effect by delivery on the one part, and payment on the other. We say for the most part, because some commodities being too bulky to be conveniently transported to market and carried home again if unsold, would be disposed of by samples. In these cases an interval takes place between the bargain, which properly constitutes the sale, and the delivery and payment which complete it; and out of the various circumstances which may take place during this interval, questions somewhat more complicated not unfrequently arise between the parties.

We have hitherto supposed trade to be confined to the mutual dealings of the inhabitants of particular districts. But the wants of men extend with their means. A demand arises for rarer and more remote commodities, and has no sooner arisen than it is supplied. For on the other hand, competition and accumulations of stock render it necessary to seek more distant markets; and thus, by a gradual and simultaneous approximation of buyers and sellers, the traffic of each region is pushed beyond the limits of its immediate neighborhood, and the sphere of communication is widened. Certain tracts of country are better suited to the growth of particular produce, while others, either from their vicinity to the places from which the rude material is obtained, or from other local advantages, become celebrated for a particular species of manufacture. Thus, to select an obvious instance, hilly regions are more favorable to the growth of wool; plains to the production of corn. In the neighborhood therefore of the former, cheaper and better cloth would be found; in that of the latter, cheaper and better grain. As soon then as the periodical fair, becomes inadequate to supply the continually increasing demand, itinerant traders appear, who, under the name of pedlars, vend the wares of one district among the inhabitants of another; making, by an addition to the price, such a profit as may remunerate them for their labor and risk. The occasional stalls of the fair, and the packs of the pedlar, are followed, and soon, in a great measure, superseded, by the establishment of permanent shops; the proprietors of which are a sort of middle men between the producer and consumer, purchasing in wholesale from the former the various articles which may chance to be in request, and retailing them at an advanced price among the inhabitants of their own immediate neighborhood. As wealth and population advance, and, by consequence, demand increases, it becomes necessary to add to the stock in each particular article, until at length it is found expedient to confine the trade to some specific class of goods; and thus, by degrees, a body of *shopkeepers* is created, dealing each in a particular kind of commodities. Again, as the profit of the producer depends mainly on a speedy return of the cost of production, of course those who could purchase the largest quantities would be able to procure them also at the cheapest rate. Hence the formation of another class of intermediate tradesmen, called, distinctively, *wholesale dealers*, or *warehousemen*, who, being possessed of a larger and more disposable capital, buy up the stocks of the grower or manufacturer, and dispose of them in smaller stocks to the retail tradesmen or shopkeepers. And thus, even without taking into account the subdivision of mechanical employment, which keeps at least equal pace with the increase of intermediate dealers, the steps between the grower and consumer are continually multiplied.

Now the transactions between the proprietor of the raw material and the manufacturer, between the manufacturer and the warehouseman, and between this latter and the shopkeeper, suppose, as we have seen, the transfer of large stocks, between parties for the most part resident at considerable distances. The transmission, therefore, of the purchased property becomes an object of considerable importance, and one which in early times would necessarily be attended with difficulty, hazard, and expence. In an industrious community, however, a want is not long felt before it is supplied. It was natural, therefore, and in the course of things, that individuals should present themselves, willing for a reasonable conpensation to undertake the safe conveyance from place to place of whatever goods might be committed to their charge. Originally this conveyance would be by wagons overland and along navigable rivers by barges; but as trade and capital increase, not only are lighter vehicles invented for the more expeditious transmissions of lighter goods by land, but artificial rivers or canals are formed, connecting the districts from which the raw material is obtained with the seats of manufacture, and these again with the distant markets. At present, therefore, the inland communication is kept up by the wagons, stage-coaches and vans; by canal-boats and river barges; the proprietors of which are classed indiscriminately under the name of *common carriers*. The owners of the soil along the banks of these rivers and canals would not unreasonably require some compensation for the permission to take on board and discharge the cargoes of the vessels which navigated them; besides which, there would be both inconvenience and risk in leaving them exposed until it might be convenient to remove them. Hence, at different points along the line of communication, wharfs were constructed, at which goods might be deposited for loading or delivery, the proprietor or *wharfinger* undertaking for a proportionate remuneration, to keep them safe and undamaged until they were carried away to their destination.

But besides this overland communication, it is evident that in an insular country like this, the surrounding seas would early be made subservient to

the purposes of traffic. The coasting trade of England seems indeed to have been almost coeval with the first efforts of her industry; and constitutes at this day one of the most important appendages to her domestic commerce. It is to the exigencies of this mode of conveyance that we owe the construction of ports, quays, piers, and docks; and when these are wanting, or not easily accessible, another class of men step in, who, under the name of *lightermen*, undertake the unloading of vessels, and the transport of their cargoes to the wharf. But with such advantages as England possesses, the spirit of enterprise would not long be confined to her own shores. The same causes which have been alluded to as producing the gradual expansion of traffic into remoter districts of the same country; together with the facilities afforded by the progressive improvements in navigation, would operate in a precisely similar manner to extend those dealings to the inhabitants of other countries. Thus, for example, the flax of Ireland, and, consequently, its linens, were found to be better than those of England; while the woollen cloths of England claimed a like superiority over those of Ireland. The latter were desirable for their warmth; the former for their cleanliness and elegance; and hence an interchange naturally took place of the surplus woollen cloths of the one for the surplus linen fabrics of the other. The same observation, carried onward, applies to the wines of France and Portugal, the silks of Italy, the hides and timber of the Baltic.

[To be continued.]

## DEATH OF THE CHIEF JUSTICE.

Chief Justice PARKER is no more to be numbered among the living. He died on Sunday night, 25th ult. between 11 and 12. It was not generally known in the city, that he had been sick, until his death was announced on Monday. It is very rarely that we have to announce a death that creates so much melancholy excitement. His loss is a severe bereavement not only to his family and immediate friends, but to the City and whole Commonwealth. He had been presiding during the week, at the special session of the Supreme Judicial Court in Salem, for the trial of those charged with the murder of Mr White, and returned to the city on Friday. He spent Saturday morning in the law library, and in the after part of the day rode to Dorchester with Mrs Parker. He spent the evening at his own house in social conversation, in his usual good health and spirits, and retired to bed to all appearance, perfectly well. It has for years, been his custom to rise very early in the morning, and take a long walk for exercise before breakfast. On Sunday morning he woke up at five o'clock, and observed to Mrs Parker, that he felt symptoms of the approach of one of the sick headaches that he was subject to. She observed instantly that his voice and countenance was changed, and expressed alarm; he replied that he would rise, and she assisted him with some difficulty to a chair, and sent for Dr Warren. The Chief Justice spoke no more, and soon closed his eyes forever! The doctor arrived in fifteen or twenty minutes, but the case was beyond human aid. It was ascertained that he had suffered a *paralysis* and continued insensible till near the middle of Sunday night, when he expired, at the age of 63 years.

Judge PARKER has taken an active part, and filled a prominent station in the annals of the Commonwealth, for more than thirty consecutive years past. He was born in this city in 1767, was graduated at Harvard in 1786, and read law in the office of the late Judge TUDOR. He commenced practice in Castine, then District of Maine; thence he removed to Portland, and soon after represented Cumberland District in Congress, and for a short period was U. S. Marshal for Cumberland.

On the death of Judge SIMEON STRONG, he was appointed Justice of the Supreme Court, but declined the appointment, probably to continue a more lucrative practice of the law. On the resignation of Judge DANA in 1806, Judge PARKER was again appointed Justice of the Supreme Court, and accepted, and returned to Boston to reside. On the decease, of Chief Justice SEWALL, in 1814, he became Chief Justice, which station he filled with honor to himself and the Commonwealth up to the very day of his death.

Judge PARKER is no more! He is indeed no more with us in the land of the living: He is no longer at home to cheer his own domestic circle: he is no longer among us as an exemplary citizen: no longer present to give direction, and to impart wisdom and the result of long experience, to our Judicial tribunals! But the valuable treasures of his mind still exist: his opinions are on record: he has contributed largely to rear for his country a structure of jurisprudence, that shall remain an imperishable monument to his fame, long after all those who now live shall have slumbered in the dust! His dicta shall regulate the decisions of after ages, and his profound principles of law shall be cited as authority all over these States and in England, the parent country of the Common Law. As a classical scholar, few were more accomplished,—as a learned man few more profound,—as a citizen, none were more universally respected than Chief Justice PARKER.

But we feel entirely incompetent to do justice to the character of the departed. We waited till the last hour in hopes that some elder and more able hand would have sent in a better sketch, and have relieved us of a task for which we feel incompetent. On reference to the college catalogue, we find among his classmates the late Hon. TIMOTHY BIGELOW, late President HARRIS, Hon. JOHN LOWELL, CHRISTOPHER CHAMPLIN, ALDEN BRADFORD, Esq. and others. We yet hope that some other of his intimate friends will furnish us for publication, with a more suitable sketch of his character.—*Columbian Centinel.*

At a Meeting of the Members of the Bar of Suffolk, held at the Court Room, on Tuesday, the 27th of July 1830, the Hon. LEMUEL SHAW presiding, and JOSIAH QUINCY, Jr. Esq. being Secretary, it was

*Voted*, That the Bar of Suffolk, deeply impressed with their recent loss in the death of the late Chief Justice PARKER, whose distinguished talents and public services have conferred an unfading lustre upon the Judicial character of his native State, take the earliest opportunity of testifying their sincere respect for his memory, their high sense of his eminent public services, and their cordial sympathy in the sorrows of his afflicted family.

*Voted*, That the substance of the foregoing resolution, be communicated to the widow and family of the late Chief Justice.

*Voted*, That the standing Committee be instructed to consider and report what further measures it may be expedient for the Bar to take on the subject of the death of Chief Justice PARKER.

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The recent demise of Chief Justice PARKER, of the Massachusetts Supreme Court, adds another to the lists of distinguished jurists who have been cut off in the midst of their usefulness, and many of them while in the immediate discharge of their laborious duties. The eloquent PINCKNEY died in this manner, surviving, however, several days, after exhausting himself in a powerful argument. The gifted EMMET, in the discharge of his duties at the Bar in one of the Astor causes, was struck with paralysis in the Court Room, and conveyed upon a litter to a neighboring dwelling, where he soon expired. ALEXANDER J. DALLAS, after arguing a cause with more than his wonted ability, returned to his lodgings at Philadelphia, and died soon after. DE WITT CLINTON, although not directly engaged in professional duty, was cut off, after a very short illness, in the fulness of his fame. SAMUEL DEXTER died somewhat suddenly on his return from an arduous session of the Supreme Court at Washington. Our lamented WEBSTER was snatched from us still more abruptly, even while engaged, on the very theatre of forensic action, in the full exercise of his high and manly powers.

The predecessor of Judge PARKER, Chief Justice SEWALL, died in a manner nearly similar. He was holding a term of the Court at the time of his attack, and survived but about a day the first warning of impending dissolution. The death of Judge PARSONS could not be called sudden, for he had been failing some time—but, if we recollect right, he was able to be in Court a short time before his decease, and if not to impart to its deliberations the fulness of his strength, still to animate his Associates and the Bar, by his venerated presence. There is a coincidence, it seems to us, worthy of notice in the respective cases of Judge PARSONS and Judge PARKER. Each died sustaining the same office, and at precisely the same age—an age fixed upon by the latter, in his sketch of the character of the former, as a period beyond which an advance was little to be desired, and was generally hazardous. Whatever difference of opinion may exist as to the correctness of his first position, the public, we are certain, will accord to the late Chief Justice PARKER the full tribute paid by him, in the conclusion, to his honored predecessor.

Beyond the age at which he had arrived, I do not know that an instance exists of an improvement of the faculties of the mind, but many present themselves of deplorable decay and humiliating debility. Should it not be considered a happy rather than a lamentable event, to escape the infirmities, the disabilities, and perhaps the neglects of a protracted old age? PARSONS died in the zenith of his reputation, in the strength of his understanding; and so dying, has left a legacy to his children and to the public, in his character, more valuable than exhaustless riches.—*Concord Statesman.*

## ENGLISH CASES.

COURT OF COMMON PLEAS—MAY.

[Sittings in Banco at Westminster Hall.]

*Doe, dem. Lord Teynham v. Tyler.*

Before the CHIEF JUSTICE resumed the reading of the evidence in this case,

Lord TEYNHAM, the lessor of the plaintiff, addressed the Court, and begged leave to be heard upon two points, not matters of law, as he should not attempt to address the Court in that particular, after the observations which his Counsel, Mr Sergeant Jones, had, with so much ardor and ability, submitted to their consideration; what he had to say referred to mere matters of fact.

The CHIEF JUSTICE said, that in this case as well as in all others, the Court must proceed according to the established rules, and as his Lordship had placed his cause in the hands of able Counsel, it would be irregular for the Court to allow the party himself to address them.

The reading of the rest of the evidence, and of the report having been concluded,

The CHIEF JUSTICE called on Mr Sergeant Jones to support his rule, observing that as the general impression of the court was not to send a cause down again for trial, merely because certain evidence might have been improperly received, where the evidence without it is sufficient to sustain the verdict.

Mr Sergeant JONES contended that the evidence above referred to was inadmissible, and ought not to have been received upon the trial. The question to have been decided, was whether the 12th Lord Teynham was of competent mind to suffer a recovery, and cut off the entail upon the property. There were two points which he should contend for—first that the evidence received (the steward's accounts) was not admissible; and secondly, if he succeeded in proving that it was not, that the rest of the evidence was not sufficient to warrant the Jury in coming to the conclusion which they had. In the first place, the evidence was not admissible, because the papers (the accounts) not only charged the steward on one side, but he discharged himself on the other by writing balance paid over to Lord Teynham. Besides, not a single individual pretended that Lord Teynham ever saw those papers or knew of their existence. The learned Sergeant quoted several legal authorities to show that evidence of this kind must be proved to be in opposition of the party making it before it can be received; but such was not the case in the present instance. With respect to the second point, whether, in case the Court should be of opinion that the evidence was not admissible, the rest of the evidence would be enough to establish the verdict, he should contend that was not the real question. It was, whether the Jury had arrived at a conclusion upon premises legally admitted in evidence putting aside those papers; he thought there was no other solemn act proved on the part of the 12th Lord Teynham; and it appeared clear to him that the Jury would not have come to their decision, without that part of the evidence which was considered highly important, and commented on as such by his learned friend. He hoped that the Court, in a case of this kind, would not trust to mere conjecture and hazard, that the Jury would have come to the decision without the evidence in question, and that they would make the rule absolute for a new trial.

The CHIEF JUSTICE, in delivering judgment, said that it appeared to him that this rule ought to be discharged. He should assume, for the purpose of the argument, that the evidence objected to was improperly admitted; but still he found that both in this Court, and in the Court of King's Bench, when applications were made for new trials, on the ground that certain evidence was improperly admitted, these Courts did not shut their eyes to the rest of the evidence; and when they saw that there was enough on the rest of the evidence to preponderate in favor of the finding of the Jury, they would not disturb the verdict. It had been said that it would be difficult to know what was passing in the minds of the Jury in considering their verdict, but he did not think it at all necessary to examine that point. The shorter and plainer course for the Court to pursue, would be, on hearing the evidence read over, to judge by their own discretion, whether if the objectionable evidence had not been produced, the Jury would have come to the same conclusion. He should not say more (as it might prejudice any future step which the noble Lord might think fit to take) than that the other facts, independent of the evidence objected to, did preponderate in favor of the verdict found by the Jury. It was open to the noble Lord to bring another action of ejectment or a formedon. Under all the circumstances, and acting upon the opinions which have been laid down in different cases upon this subject, he was of opinion that the Court could not send this case down for another trial.

Mr Justice PARK said that he quite agreed in the judgment of the Chief Justice. He did not think if he had been on the Jury that the evidence objected to would have had the slightest weight in the scale in determining the decision they had arrived at. Indeed he almost lamented that the evidence in question was received; not that he considered that it was improperly admitted, but because it led to this discussion. He might say that, having had the longest practice of any one in Westminster Hall; and he had known it over and over again when applications of this kind were made, that the answer of the Court was, 'Though this evidence may have been improperly admitted, there is quite enough to show that this verdict was found upon the rest of the evidence, independent of that which had been objected to.' This rule was so clearly understood, that it had got into the text writers. In 'Taunton's Reports,' there was a case in which a Lord Advocate, who was not apt to yield much, and who was stopped by Lord Mansfield when arguing the same point which had been so ably urged by Mr Sergeant Jones, and told by the learned Judge that the Court would not set aside a verdict on account of certain evidence being improperly received, if it appeared that there was sufficient (without it) to warrant the finding of the Jury, the same rule had been followed in the Court of King's Bench. In the case of Nathan v. in which he (Mr Justice Park) took a part, the question was whether I. S. was admissible to prove a certain fact; but Mr Justice Dallas said it was unnecessary to consider that point, because if that witness had not been called, there would have been sufficient evidence to warrant the Jury to find the same verdict. This, therefore, could not be considered a new point. It was open to the noble Lord to bring another action of ejectment, but he thought, if he could not produce stronger evidence, it would be better for him not to try the experiment.

Mr Justice GASELEE said he would assume that the evidence in question ought not to have been received. If the effect of refusing this rule would shut out the lessor of the plaintiff from bringing any other proceeding, the Court would pause before it discharged the rule; but there was nothing to prevent the noble Lord from having another inquiry, as the time was not expired for bringing another action. It had been said, on the part of the lessor of the plaintiff, that this evidence proved the only solemn act by the 12th Lord Teynham; but it appeared to him that there were a great many more solemn acts proved by the rest of the evidence than was the object of these papers to establish, he, therefore had no difficulty in saying that he concurred with the Lord Chief Justice and Mr Justice Park in directing that this rule should be discharged.

Mr Justice BOSANQUET said he was of the same opinion as the other Learned Judges, and he thought that, on refusing this rule, the Court would be violating no principle of law or practice. The question was, if the Court had any reason to think that the evidence objected to did, in any degree, influence the finding of the Jury; being of opinion that it did not, and that the Jury manifestly laid aside that evidence, it appeared to him that the rule ought to be discharged.

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KING'S BENCH.—JUNE.

(Sittings at Guildhall, before Lord Tenderden and Common Juries.)

*Huygh v. Gray.*

This was an action on three bills of exchange, amounting to 175*l*; they were drawn by the plaintiff in October, 1828, at three and four months, and accepted by the defendant. The defence was 'no consideration.' Plaintiff is a Dutchman, and was represented as at one time a Purveyor-General in the French army. The defendant is a gentleman of some property residing in London. Some years past the plaintiff and the defendant met in America, and, afterwards, upon meeting in London, they renewed their acquaintance, when the plaintiff stated that he had a lot of valuable pictures by ancient masters, and that, as he was about to visit the Continent, he was anxious either to sell some of them, or to raise money upon them. The pictures were twelve in number, and were frequently inspected by the defendant and other persons whom he took to inspect them; after some negotiations, a written agreement was entered upon between the parties, by which two of the pictures, one a Benedictine, by Rubens, and a Madona, by Vandyke, were given up to the defendant, for which he gave 125*l*. in cash, and the three notes in question. The pictures were not absolutely sold, but were given as security, subject to sale upon due notice to the plaintiff. In some time after obtaining possession of the pictures the defendant discovered that the

pictures were copies, and of no value, and he then refused to pay the bills, having previously applied to the Court of Chancery to restrain the plaintiff from disposing of the bills. The defendant, in his answer, admitted that the pictures were not originals, and that the stipulated price was an evidence of the fact, for if they had been such a much larger price could be obtained for them; in fact, that they would then be worth 7,000*l*. He also admitted having represented them as painted by Vandyke and Rubens, but contended that such representation was a custom in the picture line, and was not binding without a special warranty.

For the defence there was also put in a list of the pictures, in the handwriting of the plaintiff, and in this list the two pictures were represented as true originals.

Mr Smart was called, who proved that the pictures were not originals; and no attempts were made to deny this statement.

Lord Tenderden thought it quite clear that the pictures were warranted as originals, and that the plaintiff could not recover.—Plaintiff nonsuited.

*Moorey v. Elphick.*

This was an action brought to recover compensation for an injury done to the plaintiff's horse and cart by the careless driving of the defendant. The parties are tradesmen, residing on the Eltham road. The plaintiff's cart was standing still opposite to his brother's house, when the defendant, who was driving by, instead of looking towards his horse, whilst passing that of the plaintiff, he was looking backwards, and his cart struck against that of the plaintiff, whose horse fell, and had two of his ribs broken, besides injury done to the cart; the particulars of which were given in evidence.

The plaintiff's case was conducted by Mr Gurney, who said he could not anticipate any defence to this action, unless the defendant made such a complaint as one he had seen in a book of Travels, where the writer relates the circumstances of a ship Captain who had run ashore on a foreign island, and wrecked his vessel, for which he claimed compensation from the inhabitants, stating that, if the island had not been in his way, his vessel would not have run ashore.

Mr Denman, for the defence, said there was this difference between the two cases—namely, that the island was immovable, whereas the plaintiff's cart was drawn by a spirited horse, which started upon hearing the other come up, and caused the accident complained of.

The learned gentleman called two witnesses to make out this case, who did not, however, establish these as facts; but it was admitted by all the witnesses that the plaintiff's cart was left on the side of the road without any person in charge of it.

Lord Tenderden, in addressing the Jury, censured the practice of leaving horses and carts without persons in care of them: it was, he feared, too common a practice, and ought not to be tolerated; but, however, the question for the Jury was, whether, on his part, the defendant had driven his cart with sufficient care.

Verdict for the plaintiff—Damages 10*l*.

*Jager v. Niller.*

This was an action for slander. The plaintiff is an attorney residing in the Commercial road; the defendant is a medical gentleman, residing in the same neighbourhood.

Mr Broderick stated the plaintiff's case. In the beginning of the last year a party of friends went down to enjoy themselves at Blackwall. Amongst them was the plaintiff and his brother-in-law, a Mr Bulcock, who accidentally fell over the balcony at the Blackwall Tavern, into the water, and was drowned. In the month of August following, the defendant was at the house of a Mr Broughton, another medical gentleman, where he spent the evening, as he had frequently done, Mr Broughton being also acquainted with the plaintiff. This gentlemen proved that, in the course of conversation, the defendant, adverting to the death of Mr Bulcock, asked witness whether he had heard that Mr Jager had, on that occasion, given his brother-in-law a gentle tip over the balcony; adding, that lawyers knew how to do things nicely. On his cross-examination, he would not undertake to say that the words were or were not uttered maliciously, but he acknowledged he was afterwards present when the defendant offered the plaintiff to state that he did not believe any such report; at the same time defendant said he had never used the words imputed to him. This appeared to satisfy the plaintiff, but the witness objected, saying it would not satisfy him, for that the words had been uttered. At the time the conversation first took place between the witness and the defendant there was no person in the room, but upon Mrs Broughton entering, the defendant repeated the report, which he said he had heard; and Mrs Broughton, could not say that the words were uttered maliciously, or that they have produced any impression on her mind; and so little effect had the report on the first witness, that he did not mention it to the plaintiff for six weeks.

At the commencement of the trial, Mr Brougham, on the part of the defendant, offered to say for his client that he did not believe the report, and that he had never attributed any such act to the plaintiff, but this was declined by Mr Broderick and Mr Platt, on the part of the plaintiff; as was also a suggestion made by his lordship during the trial, that a Juror should be withdrawn; to this also Mr Brougham offered to accede.

Mr Brougham addressed the Jury, and contended that, as no injurious impression respecting the plaintiff's character had been produced on the witness's mind, he could have sustained no injury, and would not be entitled to a verdict.

Lord Tenderden said the question which the Jury had to decide was, whether, if the words were used, (and there was no proof to that effect,) they believed they were uttered with an intent to injure the plaintiff's character; and the question of damages, if they gave any, would depend on the extent of the injury which the plaintiff received.

Verdict for the plaintiff—Damages one shilling.

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COURT OF KING'S BENCH.—MAY.

(Sittings before Lord Tenderden and a Common Jury.)

*Burghart v. Slare.*

This was an action brought to recover 10*l*., being the value of a parcel sent to a booking-office, and not forwarded as directed.

The Attorney-General and Mr Earle conducted the plaintiff's case, and Mr Campbell and Mr Talford attended for defendant.

The plaintiff is a tailor residing in Suffolk street. The defendant is the proprietor of the booking-office, kept at the Old White Horse Cellar, Piccadilly. The parcel, or box, containing two coats, was left at the office on the 23d of September, 1828, and was directed to James Hamilton, Esq., Ardingly, Sussex. In a few days it was discovered that the parcel had not reached its destination; but it was not until December following that the box was discovered at the Four Swans, Bishopsgate street, where it had been lying for nearly three months. It had been brought to that office by the Worthing coach, and the case for the plaintiff was, that the parcel had been originally and wrongfully sent to the Four Swans, from whence no coach then started that went in the direction of Ardingly; and a clerk from the Bolt-in-Tun, in Fleet street, proved that, from his office, there was a Sussex coach, by which they were in the habit of sending parcels to Ardingly, which is a village about a mile and a half off the road. It also appeared that parcels for Ardingly were not taken in at the Four Swans. A card, or ticket was put in, by which the defendant undertook to take in parcels, to be forwarded to all parts of England; and on this card there was a notice that the defendant would not be answerable for parcels in value above five pounds, unless insured. This parcel was not insured, nor were two-pence paid for booking; but the plaintiff's servant who delivered the box said that he was, for two years, in the habit of leaving parcel's at the defendant's office, by whom he was allowed the two-pence for his own use, as an encouragement for bringing parcels to the office. The plaintiff had to make and send two other coats for Mr Hamilton.

Mr Campbell contended that, upon the evidence, the plaintiff must be nonsuited, as the notice protected him from liability in cases where parcels exceeded in value 5*l*.

The Attorney-General cited several cases to show that such a notice did not protect against negligence, which was shown by the defendant's having sent the parcel to a wrong office.

Lord Tenderden held that the defendant would not be liable if he had sent the parcel to the proper office from whence coaches started for Ardingly, or its immediate neighbourhood. As the evidence stood it would appear that there was no coach for Ardingly from the Four Swans; and there was also evidence that the parcel had been originally sent to that office. He could not, therefore, nonsuit the plaintiff.

Mr Campbell, for the defendant, contended, in the first place, that the action could not be maintained by the plaintiff, but by Mr Hamilton, to whom the coats belonged; next that the notice protected the defendant, who, he would show, had sent the parcel by Newman's Brighton coach, which was in the habit of taking parcels for Ardingly; and even if there were negligence on the part of the proprietors of that coach, still his client was not liable. The learned gentleman called witnesses for the defence, to show the parcel had been originally given to Newman's Brighton

coach, which passed by Handcross, and it was also proved that parcels were frequently and generally left at that place for Ardingly, which is within less than four miles of that place. But there was no entry of this parcel in the books at the defendant's office. This was accounted for by the clerk of the office, who said that when the twopences were not paid, there was no entry made of the parcel. This was the general practice of the office.

Lord Tenderden, in charging the Jury, said he did not think the action ought to have been brought by Mr Hamilton, but could be sustained by the plaintiff, and the only questions for the Jury were —first, whether Newman's coach was a proper coach by which to send the parcel to Ardingly, and if they thought that coach a proper conveyance, they had then to consider whether the parcel had been actually sent by that coach; for if it had been so sent, and that they believed Newman's coach a proper coach, then the defendant's liability ceased, for he was only bound to take care that the parcel had been sent by a safe and proper conveyance. He could not avoid reprehending the practice, which had been sworn to by the plaintiff's servant —namely, that of retaining, with the consent of the defendant, the sum of two-pence, which had been given to him to get the parcel booked. He did not mean to impute any improper motive either to the defendant or the plaintiff's servant, but the effect of the practice was to deprive the plaintiff of that security which he would have if the parcel had been entered. It was a great deficiency in the defendant's case that he had not produced Newman, by whose coach the parcel was said to have been sent, nor was the way bill of that coach produced, and at this period of time it was difficult to identify the particular parcel which had been sent by that coach. There was another feature in this case—namely, that the plaintiff's name and address were written on the parcel, and if the defendant had found any difficulty in finding a conveyance to Ardingly, he might have returned the parcel.

The Jury, after consulting for two or three minutes, found a verdict for the plaintiff—Damages 5*l.* and the box to be given up to the plaintiff, which was done in Court.

## AMERICAN CASES.

### MASSACHUSETTS.

HAMPDEN CO.—S. J. COURT—SEPT. TERM, 1829.

*Commonwealth vs. Marcus R. Stevens, et al.*

The window of a dwelling house being covered with a netting of double twine nailed to the sides, top and bottom, cutting and tearing down the netting and entering the house through the window, are a sufficient breaking and entering to constitute burglary.—*Parker, Chief Justice.*

*Horace White vs. Oliver Mosely, et al.*

The plaintiffs being owners of a close and a mill thereon, on the south side of a river, and their milldam being rightfully extended to land on the other side, which they did not own, the defendants crossed the river below the plaintiff's land and destroyed a part of the dam, on the north side, and having effected their object, they recrossed the river at the same place and went upon the plaintiff's close. It was held that the destruction of the dam and entry upon the close were distinct trespasses, so that a judgment in *trespass quare clausum fregit* for the latter would not be a bar to a like action for the former.

It was held also that in *trespass qu. cl. fr.* for the destruction of the dam, the plaintiffs were entitled to recover consequential damages for the interruption of the use of their mill, this injury being set forth in the declaration.

*George Loury vs. William Russell, Jr.*

By a bill of lading expressing that goods are to be carried from one port to another, a direct voyage is *prima facie* intended; but this may be controlled by a usage to stop at intermediate ports, or by a personal knowledge on the part of the shipper that such a course is to be pursued.

*Commonwealth vs. William F. Loring.*

An indictment under the second section of the statute of 1814, ch. 175, for receiving and concealing a dead body, was sustained, where the evidence, though it had a tendency to prove an offence under the first section, of digging up the body, did not conclusively prove such offence.

Penal statutes, though they are to be construed strictly, are yet to receive such a construction as will conform to the manifest intention of the legislature and avoid absurdity. Thus an indictment upon the statute of 1814 c. 175, forbidding any person to dig up a human body 'not being authorized by the selectmen of any town in this Commonwealth,' it was held sufficient to aver, that the defendant was not authorized by the selectmen of the town where the body was buried—this being according to the intention of the legislature.—*Parker, Chief Justice.*

### NEW HAMPSHIRE.

SUPERIOR COURT OF JUDICATURE.

Vol. 4 contains the cases decided from January, 1827, to May, 1829.

*Fernald vs. Ladd.*

The performance of a contract made by an attorney in court, in relation to an action, may be enforced by attachment.

But, except in cases where the contract has been reduced to writing and put on file, or entered by the clerk upon the docket, the court will not interfere in this mode, but leave the aggrieved party to his remedy by action.

*Spencer vs. Blaisdell.*

Bank bills may be attached by virtue of a writ and may be seized and sold upon an execution.

*Eames vs. Carlisle.*

E. and others, on the one part, and C. and B. on the other, agreed to submit a claim of the former against the latter to the determination of the referees. Afterwards C. B. and F. gave a bond to E. and others, with a condition that C. and B. should perform the same agreement on their part within ninety days from the date of the bond. It was held that a neglect on the part of C. and B. to perform an award made after the expiration of the ninety days, was not a breach of the condition.

THE JURISPRUDENT.

BOSTON, SATURDAY, AUGUST 7, 1830.

The design of this publication is to furnish to the Profession of Law, a weekly Journal of Jurisprudence and Legal Intelligence; and to give the earliest information which can be procured of the Judicial Proceedings of this country and England.

The Jurisprudent will contain, so far as is practicable, a digest of cases decided and trials had, which are of prominent interest to the public. And notice will be taken of cases decided and points ruled in courts of law, in many cases, before they appear in the Regular Reports.

It will also contain notices of all such books, men, and legal events here, and in England, as will be most likely to interest the Profession.

A regular digest of cases reported will be given as soon as possible after the publication of the Reports. It is the design also of the conductors of the publication to introduce into it, occasionally, elementary articles, legal biographies, and analyses of new works.

Those who are inclined to favor the undertaking are requested to forward their names as early as possible.

Terms $3 00 per annum, if paid within 6 months, and $3 50 if paid after.

TERMS FOR ADVERTISING.

One square, with the privilege of changing in every other paper, $20, per annum.

Single advertisements $1 50 per square for two insertions.

We commence this week the regular publication of the *Jurisprudent.*

The favor which the first Number has met from the public, and especially from members of the Profession, has afforded us much gratification.

We have received much more encouragement than we expected; and have no fear that we shall receive less patronage than we deserve.

We solicit communications from our friends on all subjects which may be likely to interest our readers.

Notices of Professional Men—interesting Trials—and important Legal Opinions, will be peculiarly acceptable.

We commend our enterprise to the favor of the public and the support of the Profession.

## NEW HAMPSHIRE REPORTS.

We continue in this number the publication of the Digest of Decisions, in the 4th vol. of these Reports. It will be found to contain a number of important cases. It is generally known that there is no authorized Reporter of Decisions in the Courts of that State. And although there are many inconveniences resulting from the want of such an officer, which readily suggest themselves to the mind of every Lawyer, there are some advantages to the Profession, at least, attending the manner in which these Reports are got up. They are prepared by the Chief Justice of the Superior Court and published under his immediate inspection. No cases will be likely, therefore, to meet the public eye, which are not found, on careful examination, to bear the test of principle and law. And cases which are of little interest will seldom find their way into the Reports.

With the exception of the first volume, which was prepared by Mr Adams, these Reports might well enough be called *Richardson's Cases.* We hardly do right, perhaps, to call the first Volume a Book of *Reports.* It being rather slender and thin when it first made its appearance, and when we were called upon to subscribe for it twice as much as it was then worth—we were surprised, on inquiry a few days since for our old acquaintance, to have a full and plump octavo handed us, bound and lettered to correspond with the other members of the family; but not more so than we were, on opening it, to find the last half of it stuffed with an *old Pamphlet of Laws on the subject of paupers and militia trainings, with an 'act for the killing of Bears,' and 'for the punishment of lewdness, adultery, polygamy and fornication.'*

A more pitiful attempt was never made to spunge the Profession out of an extra two dollars.

It is bad enough to have a mongrel volume of Reports, so that when citing it, you are not quite sure whether you may stumble upon the authority sought for, or refer the Court to an act for the settlement of Paupers, or 'the preservation of fish in Mardin Meadow;' and it is worse still to be made to pay, the thirteenth time, for Acts of the Legislature which are of little or no interest to Lawyers or others out of the state, and which have appeared already in every shape which ingenuity could invent, to those within.

We absolve the Court from all blame in this matter. The other volumes are well executed, and especially the two last, which are handsomely printed and on good paper.

There are no cases reported in this State earlier than 1816, when Judge Richardson was appointed Chief Justice. No doubt many inportant cases were determined from the year 1802 to 1816 while Judges Smith and Livermore presided in that Court. There were many able Lawyers at the bar during that time, and

Judge Smith,

who was for so many years at the head of the Court, may be considered as the Father of the System of Judicature of that State. At the time he went on to the Bench there were no Reports of Cases published in any of the New England States. 'There had been no history of past transactions preserved by a Reporter; the sage opinions and learned counsels of departed Judges had been lost even from the memory, and precedents were sought for only in the books of a foreign country.' The separate duties of courts and juries were not clearly defined or generally known. Books were comparatively scarce, and the application of the principles contained in those, which were found in the lawyers' libraries, to the new condition and exigencies of the State, was difficult. This has always been a critical task to the most profound lawyers and judges, and must have been peculiarly so in the early periods of our government.

In proportion as our judicial proceedings become more simple and concise the difficulty was increased of rejecting what was redundant or inappropriate, of dispensing with unnecessary technicalities, and yet preserving the substance. The mind of Chief Justice Smith was well calculated to accomplish this work. It was not bound down, by prejudice, to the servitude of technical learning, nor was it so illiberal, from a limited education or narrow pursuits, as to reject the aids to be derived from the experience and wisdom of others. He could give the full energies of his discriminating mind to the investigation of a question, without the danger of losing sight of justice in a too great reverence for forms, or of sacrificing general principles to individual cases. 'He would tolerate nothing of antiquity which reason did not respect, and shrink from no novelty to which reason might lead.' The effects of his efforts to reform the practice of the Court, to give weight and dignity to its proceedings, to clear the course of justice, and open it to all, are generally felt and acknowledged. And it is much to be regretted, that that gentleman, in his retirement from the Bench, and from the bustle of life, has not thought fit to give the rich fruits of his industry and learning to the public. He will live in the memory of those who were associated with him at the Bar, or who have listened to him from the Bench, long after he shall have followed his beloved, lost family to the grave. But he should be remembered otherwise, and in after-times. He should be remembered, in the recorded productions of his mind, as a public benefactor, a successful advocate, and a learned, able and upright judge—as one of the greatest and best men of his State.

New Hampshire could not, perhaps, in many respects, have been more fortunate than she has been in the selection of a successor to Chief Justice Smith.

Judge Richardson

went upon the Bench under somewhat more favorable circumstances than his predecessor. He has labored hard to sustain the reputation of the Court and entitle its opinions to the confidence of the community. The volumes of Reports now before the public bear ample testimony to his industry, and prove how well he has succeeded in the discharge of the duties of his office. To those who have only occasionally seen him presiding on the Bench, there may be an appearance of haste, and precipitancy in his decisions upon points which arise in the course of a trial; yet no one ever reviewed an opinion or reconsidered a point with a fairer or less biassed mind. The operations of his intellect are rapid, and his impressions strong; but he has nothing of the pride of opinion, and seems glad to find that if he has committed an error he has an opportunity to correct it. He apprehends the points of a case with great readiness, and, though always indulgent and courteous to the Bar, decides with much promptness upon the evidence offered, and with a clear perception of its bearing upon the issue. He gives great latitude to the examination of witnesses, and the introduction of evidence, and sometimes it may be thought, trusts too much to the discrimination of the Jury in estimating the weight and character of the testimony before them.

The Judge has always been one of the foremost of those, who readily fall in with what are called the *improvements* in the law. And at this day, when there is an inclination to walk over the ancient ways of the law, where they are thought not to lead to the gates of justice—to introduce Chancery Principles where there are no Chancery Courts—to blend the principles of Equity and Law—it may be thought by some, that he is too ready to strain a legal principle to embrace an equitable result. He sometimes makes the law *presume* a good deal more than less liberal interpreters would feel authorized to do, and often rests his opinions upon very narrow, if not doubtful grounds of distinction between the settled rules of law and the apparent claims of justice. It is a difficult task to discharge satisfactorily the functions of a Law and Equity judge, at the same time—to sit in Chancery in the morning and in a Court of Law in the afternoon. The duties must be ultimately separated and kept distinct, or the popular jurisdiction of one side of the Court will destroy the powers of the other.

Judge Richardson has always been a popular man with the Bar and in his State. He is easy, affable and full of humor. The younger members of the Bar, in an especial manner, will always feel grateful to him for the kindness which has encouraged them to hope for success and helped many of them to attain eminence in their profession. The men, who began with him are gone or are fast dropping away from his Court. But those who have already taken, or may hereafter take their places, will cherish the recollection of his faithful services and his cheerful and happy temper, long after his labors shall be finished, and his voice has ceased to be heard on the circuits.

## AMERICAN JURIST.

The 7th number of this work has just been issued from the press of Messrs Freeman & Bolles. We think it one of the best numbers of that able and interesting Periodical. It contains 230 pages of matter, and many of the articles are written with much attention and ability. There are eight regular articles, besides a digest of the 5th of Greenleaf and 7th of Pickering, and several notices, short reviews, and analyses of new works, with a quarterly list of publications.

We are glad that the conductors of that work meet with sufficient encouragement from the public, to induce them to devote so much labor and learning to its contents.

## SALEM MURDER.

The Court met at 9 o'clock on Tuesday the 3d inst. pursuant to adjournment and proceeded in the trial of John F. Knapp, who is indicted as principal in the murder of Capt. White.

Evidence was introduced to prove the murder and the state of the body on examination. J. J. Knapp, Jr. was placed on the witnesses' stand and asked if he would be sworn, which he declined, and the pledge of the Government was recalled. Benjamin Leighton testified to conversation overheard by him at Wenham, between the Knapps, which had a tendency to connect them with the murder. On Wednesday, Mr Colman was examined as to the finding of the bludgeon, &c. He was asked as to the confessions of the prisoner, but the Court ruled them out as being obtained under expectations of favor.

*J. R. C. Palmer* was released from his arrest, and examined as to certain facts which went to show a conspiracy to murder Capt. White as early as the 2d of April. The acts and sayings of the conspirators were admitted as evidence to affect the case of the prisoner on trial. Other witnesses were examined as to the prisoner's visits to Danvers previous to the murder, and the letters which were addressed to the Committee of Vigilance and to Mr Stephen White. It is thought it will take the whole week to finish the trial of J. F. Knapp. The result of his case will be important in its bearing upon the others.

## New Publications.

ENGLISH.

Brady's Instructions to Executors. 3d edition, 8vo.—8s. boards.

Statutes 8vo. 10 Geo. IV.—15s. boards.

Shaw's Constable's Guide. 12mo.—4s. boards.

Penraddock's Criminal Law. 8vo.—5s. boards.

Atkinson's Conveyancers Manual. 8vo.—12s. boards.

Seton's forms of Decrees in Equity. Royal 8vo.—£1 1s.

Tucker's select cases from the Records of the Supreme Court of Newfoundland. 8vo—15s. boards.

Atkinson's Forms in Conveyancing. 8vo.

Hall's Rights of the crown on the Sea and Shores of the Realm. Royal 8vo.—12s. boards.

Petersdorf's Reports, vol. xiii.

Sturgeon's Bankrupt Act. 12mo.—6s. boards.

NEW LAW BOOKS.—JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

CONDENSED REPORTS of CASES decided in the SUPREME COURT of the United States, from the organization of the Court at August term 1791, to January term 1828. Edited by Richard Peters, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

This work is intended to contain the opinions of the Supreme Court, *in the language of the Judges*, in every case decided in that court from the establishment of the Government of the United States, to the commencement of Mr Peters's Reports at January term 1828. The reported decisions in the Circuit and District Courts of the United States, upon similar points, are also collected and digested in the work, as notes; and abstracts of those Cases, and also of the collateral decisions of the Supreme Court are given, so that the Professional Gentleman and the Student will be in possession of all the adjudicated Law of all the Courts of the United States, in an authoritative, condensed, and arranged form.

The work will be contained in not more than six volumes; the first volume is now published; the second volume will be published about the 1st of August, and the balance of the work during the present year and 1831.

Those who wish to possess this work will do well to make an early application as the greatest portion of the edition is taken up by subscription. They are for sale by the principal Booksellers in the United States, with J. Griggs's other law publications.

Price six dollars to those who subscribe, and seven dollars to non-subscribers, payable on delivery of each volume.

PETERS' REPORTS.—Reports of Cases argued and determined in the Supreme Court of the United States, by Richard Peters, Esquire, Reporter of the Supreme Court of the United States, 4 vols. royal 8vo.

FONBLANQUE'S Celebrated TREATISE ON EQUITY. A new edition, with considerable additions, from the last London edition, by a distinguished Member of the Philadelphia Bar, in 1 vol. royal 8vo.

CHITTY ON CONTRACTS. A new and Practical Treatise on the Law of Contracts not under Seal, and upon the usual Defences to Actions thereon, with Corrections and Additional References. By a member of the Massachusetts Bar, in 1 vol. 8vo.

SAUNDER'S REPORTS, in 3 vols. 8vo. The 4th American, from the 5th considerably enlarged London edition.

Say's Political Economy, new edition.

TOLLER'S LAW OF EXECUTORS AND ADMINISTRATORS. With notes and references to American Authorities, by E. D. Ingraham, Esq. new edition, in 1 vol. 8vo.

Sugden on the Law of Vendors in 1 vol. 8vo.

Jones on Bailments in 1 vol. 8vo.

CHANCERY REPORTS. JOHN GRIGG, has in press the Decisions of the English Chancery Reports, upon the plan which has been adopted and successfully executed with the 'English Common Law Reports.' The work will comprehend, in a condensed form, all the Reports which have *not* been republished in the *United States*; and it will be continued, so as to present to the profession, annually, the Chancery Reports as they shall hereafter appear in Great Britain.

The work will also contain references to the decisions of the chancery courts of the United States, and of the several states. July 10.

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NOW PUBLISHING, BY CARTER & HENDEE, A SERIES OF SCIENTIFIC TRACTS, designed for Instruction and Entertainment, and adapted to Schools, Lyceums and Families. Conducted by Josiah Holbrook and others.

The whole Series will contain simple and clear outlines of the various sciences, and their principal division, with their application to the common purposes of life.

TERMS.—Not lest than 24 numbers of a 12mo size, containing 24 pages each, will be published in a year, at $1,50, payable in advance. July 10.

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CARPENTERS' CATECHISM. THIS DAY PUBLISHED, By GRAY & BOWEN, An Introductory Catechism. By Dr CARPENTER; and also a Catechism of Scripture Names, by Dr Watts. Intended for the use of Sunday Schools and Families. July 10.

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PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

The work will be published with despatch.

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The work will be printed on a beautiful small type, and good paper, and will be comprised in four or five volumes, (probably not exceeding four,) royal octavo size, each volume to contain about 1000 pages; and will be delivered to subscribers at $5 per volume, in good law sheep binding, which is a very low price for a law work embracing so great a quantity of matter.

After publication the price of the work will be raised to $6 per volume.

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RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan itself suggests.

ISAAC PARKER.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. Will shortly be published a Digest of Pickering's Reports by Lewis Bigelow, Counsellor at Law, being a continuation of his Digest of Massachusetts Reports. It will be printed and bound to match that work. For further information apply to HILLIARD, GRAY & CO. July 10.

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PICKERING'S REPORTS, No. 1, Vol. 8th, this day published by HILLIARD, GRAY & CO. July 10.

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GRAY & BOWEN have received by late arrivals the following valuable Foreign Books, which they will sell at low prices.

Dibdin's Library Companion, second edition, one large 8vo. vol.

Bowring's Poetry of the Magyars.

Moore's Byron. Splendid quarto edition.

Belzoni's Researches in Egypt and Nubia.

Description of the Ruins of an Ancient City in South America, with plates.

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Teatro Italiano Antico, 8 vols. July 10.

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NORTH AMERICAN REVIEW. Complete sets of this work (thirty volumes in all) can now be had, on application to the Publishers, on liberal terms. The number and variety of the topics discussed in this work, and the high reputation it enjoys both in this country and Europe, render it a most valuable addition to the library of literary men. A General Index of the first twentyfive volumes has also been published, in a style to match with the current volumes of the work.

Subscribers and others whose sets may be deficient, can be supplied with the missing numbers. Subscriptions to commence at any period, received at $5 per annum. GRAY & BOWEN.

July 10.

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PETER PARLEY'S TALES ABOUT AFRICA—PETER PARLEY'S TALES ABOUT ASIA.—These works are now in press, and will be shortly published by GRAY & BOWEN. They will be executed in the neatest style, and embellished by maps and numerous engravings, many of them from original designs. The object of these works is to communicate to children, in an amusing manner, the outlines of Geography and History. The Tales about America and Europe have been before the public some time, and have had a sale beyond any other publication of the kind.

PETER PARLEY'S TALES OF THE SUN, MOON, AND STARS.—This work will be published in a short time. It is designed to follow the books mentioned above, with a more particular reference, however, to its use in schools. It will embrace a view of the more simple parts of Astronomy, and be so prepared and illustrated by engravings as to bring this subject easily within the grasp of the juvenile mind. A work of this kind is evidently needed, as there is now no book before the public which pretends to give a familiar view of Astronomy suited to children.

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WORCESTER ON THE ATONEMENT.—Just published and for sale by GRAY & BOWEN, The Atoning Sacrifice, a Display of Love—Not of Wrath. By Noah Worcester. Second Edition. July 10.

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ENCYCLOPEDIA AMERICANA. CARTER AND HENDEE have just received Vol. III. of the Encyclopedia Americana. A popular Dictionary of Arts, Sciences, Literature, History, Politics and Biography, brought down to the present time, including a copious collection of original articles in American Biography; on the basis of the seventh edition of the German Conversations-Lexicon. Edited by Francis Lieber, assisted by E. Wigglesworth.

C. and H. are Agents for the above work, for the States of Maine, New Hampshire, Massachusetts and Rhode Island, and receive subscriptions for the same at their store, corner of Washington and School Streets, Boston. July 10.

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THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

BY GRAY AND BOWEN.

Printed by Isaac R. Butts, No. 25 School Street.

# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, AUGUST 14, 1830. NO. III.

## MERCANTILE LAW.—No. II.

[Continued.]

Stimulated by wealth, adventure, and the thirst of gain, commerce rapidly extends itself. Lands more and more remote are sought, either as a vent for the superfluities of a busy and over-stocked community, or for the gratifications which they are able to minister to its real or artificial wants. Colonies are formed; plantations established; and the whole civilized world becomes at length a general mart, each country contributing to the common stock either the choicer productions of its soil, or the works of its superior skill. The juice of a leaf gathered in the remotest nation of the East, and sweetened by the pith of a reed grown in the islands of the western ocean, now forms the ordinary beverage of overy class in England, On the other hand, the cotton cloths manufactured here are worn by the inhabitants of the tropics; the woollens by men who border on the arctic regions. The material out of which the former is fabricated is fetched from Brazil, from the East Indies, and from the islands of the Spanish main. It is dyed by the juice of an herb * which flourishes in Bengal, and the blood of an insect † which is reared in Mexico. Experience, indeed, has shewn that the transmission of commodities by sea is both easier, cheaper, and more expeditious than that by land; and thus the ocean, which seemed the barrier to social intercourse, serves rather to connect and unite the families of the earth. The interest and magnitude of the topic will be an excuse for this brief digression. But our limits forbid us to extend it; and we return. The *owners* of ships, by the medium of which this wide and beneficial intercourse is carried on, constituting the last, the most numerous, and the most important class of public carriers. Immediately connected with these is another and highly influential body of men, who are designated *par excellence* by the name of *merchants*. Originally, of course, the ship-owner and the merchant were one; but the separation must have taken place at a very early period. The adventurer who had brought home a cargo of foreign products would soon learn to release himself from the risk, the trouble and delay of dealing them out in small portions, by disposing of the whole at a much inferior rate to some one who was willing for the profit to submit to the inconvenience. This latter, if the speculation answered, would then employ the owner of the vessel to procure and bring over for him another cargo of the same or like commodities. His next step would be to establish on his own account a connexion in the foreign market, to purchase the goods and supply the funds himself, and, in short, to take upon him the whole risk of the adventure, hiring merely, for a stipulated reward, the services of the ship-owner in transporting the cargo. The same observations will apply *mutatis mutandis* to the export trade. There, also, the merchant would by degrees step in between the grower or manufacturer and the ship-owner, would take the risk and profit of the sale in the foreign market, and employ the proprietor of the vessel simply as his carrier. At this day, therefore, ship-owners, whether engaged in the coasting or the foreign trade, are, in effect, public carriers by water. The same general principles, therefore, which apply to carriers by land, equally govern them. There are, however, many and very important regulations arising out of the relation of the ship-owner and the merchant, which form a peculiar code affecting them alone. The engagements which they enter into are, for the most part, the subject of special contracts, attested by formal instruments called *charter-parties*. Sometimes the whole vessel is taken into the service of the merchant for a definite period, or a particular voyage. In this case, he either takes entirely upon himself the temporary control and ownership, or leaving the possession to the proprietor, has merely the use and benefit of it for the stowage of his goods. In the former case he is called the charterer or hirer; in the latter, the freighter of the ship. Sometimes, again, he stipulates merely for the use of a part of the vessel, agreeing to pay for the freight or carriage of his goods after the rate of their tonnage. In this case no charter-party is executed; but when the goods are put on board, an instrument, termed a *bill of lading*, is tendered by the shipper to the commander for his signature. By this document the latter acknowledges the receipt of the goods on board, and engages to carry them safely and deliver them in good order to the person to whom they are consigned. A counterpart of the bill of lading is immediately transmitted to the consignee, another is delivered to the master of the vessel, and the original remains with the shipper, each of the other parts being void on fulfilment of the terms of one. The property in the goods specified may be transferred by the indorsement and delivery of this instrument, and the first *bona fide* indorsee has the priority of claim. Without entering farther into details, which would be manifestly inconsistent with our present design, we may content ourselves with observing, what indeed is sufficiently obvious, that in transactions so extensive many difficult and important questions are involved. Nor is this all. The proprietor of the vessel, for the most part, delegates the command, and the conduct of the voyage, to some professional seaman; and hence new relations spring up—between the owner and commander, and between the commander and the subordinate officers and crew—also governed by peculiar rules and usages, or forming the subject of express agreements. When to this we add the regulations as to the registry and transfer of ships, pilots, ports, docks, customs and other dues, the usages of foreign countries to which ours must in some degree be accommodated, and the rules which relate to partial losses and expenses of necessary repair, with the assessment of the proportionate contributions under the name of *average;* and, lastly, the raising of money for these and other purposes by the hypothecation of the vessel, called *bottomry*, or of the goods, called *respondentia*, a subject opens upon us apparently as intricate as extensive.

It has been intimated that the ship-owner contracts to convey the goods in safety. His engagement, however, is qualified with a wide exception as to the perils of the sea, and the acts of the King's enemies. For any loss which may arise from wreck, tempest or capture, he is not responsible. It is evident, therefore, that the freighter as well as the owner of the vessel, is subject to considerable risk in every voyage. The cargo of the former, and the vessel, stores, and tackle of the latter, may be lost or damaged by violence or accident; but besides this, the ship-owner is exposed to loss arising out of the fraud, wilful negligence or other misconduct of his captain and crew, for the consequences of whose acts he is also answerable to the freighter. Out of these risks and the injurious consequences which resulted from them to individuals, a practice has arisen of great and acknowledged utility. A number of persons stipulate, in consideration of a premium varying with the risk, to insure at their joint hazard both the ship-owner and the merchant against all or any of these contingencies. An instrument is drawn up attesting the contract, and called a *policy of insurance*, at the foot of which those who are willing to take part in the speculation subscribe their names, and are thence called *underwriters*. At what period this most valuable usage sprung up does not exactly appear. It has, however, an undoubted claim to great antiquity; for we find honorable mention made of it in the preamble to the stat. 43 Eliz. c. 12. 'By means of policies of insurance,' says the legislature of that day, 'it cometh to pass upon the loss or perishing of any ship there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not, than those that do adventure; whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely.' But in order to entitle himself to these advantages, the party insured must act towards the insurer with perfectly good faith. He must make no false representations—conceal no defects. The vessel must be in every respect fit for sailing, or, as it is technically termed, seaworthy. She must enter upon the voyage specified in the policy, and no other. There must be no intentional deviation from the line of that voyage. In short, no risk must be incurred which might not fairly be contemplated by those who bind themselves to the indemnification. When these conditions are fulfilled, nothing can release the

* Indigo. † Cochineal.

insurers from the liability which they have voluntarily incurred; and it is matter of honest pride to this country, that the scrupulous punctuality with which these engagements have generally been fulfilled, has been an inducement to foreign traders to effect their policies by preference in England.

The fiscal regulations of this country as to the duties imposed on goods imported for home consumption, and remitted as to goods which are again exported, have led to a practice now prevailing to a great extent, and which it is necessary in the prosecution of our plan to advert to—we mean the system of *warehousing*. But, without entering into particulars, it is enough for the present to state, that payment of the duty on specified articles is not exacted at the time of importation—that upon a bond given by the importer in double the value of the duty for payment, if required, at the expiration of a definite period, he receives from the officer of the customs or excise a *warrant* permitting him to land the goods (which are specifically enumerated in the instrument) and to deposit them in the warehouses attached to the dock. They are then said to be in bond. The importer, though he has not actual possession of the goods, has access to them for the purpose of inspection or sale, and the warrant serves as the symbol of his property. By the indorsement and delivery of this document he may effect as valid and complete a sale, as by the actual corporeal delivery of the goods for which it is substituted. Before we quit this subject it may be as well to mention that besides these public warehouses, there are others belonging to individuals, who derive a profit, as *warehousemen*, from permitting the deposit, and undertaking the safe custody of goods, which it may not be convenient for the owner immediately to dispose of.

The incidents which belong to the transfer and *delivery* of commodities, with the various mercantile occupations thence arising, have now been noticed as accurately as the narrow limits of an article permit. It follows that we glance as cursorily over those which relate to the *payment*. The basis of traffic being, as we have said, reciprocity of advantage, it might be expected that no one would be willing to part with the possession of his goods without securing an immediate equivalent. It was on this natural supposition that money was introduced; and without doubt the invariable practice anciently was, as the general rule still is, that payment should be contemporaneous with delivery. Variouscauses, however, of which it is enough to particularize competition, and the insufficiency of the actual currency for the increasing transactions of trade, gradually introduced the system of *credit*—and it has now become in many branches of trade, an established usage, in all it is a frequent practice, to allow an interval between payment and delivery, either fixed by the terms of the bargain or the understood cause of dealing, or left in some degree to the discretion of the parties.

## SIR JAMES SCARLET.

From the Dublin Literary Gazette.

It is a difficult task to portray a character like that of the English Attorney General, presenting nothing striking or uncommon, none of those lofty attributes that single out an individual from the vulgar herd, and hand him down to posterity and fame. There is no prominent feature in Scarlet's character which you can lay hold of; like a smooth and polished globe, it eludes your grasp; perhaps I am wrong, and many doubtless will be ready to exclaim: 'impossible that he could have attained such professional eminance without the aid of high abilities and extensive learning'—this is worth investigation. To me the most remarkable circumstances concerning the gentleman in question is, that there is nothing remarkable about him. Whatever merit he possesses lies in this, that he has reached the top of an arduous profession, without appearing to take the slightest trouble about the matter. Anxious to hear and see the man who succeeded Erskine in the King's Bench, I paid an early visit to that court. In the centre of the seat appropriated to King's council, behind a pile of briefs, sat Mr Scarlet, a portly, comfortable-looking personage with a red face, who seemed to live well and to have a keen relish for all the good things of this world—an admirable subject for an alderman, but exhibiting not the slightest symptom of that lassitude and debility which not unfrequently results from laborious occupation, or from long and painful study. It would be impossible to place in juxtaposition two individuals more dissimilar in mind and person, than Messrs Brougham and Scarlet; the former looks, and generally is, buried in profound thought, and is, moreover, as thin as though he lived on the oaten cakes of his own dear Scotland; while the Attorney General's plump and ruddy cheeks amply testify that he has shared in the luxuries of London, and afford ground for inferring that he is one of those easy minded individuals who has never thought long or deeply on any subject. I watched him attentively—he had brief in every motion—with self possession bordering on *nonchalance*, with a subdued tone, and in an easy, colloquial, and rather familiar manner, he addressed the court, obtained what he wanted, opened another brief, and so on, till he got through the entire bundle, and when he had concluded, looked just as fresh as when he began. I confess I then thought him a very commonplace sort of a person, and was astonished that this was the man deemed fit to succeed Erskine, and as some said to eclipse him. I felt indignant at the idea of a comparison so derogatory to that great man; but, then, thought I, this is term, the business of which requires legal argument and practical knowledge, but affords no scope for the display of brilliant eloquence and wit, or of those shining qualities of mind, the exertion of which trials at Nisi Prius more frequently and appropriately elicit and require. Throughout term, however, Scarlet was, as I have endeavored to describe, going through his vast business without the slightest bustle or confusion, stating facts and dates, and citing cases with the most marvellous accuracy. His eyes constitute the only peculiarity in his features; they are small and sharp, never more than half open, and in a perpetual twinkle.—These are lawyer's eyes, quick and knowing; and these the subject of this sketch transfers with infinite address, from the cosy Justice Parke, at one end of the bench, to Justice Bayley, cast by nature into a lawyer, at the other; with these winching eyes he reads the well known countenances of the judges, anticipates every objection, and meets Justice Bailey half way, with volume, case, and page. Justice Littledale, when he has finished his little bag of dry toast, sometimes ventures upon a gentle admonition, suggesting his modest opinion in a quiet, unpretending way: while Lord Tenterden rarely interrupts 'Sir James' in the progress of his argument, but listens with complacency and attention. When the sittings at Nisi Prius commenced, I frequented the King's bench every day, and had ample opportunity of observing the habits and peculiarities of this wily advocate. The extent of his practice in this branch of his profession is enormous; the labor, also, of senior counsel in Westminster in each individual case, is infinitely greater than in Dublin; the leader accomplishes everything—states the case, examines, cross-examines, and finally speaks to evidence; a junior can find no opportunity to show off; he may open the pleadings or suggest a case in point to his leader in a modest whisper, and there his exertions must end. At first I was almost disgusted at the uniformity of Scarlet's manner. He seemed incapable of excitement—breach of promise, seduction, defamation, assault, insurance and bills of exchange, succeeded one another, and were by him disposed of in the same easy manner; he never either rose or sunk—never employed a passionate expression—never evinced the slightest emotion—never indulged in tenderness of speech—never attempted to stir the sympathies, or reach the hearts of jurors: yet strange to say, invariably obtained large damages.—Thenceforward I admired him as a skilful and successful advocate; my admiration was confirmed by contrasting him with his legal brethren. Denman and Brougham are staggered by a point of law, and will at times come to a full stop from a break in their evidence—even the eagle-eyed Gurney fails in the management of a rotten case, from a too palpable anxiety and a suspicious earnestness. In cases of such a description it is, that Scarlet stands unrivalled, not only among his contemporaries, but above all the lawyers that ever lived.—Nothing can disconcert him even for an instant; no unlucky accident disturbs, no unexpected evidence discourages him, the presence of mind he displays on these critical occasions is truly wonderful. By an uninitiated spectator his tact is neither seen nor understood, simply because it is the very consummation of art; but the attorneys understood it—they knew full well, that, where any other man would meet a nonsuit, Scarlet will gain a verdict. He treads on dangerous ground with softness, and handles every fact with cunning dexterity. In the mildest manner, and with his professional smile, he assures his Lordship that his learned friend, Mr Brougham, is totally mistaken with respect to the case cited from Barnwell and Creswell. Lord Tenterden doubts Sir James' law—he gently perseveres, and having at last persuaded that most learned and most honest judge that there is a point to go to the jury, his triumph is complete. He has got over the scruples of the judge—the scruples of the jury he can easily satisfy. He coils himself into the details of his case—explains just what he thinks necessary for the jury to know—glosses

over all the rest—anticipates their verdict, because 'he well knows they are rational, sober minded men'—communes with them as an old friend in the most unembarrassed strain imaginable: and they, imposed upon by the plausibility, and apparent frankness of his manner, find according as he bids them. No one forming his notions of a Nisi Prius lawyer on the model of Wallace, O'Connell, or Goold, can have a conception of Scarlet. Take the opposite of Goold in every particular, and it might give you some slight idea of his manner. He is sly and calm, as Goold is loud and overbearing. How our lawyers do shout and storm at a witness—this may sometimes do; but I am convinced Scarlet's method is infinitely more efficacious. He throws a witness completely off his guard by his mildness—elicits all his case requires, and not a scintilla more. In his replies he excels; it is here the sagacity and craft of the lawyer produce the most decisive effect. He culls out, on the moment, all that is material, from the confused evidence of a host of witnesses, never wading through wearisome and useless details; he converts suspicions into certainties, and connects the minutest circumstance which can illustrate or assist his case, evincing a tenacity of memory which is perfectly surprising. His action is peculiar: he never gesticulates, nor does he, Wallace like, excite clouds of dust by striking the table with vehemence and fury. He employs his right hand in a little circle, never extending his arm to its full length, as ever and anon he beckons the jury with two fingers, as if he wished to speak with them behind the door. Such I have observed to be his invariable action. Now that I have endeavored to enumerate those qualities which he does possess, I ought to mention those which he does not possess. Well then—he has neither fire, nor energy, nor eloquence, nor passion, nor wit, nor humor, nor pathos. His excellence consists in fact in the management of causes. It is vain to expect from Scarlet a single observation calculated to instruct the understanding, to delight the fancy, or to touch the heart. Even though the subjects admitted, he could not indulge in wide, enlightened, or philosophical reflection. He thinks—he *can* think only of plaintiff and defendant; he wants a verdict, and nothing but a verdict. He is entirely the same; his sympathies seem deadened within him; the misfortunes and suffering of his client cannot divert him from his accustomed course; the exposure of unexampled villany cannot fire him with honest indignation. He is a composition of art—there is nothing natural about him. His voice is measured within a certain compass, his action tutored; and sooner might one expect melodious music from an owl, than an ebullition of natural feeling from the lips of Scarlet.

The highest and only praise then which can be given to the subject of this sketch, is, that of being a consummate legal tactician. Outside Westminster Hall, he is merely nobody; while the other great lawyers of the day, after discharging zealously their duty to their clients, hasten to discharge the still higher duty they have imposed upon themselves towards the public and mankind, Scarlet posts away to chambers to count his guineas and to hug his briefs. As a preliminary speaker, he is contemptible; his artificial habits totally unfitting him for a popular assembly.

## LORD REDESDALE.

Within the last quarter, the death of Lord Redesdale and the resignation of Mr Justice Burrough have occurred. Our notice, in this place, of such a life as that of the former, can contain little more than an enumeration of the appointments which he filled; indeed only one or two particulars have reached us which our readers are not acquainted with already. John Freeman Mitford was born Aug. 18, 1748; not 1741, as all the papers have stated; neither was he, we learn from pretty good authority, intended from the first for the bar. He was a clerk in the Six Clerks' Office before he resolved on devoting himself to the higher branch of the profession; and, in this particular, the early part of his life coincides with that of Sir Samuel Romilly. He entered at Lincoln's Inn, and devoted himself to the Court of Chancery; and in 1782 he published 'A Treatise on Pleadings in Suits in the Court of Chancery by English Bill.' We are not aware what extent of practice he possessed before the publication of this admirable work, but we find him enjoying a first-rate practice soon after it appeared, and, jointly with Lord Eldon, leading in the Court of Chancery. We shall leap over the intervening space, during which he became successively King's Counsel, Welsh Judge, Member of Parliament (1789), and Solicitor General (Feb. 1792), and come at once to the prosecution of Horne Tooke for high treason in 1794, when Lord Eldon, (then Sir John Scott) as Attorney General, and Lord Redesdale, (then Sir John Mitford) as Solicitor General, conducted the case for the crown. On this occasion Lord Redesdale distinguished himself not only for his forensic exertions, but by a singular display of sympathetic emotion. Tooke had been making some pretty strong insinuations against the Attorney General's integrity, which the party assailed thought it necessary to repel. He accordingly expiated at some length on the value of character, and the excellence of his own: 'He could endure anything but an attack on his good name; it was the *little patrimony* he had to leave to his children; and, with God's help, he would leave it unimpaired.' Here his voice faltered, and he burst into tears; and, to the surprise of every one, the Solicitor General became equally affected, and wept as profusely as his friend. 'Do you know,' said Tooke, in a loud wisper to a bystander, on finding this bit of pathos likely to tell against him,—do you know what Mitford is crying about? He is crying to think of the *little* patrimony Scott's children are likely to get.'

We have nothing else to tell about this trial which is not probably well known, or much too long to repeat; neither can we venture to particularise the more celebrated speeches which he made in support of Mr Pitt's administration; a long list of which might easily be formed from the Debates. He was named Attorney General in the summer of 1799, on Lord Eldon's being raised to the peerage and named Chief Justice of the Common Pleas. Under Lord Sidmouth's administration (in 1801) he filled the situation of Speaker of the House of Commons; and in 1802 succeeded Lord Clare as Chancellor of Ireland, and was elevated to the peerage by the title which he held at the time of his death. It seems, according to the somewhat apocryphal authority of Barrington, that his Lordship was rather out of his element on his arrival among the wits of the Irish bar; and a humorous account is given of his efforts, at the first dinner party, to chime in with the tone of the company. 'His Lordship had obviously got together some of his best bar remarks (for of *wit* he was totally guiltless, if not inapprehensive), to repeat to his company, as occasion might offer; and if he could not be humorous, determined at least to be entertaining. The first of his Lordship's observations after dinner, was the telling us that he had been a Welsh judge, and had found great difficulty in pronouncing two double consonants which occur in the Welsh proper names. 'After much trial,' continued his Lordship, 'I found that the difficulty was mastered by moving the tongue alternately from one dog tooth to another.' Toler seemed quite delighted with this discovery; and requested to know his Lordship's dentist as he had lost one of his dog teeth, and would immediately get another in place of it. This went off flatly enough—no laugh being gained on either side. Lord Redesdale's next remark was,—that when he was a lad, cock-fighting was the fashion; and that both ladies and gentlemen went full dressed to the cock-pit, the ladies being in hoops. 'I see now, my Lord,' said Toler-'it was then that the term *cock-a-hoop* was invented.' A general laugh now burst forth, which rather discomposed the learned Lord Chancellor. He sat for awhile silent; until skating became a subject of conversation, when his Lordship rallied—and with an air of triumph said, that in his boyhood all danger was avoided; for, before they began to skait they always put blown bladders under their arms; and so if the ice happened to break they were buoyant and saved. 'Ay, my Lord!' said Toler that 's what we call *blatheram-skate* in Ireland.'—These do no discredit to Sir Jonah's invention; but there is a much better, and (if that be material) a well authenticated story of his Lordship's inaptitude for joking: 'A cause was argued in Chancery, wherein the plaintiff prayed that the defendant should be restrained from suing him on certain bills of exchange, as they were nothing but *kites*.—'Kites?' exclaimed Lord Redesdale: Kites, Mr Plunkett? Kites never could amount to the value of those securities? I don't understand this statement at all, Mr Plunkett.' It is not to be expected that you should, my Lord,' answered Plunkett: 'In England and in Ireland, kites are very different things. In England, the *wind* raises the *kites;* but in Ireland, the *kites* raise the *wind*.' 'I do not feel any way better informed yet, Mr Plunkett, said the matter-of-fact Chancellor.—His Lordship continued in the Irish Chancellorship about seven years; his decisions are contained in the Reports of Messrs. Schoales and Lefroy; a book, we need hardly add, of high authority in the courts both of England and Ireland. His chef-d' œuvre in legislation is commonly supposed to have been the introduction of the insolvent laws, which this, assuredly, is not the place to discuss. The principle may be good, but it has hitherto been most injuriously applied; and nothing can be more vague and unsatisfactory than the last act upon the subject. His Lordship died January 23, 1830, and was succeeded in his title and estates by his son. Our readers are aware that he was the brother of the historian of Greece; a memoir of whom, by Lord Redesdale, appeared in the last edition of the History.—*Law Magazine for Jan.* 1830.

## ENGLISH CASES.

### COURT OF COMMON PLEAS—APRIL.

Sittings at Guildhall, before Chief Justice Tindal and a Special Jury.

*Catherine Simpson v. Barrow and another.*

Mr Sergeant Taddy, (with whom were Mr Sergeant Andrews and Mr Patterson) stated that this was an action upon a policy of insurance. The defendant was one of the Directors of the Globe Insurance Office. The amount of the policy was 1,500*l*, and was effected upon the life of a Miss Lydia Jane Simpson. It was dated the 10th of September, 1828, for the term of seven years. In March 1829, Miss Simpson died, and her body was submitted to a post-mortem examination, but nothing appeared to show the cause of her death. She had previously been in good health, and there did not seem to be any latent disease likely to shorten her life. He was not at all aware what defence the opposite side would rely upon; perhaps it might be said that she had been guilty of imprudence in her early years, or her sanity might be impeached because she wished this policy to be effected in order to obtain money to set up a school. However these points might be disposed of, he should prove that her's was an insurable life, and, having done so, he would be entitled to a verdict in favour of the plaintiff.

The policy was then put in and read. It was dated on the 10th of September, 1828, and was effected to the amount of 1,500*l*. on a declaration made on the 6th of the same month. After the usual words respecting the person going beyond sea, the grounds for the policy's not becoming void were, that the person insured was not afflicted with gout, rheumatism, or other disorder, or any disease tending to shorten life.

Mr Thomas Edwards—I live at Kennington. I knew Miss Jane Simpson. Her mother married my brother. Her daughter was the child of a second marriage. Miss Jane was the eldest of eight children. Her mother lately lived at Plymouth. I knew Miss Jane at a very early age. She came to join my family at Christmas, 1827. She was then in a fair state of health. She had been living at Wantage, in Berkshire. She died in February, 1829. My family consisted of my wife, my daughter, and myself. Miss Jane had been at the house of her half-brother when she was taken ill. She had sometimes before complained of what we call determination of blood to the head. Mr Edwards, her half-brother, lived in Brunswick square. When she came back, she complained that she could keep nothing on her stomach. She was attended by Mr Edwards and Mr Handy, of Stamford street. She died in a week or ten days. In the first instance her illness created no alarm in my mind. On the Friday I began to be alarmed. I had understood that Mr Handy did not apprehend the least danger. I did not know, until after her death, that any policy had been effected on her life. In September 1828, she was in general good health. She complained of nothing, except occasionally of those little pains in her head.

Cross-examined—When Miss Jane Simpson came to my house she was under 20 years of age. I had not seen her for seven years before. I never heard of her living with a Mrs Bradberry. The lady with whom she lived at Wantage was Mrs Pearce. That lady kept a school. She came at once from Mrs Pearce's to my house. She had been there nearly two years. I understood she had been subject to those little complaints in the head. They used to come and go. I never heard of her fainting in consequence of these complaints. She was a pale and weakly looking person. I understood she had a very severe illness at Wantage; an illness of some continuance. She had no illness whilst at my house, except those headaches. She occasionally took pills, and I understood that leeches were sometimes applied to her head, but that never occurred at my house. She was so treated while she was away. When absent from my house, she was always at Mr Henry Edwards'. I know of no other place where she visited. I think that it was not long after she came to my house that I heard of those pains in her head. I never heard her mention the quantity of blood she had lost at any one time. I never heard from Mrs Simpson that policies had been effected on Miss Simpson's life to the amount of 8,000*l*, nor that Mr Henry Edwards had effected a policy on her life. We were very intimate with Mrs Simpson before she went to Plymouth. We had no communication afterwards until she came to town. I was on good terms with Mr Henry Edwards during 1827 and 1828. I received 15s. a week for Miss Simpson's board and lodging. It was paid regularly each quarter from Mr Henry Edwards. I received also a few pounds for teaching her music. It was not until after her death that I was made acquainted with the fact of her having had a child. Her brother, who had been apprenticed to Mr Henry Edwards, was a year or two younger than she was. Mr Henry Edwards was 30 years of age. I never heard that he had been a refiner. I heard he had once been a stereotype printer, and afterwards became a medical man. He had a chemist's shop in St John street, at which George Thomas Simpson, the brother of the deceased, attended. Miss Simpson was not in the constant habit of taking pills. She was sometimes a little flushed after walking, and could not take any great exercise.

Mrs Edwards, the wife of the last witness, confirmed his statement.

In her cross-examination she said that Miss Jane Simpson was always delicate. Her appearance was always very pale—rather cadaverous, perhaps. She was moderately strong; but could not bear walking well. She frequently took medicine, but always by the order of Mr Edwards. In February, 1828, she had been bled and leeched for a determination of blood to the head, as she thought; but I don't believe it. We used to smile at her idea of that complaint, and sometimes she would smile at it herself. She was bled at her brother's. I don't know any thing of the quantity of blood she lost at any one time.

Miss Edwards, the daughter of the last witness, gave similar evidence.

Cross examined—Miss Jane Simpson did not constantly take medicine while she resided in my father's house. She took a draught occasionally. I was not at home when she first came to the house. When I returned she was taking tonic medicines, and continued them for a fortnight. She took a draught occasionally in March. She was not in the habit of taking pills, but she took blue pills occasionally. Did not analyse them. She never took medicine three times a day. When I left her in the beginning of September her health was as good as it ever was. I used to say she was sometimes a little fanciful about her health. I considered it a little affection of the nerves. She was not perpetually complaining of being ill. She was recovering from some illness when I first saw her. She was never free from occasional complaints afterwards, but they were very slight during that time. She occasionally complained of headache, but it passed off without taking medicine. She always looked pale.

Re-examined—Her illness did not appear of a serious character.

Mr Handy—I am a surgeon, and live in Stamford street. I knew Mr Edwards' family slightly. I became acquainted with Lydia Jane Simpson in 1825, and knew her until her death. I saw her at various times during that period. I was introduced to her whilst I was taking a tour in the West of England. She was a person of delicate complexion, but rather plump in her person. I had no reason to suppose, from what I saw, but that she was a very healthy young woman. I attended on the Monday, 9th of February, preceding her death. I think I saw her in the January previous, in Brunswick square, and she said, 'What do you think of me? I have walked to Hampstead and back.' When I saw her at Mr Edwards', of Kennington, she complained of great nervous debility, of sickness in her stomach, and general excitement (fever). I should say her stomach was principally affected—there was pain, and irritation. I gave her calomel, opium, and some James's powder, and applied a blister to her stomach. I saw her on the next day; the sickness continued, her pulse was exceedingly quick, she was bled, the pills were repeated, and Seidlitz powders were added. She was in much the same state on the Wednesday, and the medicines were repeated. On the Thursday her head was affected in consequence of the medicines not having had the effect. I ordered her head to be shaved, and an evaporating lotion to be applied to allay the pain. I ordered the same medicine, and that she should be kept very quiet. On Friday she appeared better. On the Saturday she complained of great debility of the stomach. I then ordered slight tonics, and a smaller quantity of calomel. During all that time I did not consider her in danger, save that on the Friday I wished to have another opinion, and I drove up the Kennington road to Dr Wilmot. On the Monday I did not call on him, as I thought there was a chance of her getting completely well, in consequence of the medicines acting sufficiently; but when I saw her on the Sunday morning, her head was very much affected. I ordered a blister to the neck, an evaporating lotion to the head, and a fever mixture to be taken every four hours. I saw her again between seven and eight in the evening; she was then dead. I expressed the greatest surprise, and wished for a post-mortem examination, not being satisfied with the cause of her death, it being so unexpected. Her family consented. Mr Franks, a surgeon, was called, and he brought Dr Wilmot with him. The examination took place on the Tuesday morning. I found nothing particular in the stomach but biliary secretions.

There was nothing unhealthy about it. The head was opened. I found nothing that we call unhealthy, but great congestion of the vessels. We were at least an hour and a half examining the body, and the result did not lead me in any degree to suppose that she was affected with any disease like to shorten life.

Cross-examined—I had not been on very intimate terms with the family at Kennington, but I was particularly intimate with Mr Edwards, of Brunswick square, who is a surgeon. He attended her for two days, and bled her. On one occasion, as I was labouring under nervous affection, I was dining at Mr Henry Edwards', and called at my sister's on my return. Whilst there, Mr George Simpson came to the house, and called Mr Edwards out of the room. In a few moments after Mr Edwards called me out, and said, 'George has informed me Jane is much worse, and he does not think she will live.' I said, 'It is no such thing; he is a young man, and, not having seen so much disease as I have, cannot be so good a judge.' Upon that they sat down to dinner, and, after taking three or four glasses of wine, I proceeded to my own house, and thence to Kennington, where I found her dead. Mr Henry Edwards had been with me on the Monday and the Tuesday, but I believe he had seen her between the Tuesday and the Sunday. The deceased told me so. Mr Edwards and I had no dispute about her life. I have been 25 years in the profession. I certainly said to him, 'Harry, how came you to insure this girl's life?' I made use of the remark, from thinking her so well. I can't say, when I used that expression, but it was on the occasion of being applied to by one of the insurance offices. His answer was, certainly not that he considered her health bad, and that she could not live, but he said to the effect that she was not so good a life. He also said something about having advanced a great deal of money. I had some conversation with Mr Freshfield afterwards. My opinion of her being a good life was confirmed by the post-mortem examination; and I remarked to Mr Edwards that I was right in my opinion. It often happens on post-mortem examination that the cause of death cannot be accounted for. The document produced is in Mr Edwards' handwriting. When I first saw Miss Simpson at Trowbridge, I remarked how plump she was; but I had then no idea of her being pregnant, but I was told so in a few days after by Mr Henry Edwards, who said that a most dreadful occurrence had happened. I saw the deceased several times at Brunswick square, in 1828, but I can't say how early it was in that year that I first met her. She came often to my house about that period. If I had my diary I could tell every day I saw her at that time. The conversation I had with Mr Edwards about her life was over a glass of wine, and the subject was not afterwards renewed. I have no recollection of having seen the answer Mr Edwards sent to the office, or of his having seen the one I sent. I did not attend the deceased in her confinement, which took place about the latter end of 1825, I was afterwards informed that the child died. I did not learn who was the father of the child. There was no conversation at the post-mortem examination of a cancer of the uterus. He never heard of the deceased being ill but once, when she was at school at Wantage. I was not aware of her having taken any medicine in 1828. I have not often been referred to by insurance offices. The letter produced is the one from the office to which I sent an answer. I was referred to by two offices, but certainly by not more than three. I can't recollect the names of the offices—I think the Globe was one, and am confident the West of England was another. I answered that I had no objection to be referred to. I never heard that this young lady had unfortunately been twice in the family way.

Re-examined—I have not the slightest interest in the insurance effected upon the young woman's life. I have no doubt of the correctness of the answers sent to the offices.

Dr Wilmot—I reside at Kennington. I attended at the post-mortem examination of the body of Jane Simpson. Mr Franks, a surgeon, and myself, operated on the body. Mr Handy was present. The examination lasted four hours. I think Mr Handy was there during the whole time. I don't recollect an accident happening to any gentleman during the operation. I observed nothing that could lead me to judge of the cause of the young woman's death. There were no appearances sufficient to account for it. I saw nothing to make me believe that the deceased was afflicted with any disorder to shorten life. The fact of the deceased's having had a child would not have furnished a cause for accelerating her death.

Cross-examined—I have not often been applied to by insurance offices. If applied to, I should not particularly think it necessary to inquire if a female had a child. I should judge from the actual state of her health. I have never paid particular attention to that subject. If I had been applied to by an insurance office, and was aware that a young woman had had a child, I should think it material to state that fact.

Mr Franks—I am apothecary to the South London Dispensary. I attended the post-mortem examination of the deceased. I observed nothing remarkable in the state of the stomach. No part of the body appeared unhealthy. I saw no apparent cause of death, nor any appearances to make me think that the deceased had any disorder to shorten life.

Cross-examined—I principally conducted the operation. I am a surgeon by the diploma from Apothecaries' Hall; but I have not been admitted at Surgeon's Hall. I took no minutes of the examination. I have been present at many; but very rarely take any minutes, except occasionally, when the case had been under my own care. A Mr Edwards was present during the examination.

Re-examined—I was satisfied there was no disease of the uterus.

This was the plaintiff's case.

Mr Sergeant Wilde addressed the Jury for the defendant, and observed that there were some cases which came before them, in which the parties had a greater stake than the mere verdict. He had the honor of appearing for the Globe Insurance Office; and his duty was not limited to obtaining a verdict in this case, knowing the character of the gentlemen whom he represented, and who, if it could not be obtained with perfect honor and integrity, would not wish for one moment to prevent the plaintiff from having the full benefit of the policy in question. Their object was not to resist a just and fair demand; but the defence he had to submit on their behalf was, that the case on the part of Henry Edwards was one of the grossest fraud and conspiracy. The Learned Sergeant then proceeded to detail the facts on which he meant to resist the present action, and said he should principally rely upon letters written by Miss Jane Simpson herself, shortly before and after the insurance was effected, and detailing the state of her health, which she considered very bad. These letters were addressed by Miss Simpson to a schoolfellow, to whom she stated that 'her health was entirely gone, and her constitution quite undermined.'

Here the Chief Justice interposed, and asked Mr Sergeant Taddy if he thought he could get over the declarations in these letters if they were authenticated? and also the fact of Mr Henry Edwards concealing the circumstance of Miss Simpson's having had a child, of which he was aware?

Mr Sergeant Taddy said that if the letters were proved he did not see how he could carry the case any farther.

After a few observations from the Counsel on both sides, Mr Sergeant Taddy submitted to a nonsuit.

## CHANCELLOR KENT'S OPINION,

### UPON THE CITY RAIL ROAD.

*Question.* Can the Legislature of Massachusetts constitutionally grant authority to the city of Boston to subscribe to the stock of a company, to be created by an act of the legislatue, for constructing and establishing a railway or road from Boston to the western borders of the State; and to be continued, if it should be deemed expedient, into one or more adjoining States, with the consent of the legislature thereof, and with such rates of toll to be levied on behalf and for the use of the company as may be authorized by the said legislatures?

This question has been submitted to me for my professional opinion; and with it the constitution of Massachusetts as it now exists, and the act for establishing the city of Boston, have been laid before me.

I have examined these documents with a view to the question. The Legislature of Massachusetts possesses all the plenary and sovereign powers of legislation which belongs to every free and independent state, except so far as those powers are restrained or limited by the constitution of the State or by the constitution of the United States. It has power to erect city governments, and to grant to the inhabitants thereof *such powers, not repugnant to the constitution, as it shall deem necessary or expedient for the regulation and government thereof.*

*It has power to make new laws as the common good shall require. It has full power aud authority to make all manner of wholesome laws not repugnant to the constitution, and which shall be judged to be for the good and welfare of the Commonwealth.*

Under this general authority it would appear to me that the legislature may, *in its discretion*, vest the inhabitants of the city of Boston in their corporate capacity, with power to subscribe to the stock of a company to be created for the construction of a railway terminating in the city, and extending indefinitely to and beyond the bounds of

the state. It is sufficient that such a grant of power shall have appeared to the legislature to be for the welfare and common good of the city, and that it is to be exercised with the assent of the inhabitants of the city duly and legally declared.

There is nothing which I have perceived in the constitution which restrains the general court from the grant of such a power.

It is embraced in the general delegation of legislative authority, and it falls so naturally, and indeed, so necessarily, within the inherent character of legislative sovreignty, that it would require some very explicit exception in the constitution, to induce us to say it was withheld.

It may be said that neither the municipal authorities of a city, nor even the inhabitants, by a regular vote of the majority, can, or ought to be permitted, to raise moneys by tax or assessment, for any other, than *municipal objects* and *purposes*. But it rests with the legislature of the state to determine and define what are such objects and purposes, and they may extend to improvements that bear upon those objects *indirectly* as well as *directly*.

A railway, or a turnpike road, or a canal, or an acqueduct, may become fairly an object of municipal effort, and necessary to the well being and prosperity of the city, though one of the *termini* of such an undertaking should extend to other towns and counties, and should even reach the extremity of the states. The descretion to judge and determine on the fitness of the means to the end, must be reposed somewhere; and I have no doubt it does, and ought to rest in the first instance, with the legislature of the state in granting the capacity to the city to decide, and then with the people of the city lawfully convened by themselves or their representatives, under the provisions of their charter, to deliberate and either to adopt or reject the proposed measure.

If the legislature should authorize, and the city of Boston should consent, to a subscription in the name and on behalf of the city to the stock of a railway company, the object would be directly and essentially the benefit of Boston, and indirectly and consequentially the benefit of the commonwealth. The tolls would go directly into the city treasury, in a ratio to the amount of its stock.

The object would be therefore the pecuniary emolument and commercial prosperity of the city, and whether the calculation of the advantage be well or ill founded, it will not effect the question of right and power.

The legislature have most assuredly a right to grant to the city of Boston such municipal powers, as it shall from time to time deem for its good, provided they be not inconsistant with the constitution.

The legislature have a right to authorize the city to borrow money for city purposes, and to raise money by tax and assessment for city purposes, and if the legislature, in its wisdom and discretion, should deem a rail road to be one of those purposes, their decision would *be binding and conclusive.*

There is nothing in the constitution to control the legislative discretion on this subject. When it is said that the legislature are to impose and levy *proportionate and reasonable assessments, rates and taxes upon all the inhabitants of, and estates laying within the commonwealth*, this general direction applies only to the *actual assessment* of general taxes, and it leaves the legislative discretion as it existed before, in respect to the objects and purposes for which assessments are to be made and levied.

If this constitutional advice be applicable to this case, it is only when the local authorities of Boston come to *assess the tax* for the subscription to the railway upon the inhabitants and their estates; and in the exercise of this and of all other powers of taxation, depending on popular vote, the assessment should be *proportionate* to every man's taxable ability and estate. This is a principle of universal justice and equity as well as of constitutional injunction.

I have not met with any judicial decision in the reports of the Supreme Court of Massachusetts, that has much bearing on the question. In the case of Stetson vs. Kempton (13 Mss. Repts. page 272) it was decided that the inhabitants of a town had no authority to raise money to give additional wages to the militia for the purposes of defence. But this opinion was founded upon the construction of the act of 1785, authorizing towns to grant and vote moneys for the support of the *ministry, schools, the poor, and other necessary charges* arising within the town. The assessment in question was held to be, not for a town, but for a public and general purpose, and it seemed to be assumed throughout the case, that there was no statute authority for the assessment, and that such an authority was '*a question for the legislature.*' If the city of Boston were to undertake to subscribe to such a stock as that of a railway company, and to vote and raise moneys by an act of the majority of the votes, to meet such a subscription, the doctrine of the case would then be applicable, so far as to bring into consideration the power of the city under its charter, and without any special statute provision, to raise moneys for such a purpose. Such a question is not submitted to me.

The point now is, *whether* it is not within the *constitutional competence* of the *legislature* to confer the power in this case upon the city of Boston, and I see no good reason for a serious doubt on the subject.

Even if the question was susceptible of doubt on a strict construction of the constitution, yet in all doubtful cases the conclusion would be in favor of the *general legislative discretion.* All exceptions to the general delegation of legislative power under the State Constitutions are to be taken strictly. JAMES KENT.

*New York, July* 23, 1830.

THE JURISPRUDENT.

BOSTON, SATURDAY, AUGUST 14, 1830.

We occupy our usual Editorial space this week, with a part of the debate upon an important question of evidence which arose in the course of the trial of J. F. Knapp for the murder of Capt. White. The point was one of great interest and importance, in the case, and was discussed with much ability. The trial has been full of nice and difficult questions, the discussion of which has added even to the intense interest created by the development of the facts. The case in its origin, disclosures, development, trial, and, if we mistake not altogether, we may say in its issue and termination, is one of the most extraordinary in the history of Jurisprudence.

## SALEM MURDER.

The evidence on the part of the prisoner was closed on Tuesday last at 3, P. M. when Mr Dexter commenced his argument and concluded at half past eleven A. M. on Wednesday. Mr Webster shortly after began to address the Jury in behalf of the government and finished at eleven on Thursday, having occupied about eight hours in his argument. Judge Putnam then gave the case to the Jury in a charge of two hours, and the Court was thereupon adjourned to 3 o'clock, P. M. The Court met and again adjourned pro forma to Friday morning at 9 o'clock. At 3 o'clock yesterday, the Jury had not agreed, and were discharged. It is understood that the difficulty lies in the proof of the *presence* necessary to constitute the prisoner a *principal* in the murder.

The Prisoner's defence has been conducted throughout with great skill and talent. Every effort has been made in his behalf which industry and learning could bring to the case. Mr Dexter's argument was cool, dispassionate, logical and persuasive. He arranged, compared and enforced the testimony with great clearness and ingenuity. The duty which rested upon him, was one of great moment and it was discharged in a manner which not only did ample justice to the Prisoner's case, but has gained for the Advocate a high and enduring reputation. The occasion called for great research, judgment—discrimination and independence. Mr Dexter fearlessly and fully responded to the call. The horrible event which has so long occupied the public attention has, from first to last, drawn after it disaster upon disaster—and in its consequences, has destroyed life, reputation, happiness—everything on which it has been made to bear. The tragedy has been bloody and terrific in all its acts and developments. The sentiment of the whole community had turned the full pressure of all the horror, fear, and passions, which were naturally excited at the event, upon the Prisoners. It required strength and boldness to meet that pressure. It was an occasion beyond most others for a great failure or a great triumph. The case was to be taken up and borne off with the strength of confident talent, or it would crush the adventurer at once beneath its oppressive weight. He who has no fear to stand against the shock of such an occasion, and can come out with honor from such a contest, need shrink from no collision with talents found any where or on any occasion.

Mr Gardner's opening to the Jury we had not the pleasure of hearing.—It is highly spoken of.

## SUPREME JUDICIAL COURT.

SPECIAL TERM.

*Commonwealth vs. John Francis Knapp.*

On Thursday, 5th inst., the counsel for the Government offered Mr Colman as a witness. He was sworn and stated that he with N. P. Knapp, Esq. went from the cell of Jos. J. Knapp to that of J. F. Knapp—that N. Phippen Knapp in his hearing there said to J. Francis Knapp—'well, Frank, Joseph has

concluded to make a confession and we want you to consent to it.' To this the Prisoner answered, 'that it was hard or not fair—that his brother Joseph should have the advantage or benefit of a confession, as the thing was done for his benefit. He said he told Joseph when he first proposed it, that it was a silly business and woul l get them into difficulty. N. Phippen Knapp said to Prisoner, if Joseph was convicted there was no chance for him, but if he (Francis) was convicted there was some chance for a pardon—and appealed to Mr Colman and asked him if he did not think so—to which he replied 'I don't know—I am unwilling to hold out any improper encouragement.'

He, Mr Colman, was asked then to state what further confession Francis, the Prisoner, made at that time. To this the Prisoner's Counsel objected, on the ground that whatever confessions were made, were made under the promise or expectation of favor. After a short discussion the witness was called again, and stated that no promise was made or expectation of favor held out to the Prisoner, other than what was contained in the language above stated. The Court after consultation decided, (Judge Putnam dissenting) that the language used amounted to such a promise or encouragement to the prisoner as would render any confession or disclosure he might make afterwards inadmissible evidence. And the trial proceeded. Mr Webster afterwards gave notice that when the government had finished their other testimony, he should move a reconsideration of the judgment of the Court and ask to be heard thereon. Accordingly, on Friday, Mr Webster made his motion, accompanied with a request that the Solicitor General might be permitted to argue the question. The Court expressed their willingness to hear an argument, but thought it not proper at that time to make any new arrangements as to Counsel.

Mr Webster then proceeded in the argument.

He was unexpectedly called upon to take a part in a most important discussion,—one of the most important of any in his life. The decision of the question now addressed to the consideration of the Court would be followed by the most important consequences.

This was a trial for murder. In the progress of it the government had offered Mr Colman as a witness. He had testified that he knew the Prisoner and the other persons indicted. He states that he went to J. F. Knapp's cell in the prison, and what took place there. The Court had his words. They called upon the witness to state the further conversations or confessions of the Prisoner, but the Court forbad them. It was not necessary for him to make any suggestions upon the great importance of the evidence or of the subject before the Court. Nothing which he could say would make it more manifest or augment its importance. He felt it to be his duty in the present state of the case to bring the question again before the Court, and submit to their consideration such views of it as occurred to his mind.

The question arose suddenly and unexpectedly to them. There was a disposition to make all convenient despatch. The question was hastily considered and decided without consulting authorities or books. No case had been produced—their researches had disappointed them. They did not think any authority could be shown. A great principle of law was submitted to the consideration of the Court. Matters of life and death hung on both sides. No eye could see the consequences. It might happen that the perpetrators of a m urder unequalled in our time, or all times, guilty, by confession, would escape the retributions of the law. The lives of the innocent as well as the accused were endangered. It was an all important question in criminal law.

Another consideration. They might be allowed to presume it to be a doubtful question. What course should the Court pursue? Would they decide now in such a way as that they might reverse their decision, if wrong, hereafter; or decide now and put it out of their power to correct their judgment. It could work no injury to the Prisoner. It touched not a hair of his head—endangered not his life.

If there were any inducement, it was so small that no eye could see it, so light that no scruple could weigh it. The Court could not.

On the other hand, if the Prisoner and his associates are acquitted, this whole band of conspirators would be sent abroad again upon the community. The government could not move a new trial. There could be but one trial. Whether the law were given wrong by omission, mistake or inattention, the Prisoners would escape. They thought, if the Court had any doubt upon the admissibility of the evidence, they should admit it, and let the Prisoner have the advantage of a revision of the opinion hereafter. But if, on the other hand, they had no doubt, it should be at once ruled out.

They did hope, as the trial was not yet through, and as this was a *special term* of the Court created for the purpose of these trials, the Court would not think it unreasonable to reconsider their opinion and leave the question open to argument.

*Mr Dexter* remarked that it would not be necessary for him to say much at this time. He had considered the question settled. They had acted upon the opinion of the Court although an intimation had been given yesterday, that this motion would be made. They were bound to take their course upon that decision. The position assumed by the government was that if the question be doubtful, the Court should admit the evidence. They denied that to be law. They supposed all doubts were to weigh for the Prisoner. What was more strange, the revision was urged on the ground and presumption of guilt. They stood by the law, that every person was regarded as innocent until proved guilty. They did not abandon that presumption. The Prisoner was innocent of the charge alleged. The Court had ample time for deliberation and decided the point upon argument. He would now refer the Court to a single authority—9 *Cowen*, *People* vs. *Whipple*.

*Mr Webster* said he would make a single remark. He agreed that all reasonable doubts should go in favor of the Prisoner. The Counsel could not go farther than he did on that point or give to the accused more fully the benefit of all doubts which might arise upon consideration after verdict. The case should, however, be fully heard and deliberately decided. It was the common practice to reserve questions in this mode in England. One half the cases in criminal law were made up of points ruled and saved in this way. Look at Chitty, McNally, and others. They are full of cases ruled against prisoners and heard at Seargent's Hall upon points or questions sewed at the Assizes. If the Court could say there was no doubt, then they would not hear an argument. If not and their opinion was to settle this case perhaps, and afford a precedent to future time, he thought the Court would open their judgment to reconsideration. The case of the *People* vs. *Whipple* was not before the full Court, but come up on trial at a Court of Oyer and Terminer.

*Mr Dexter* here said, there was not a case in Great Britain where a prisoner had been convicted upon the ruling of the Court against the accused to get the opinion of the twelve Judges. These questions went then only when the Judge at the trial gave his opinion against the Prisoner and the question was saved for a full Court. He had taken pains to examine the practice on this point.

Mr Webster replied in a few words.

The Court decided to hear an Argument.

*Mr Webster* said he shoul l contend that the confessions of the Prisoners was voluntary. There were no threats or force. The evidence had been stated.

The question was divided into two or three points. Their Honors must have observed that whatever was said which might be construed or misconstrued into threats or encouragement, applied solely to the point whether the Prisoners would consent to Joseph's disclosure. The language of the witness was on the Court's minutes. With regard to any confession of his own, no encouragement was offered him. Now this raised important questions.

1. Was the matter proposed to the Prisoner or the assent asked such as came within the general principle. If encouragement were held out upon condition of yielding his assent, merely nominal, to what he could not prevent, would a confession under such circumstances come within the rule? He held not.

Was it not as clear as the light of the sun? The whole principle was this, that the party accused disclosed something which he had a right to withhold. That he has parted with something which he had a right to retain—some secret visible only to God. This is the extent of the rule. What in this case, was asked of the Prisoner? Any thing of his? Any thing within his power to withhold? It was a mere matter of form, of courtesy, of kindness. It was a mere nullity—a legal nonentity. How was it then, one of those secrets, which he had a right to keep—was not in any way bound to disclose, according to the good old English rule? If not by that, not by any law or rule here. We have no racks, no thumb screws. The secrets of every person so situated are his own. He may keep them or open his bosom and shew them to the world. If he does disclose them he must do it voluntarily. It must be free, voluntary—*mero motu*. If so, the law will bring them to bear with all their weight upon his case.

[Remainder next week.]

DIGEST OF PICKERING'S REPORTS. The Subscribers are publishing a Digest of Pickering's Reports, subsequent to the first volume, as a Sequel to Metcalf's Digest, and also to Bigelow's last edition of 1825. Each of those Digests includes the first volume of Pickering,—the present volume, will accordingly, be a continuation of each of them. This Digest is prepared by WILLARD PHILLIPS, Esq., with the assistance of other Gentlemen of the Profession. It is constructed, as nearly as may be, upon the plan, and according to the choice and arrangement of titles, of Metcalf's Digest. The Volume will be well printed and bound, and be delivered at a price not exceeding $4.

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Aug. 14.

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PICKERING'S REPORTS, No. 1, Vol. 8th, this day published by HILLIARD, GRAY & CO. July 10.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

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RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan itself suggests.

ISAAC PARKER.

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C. and H. are Agents for the above work, for the States of Maine, New Hampshire, Massachusetts and Rhode Island, and receive subscriptions for the same at their store, corner of Washington and School Streets, Boston. July 10.

THE JURISPRUDENT

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# THE JURISPRUDENT.

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## MERCANTILE LAW.—No. II.

[Continued.]

In giving credit the seller parts with goods, trusting in the will and ability of the buyer to pay the price of them at some future time. When, therefore, it is considered how often the will is tainted with dishonesty, and the ability affected by unforeseen contingencies, it is easy to perceive how frequent occasion must be given to the interference of municipal authority. Accordingly, we shall find that a great part of the code of mercantile jurisprudence is occupied with the various modes of enforcing payment, or obtaining in some way remuneration to the creditor. It happens, not unfrequently, that the tradesman, not considering the buyer trustworthy, refuses to give him credit, except upon the *guarantee* of some third person, who makes himself responsible for the debt, in case of the buyer's default. And that no undue advantage may be taken of promises hastily and incautiously made by persons, whose only interest in the transaction was, perhaps, a wish to do a friendly office, the legislature requires among other things, that this pledge, in order to bind the party giving it, shall be in writing.

It would obviously be desirable for the tradesman who had given credit for goods, to obtain from his debtor a distinct promise to pay the sum actually due, with an acknowledgment that he had received the value for it. Such a promise, reduced formally into writing, and signed by the debtor, would at once dispense with all proof of the items composing the demand, and of the price and delivery of the articles. Hence, probably, the introduction of *promissory notes*, the form and effect of which is precisely what we have stated. He who gives the note is called the *maker:* he in whose favor it is given, the *payee*. As to the period of payment they vary; some being due on demand, others at the expiration of a specified time from the date. But there is another advantage attending these securities, of at least equal importance with those which have been mentioned. In a trading community, where the quick return of capital is a matter of great consequence, it is evident that independently of the risk incurred by giving credit, a partial loss would be sustained by the mere *delay* of payment, unless it were in some way provided against. A profit may be obtained from the employment of money; and he, therefore, who advances it to another, or, which is in effect the same, forbears to call for it when due, is entitled to receive from that other such a remuneration as the use of it for the time would be worth. This remuneration, which is known by the name of *interest*, like the profit upon *all other* commodities, would vary, if left to its own operation, according to the value of money in the market. It has been found expedient, however, to limit it by law to the rate of five for the use of every 100 for one whole year. Now by means of a promissory note the creditor has it in his power to stipulate for the payment of interest as well as principal, and in general takes care so to express it in the body of the note. Even when he omits to do so, the law taking notice of the usage, assigns it as due; where the note is made payable on a day certain, from that day; where it is made payable on demand, from the time of demand. But though a good and valuable security for his debt, a promissory note was no further available to the holder for the purposes of commerce. Originally the maker was liable to none but the payee. The instrument was not transferable, and therefore not convertible into cash. Nevertheless, by degrees the practice grew up of passing it from hand to hand, and assigning over (of course in consideration of some equivalent) all its rights and liabilities to the holder for the time being—a practice which, though long discountenanced by the law, at length received a statutary sanction.

The practice of negociating promissory notes was derived from that which had always prevailed as to another and more important instrument, long introduced into commercial transactions under the name of a *bill of exchange*. This may be properly described as a written order or request, addressed by one person to another, directing the latter to pay on account of the former, to some third person or his order, a certain sum of money at a time therein specified. The person who gives the order, is called the *drawer* of the bill; he to whom it is directed, the *drawee;* and he in whose favor it is made, the *payee*. It is made payable either at sight, or at so many days or months after sight, or at so many days or months after date. It is called a *foreign* bill when drawn by a person resident abroad on his correspondent in England, or conversely an *inland* bill, when both parties reside in this country. In drawing foreign bills of exchange, it is customary to give two or three of the same tenor and date, to guard against unforeseen but probable casualties; in which case it is mentioned in the body of the bill, that it is the last, 2nd, or 3d bill of exchange, either of which being paid, the rest become void. It is generally said that bills of exchange were invented by merchants resident in different countries, for the more easy and safe remittance of money from the one to the other, and that from thence it was subsequently extended to commercial transactions within this kingdom.* Undoubtedly the method is not indigenous with us, and seems to have been borrowed from countries which preceeded us in the pursuit of commerce. Its usefulness also as a mode of remittance is sufficiently evident; for to take the instance given by Blackstone, 'If A. live in Jamaica and owe B. who lives in England 1000*l.*, now if C. be going from England to Jamaica, he may advance B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither: thus B. receives his debt at any distance of place by transferring it to C., who carries over his money in paper credit, without the risk of robbery or loss.'† Still it is more probable, that the practice of using bills for foreign remittance was an extension of that which already prevailed in inland transactions, than that this latter was adopted from the example of the former. Nothing could be more natural, when the system of credit was once established, than that the trader, whose available funds might not be sufficient to pay ready money for a commodity which he was desirous of purchasing, should tender to the seller an order for payment on some other on whom he had a claim to an amount covering the price of his present purchase. By this contrivance the seller had also an additional security for the payment. It was probable the drawee might honor the bill, and at its maturity, pay the money; and if he did not, the drawer would still be liable for the amount. It afforded him also an expeditious and summary remedy against the latter; for as in the case of a promissory note, so in a bill of exchange, it is unnecessary to prove the consideration for which it is given. Of course the payee would take an early opportunity of ascertaining from the drawee, whether he would undertake to satisfy the bill at the expiration of the specified time. If he consented, and signified his acceptance, either by writing upon the bill or otherwise, he was then termed the acceptor, and immediately became liable as such for the amount, not only to the payee, but to the drawer also, whose title to give the order he by this act admitted. Precisely in the same manner as the payee had been induced to take this bill or order in payment, another might be willing to accept it from him in the purchase of other commodities, and as it purported to be payable to his *order* as well as to himself, he signified that order by the indorsement of his name. The bill might thus be passed from hand to hand, and would increase in value by each successive transfer, inasmuch as the holder had a claim, not only upon the original parties to the bill, but also on every preceding indorser, each of whom guaranteed the payment of all who followed him, in case of default by the person primarily liable. Though the payee in general, as we have said, presents the bill for acceptance, yet where distance or other causes interfere to prevent this, any subsequent holder may do so at any time during the period of its currency. Occasionally when the drawee refuses to accept, some other person, not a party to the bill, for the credit of the drawer, or some one of the indorsers, voluntarily undertakes to pay it when at maturity; such person is termed an *acceptor supra protest*, or more generally *an acceptor for honor*, and becomes responsible to all whose claim upon the bill extends to the party for whose honor it has been accepted. Originally, perhaps, the use and operation of bills of exchange were confined to the case which we have supposed; but as the transaction was founded on a supposition that the drawee either had in his possession funds of the drawer, or was in his debt to the amount of the sum specified, it was by no strained application that it became usual in the bargains of commercial men, for the seller to draw a bill on the buyer, payable to his own order, for the price of the goods sold, which bill the latter immediately accepted. The effect of this arrangement, which is now frequently adopted, is this:—The buyer is not called upon for actual payment in cash, until the maturity of the bill; or in other words,

* 2 Blac. Com. 460, 7. † 2 Blac. Com. 460, 7.

he has credit for that time, while at the same time the seller has not only an available security for his debt, but can at any time, by endorsing his name, and thereby adding his own guarantee, dispose of the bill and convert it into value. Neither was it any great stretch of the principle of these negotiable securities, that one, who had consigned goods to another to be sold on his account, should draw, and that the consignee should accept, before the goods were disposed of, perhaps even before they were received, bills for a sum short of their estimated value, on the reasonable supposition that before they became due, the acceptor would have procured by the sale funds adequate to meet his liability. Thus far the use of bills was certainly natural, and perhaps warranted by general convenience. But the facility of negotiation has given rise of late years to practices which are not only a departure from the original purpose of these useful instruments, but which are liable also to an abuse, injurious to the real interests of trade. It has been already said that the use of money for a given period is always of some value in the market; and where, as in this country, it is plentiful, persons are always to be found who are willing to advance it for the sake of the interest. Now to give cash for a bill not due, is in effect to advance so much money, and the person cashing it is entitled to interest for the time which must elapse before it becomes due. Subject, therefore, to the deduction of this sum, which is termed the *discount*, the holder of a good bill may at any time obtain the value of it in specie. Thus by an easy transmission it becomes an instrument for the raising of money: for suppose A wishes to procure 100*l.* but is conscious that his own credit is not sufficient for obtaining it by loan, he applies to some friend whose credit stands higher, to accept a bill drawn by himself, payable perhaps at the end of three months, undertaking either to supply the funds necessary for paying it when due, or in the meantime to provide for it in some other way. The bill so accepted (and which, from the mode of procuring it, is called an *accommodation bill*,) he now takes to some monied man, who cashes it, and thereby puts him into immediate possession of the sum wanted, *minus* the small deduction for discount, or in other words, lends him that sum for three months upon the personal security of the acceptor and himself. This may serve as one instance out of many; for to enumerate all the purposes to which bills of exchange are made subservient would exceed our limits. Suffice it to say, that they enter into almost every transaction of trade, and are not only, as was their original intention, the ordinary instruments of payment, but the general media for the procuring of temporary loans.

## JUSTICE BURROUGH.

As Mr Justice Burrough has signed his resignation, though, at this present writing, ostensibly a judge, we may consider him within our jurisdiction. We do not know the place or date of his birth, but his family, we believe, are established in Hampshire. He had not the advantage of a university education; nor, indeed, was he ever remarkable for learning or literary acquirement; though this may be attributable in some measure to the close attention he paid to special pleading; a branch of practice pursued by him for several years before he was called to the bar. On being called, he attended the Hampshire sessions and western circuit; and he has been heard to say that his profits, at a single session, often exceeded one hundred guineas. He held a high rank on the western circuit, though he never arrived at the dignity of leader. In 1816, he was raised to the bench; where he continued to distinguish himself, as before, by a profound knowledge of certain branches of law, particularly of special pleading; and by the kindness and simplicity of his demeanor. It is said, that, upon his elevation, he made it his formal request to the bar, that they would not call him 'Jemmy' in court. He was, it may easily be supposed, extremely averse from the least shadow of affectation; of which some amusing instances are told. The following may pass for a specimen: a man was tried before him for stealing a pair of breeches. The prosecution was conducted by a young barrister, who, seeing a female witness in the box, and the court crowded with ladies, thought proper to speak of the stolen garment as *inexpressibles*. '*Inexpressibles!*' said the judge, 'inexpressibles—I don't find any mention of such a thing in the indictment.' 'Why no, my lord,' simpered the counsellor; 'I thought, my lord, it might be as well'—(and here he winked and nodded, in the vain endeavor to inspire the judge with the same regard for propriety); 'the indictment mentions *breeches*.' 'Then why could'nt you say breeches at once; here, Mr Undersheriff, please to hand them up to the lady. Now, ma'am, are you ready to swear that those are your husband's breeches?' His mode of illustration was also remarkably quaint. We once heard him begin an address to a jury in this manner: 'Gentlemen, you have been told that the first is a *consequential issue*; now perhaps, you don't know what a consequential issue means; but I dare say you understand ninepins. Well, then, if you deliver your bowl so as to strike the front pin in a particular direction, down go the rest; just so it is with these counts; knock down the first, and all the rest will go to the ground; that's what we call a *consequential issue*.' Mr Justice Burrough was always rather popular with the bar; his chief fault being the remaining too long upon the bench; and as he is not likely to commit that fault again, we shall say nothing more about it. A facetious Ex-Baron of the Exchequer complains, that Mr Justice Burrough's conduct was rather hard upon him; as he was induced to resign by the constant allusions of the press to the improper continuance of superannuated judges on the bench, which, though they now appear to have been aimed at his learned brother, he all along considered to have been intended for himself.

*Law Journal, January* 1830.

## COMMONWEALTH OF MASSACHUSETTS.

*Commonwealth* v. *J. F. Knapp.*

At the Supreme Judicial Court for the Commonwealth of Massachusetts, holden at Salem, on the second Tuesday in July, A. D. 1830, pursuant to an Act of the Legislature, passed June 5, 1830.

PRESENT,

HON. ISAAC PARKER, LL. D., *Chief Justice.*
HON. SAMUEL PUTNAM, LL. D.,
HON. SAMUEL S. WILDE, LL. D., } *Justices.*
HON. MARCUS MORTON, LL. D.,

The Grand Jury being empannelled and sworn, the following very lucid and impressive charge was delivered to them by his Honor Chief Justice Parker.

*Gentlemen of the Grand Jury,—*

This Court is convened out of its ordinary season in virtue of a special appointment of the Legislature made at its last session, and you have been summoned here by the same authority, and having had the oath administered to you, which is prescribed by law to qualify you to act in the capacity of Grand Jurors, you now have become the Grand Inquest of the Commonwealth for the body of this County of Essex, with all the power and duties which pertain to that body when attending the ordinary sessions of this Court in relation to such cases as come within the purview of the statute above referred to.

The Jurisdiction given to the Court by this Act of the Legislature, extends to all crimes and misdemeanors which may have been committed within the body of this County before the passing of this Act; such as may have occurred since that time are to be left to the usual administration of justice at the succeeding regular term of the Court.

Notwithstanding the general terms in which the jurisdiction is given, comprehending all crimes and misdemeanors, there is reason to believe that the chief purpose of the Legislature in establishing this term, was that judicial inquiry should be made into a transaction of a most afflictive nature which took place in this town some months since.

This transaction was of a nature to excite alarm and agitation, not only in the vicinity where it happened, but throughout the Commonwealth and even beyond it.

An aged and respectable citizen, living in the centre of this populous town, so long remarkable for its tranquility, peace and order, he being surrounded by all those circumstances which usually give security to the property and person, has been assassinated in his bed probably in the depth of sleep—his skull fractured by a blow from some heavy weapon—his body pierced with many wounds—and this was done with such secrecy that not a trace for a long time appeared to be left, by which the perpetrators of so horrid a deed could be discovered. No wonder that the shock felt here was so great; it has vibrated through the whole community.

Murder is under all circumstances an appalling crime, it exhibits in the perpetrator the deepest stain of depravity of which human nature is capable. But when in the stillness of night during the hours of repose, the assassin invades the quiet mansion—steals into the chamber of sleep—and converts that sleep into death by one fell blow, and as if insatiate of blood seeks the heart of the victim, which had already ceased to beat—there is no stoicism, no philosophy, hardly any religion which can repress those feelings of terror, those expressions of horror, which such a tragedy is calculated to produce.

I speak thus of the crime because it is notorious. We all feel alike about it, nor is there any occasion to suppress the feeling, but it must be regulated and kept within just bounds.

You are convened here not so much to inquire if a crime has been committed, though even that must be proved to you by legal evidence, as to seek out the perpetrators and present them, if discovered, to the bar of this Court for trial. It is the duty of the Court to warn you against suffering your indignation for the crime to affect your inquiries for the offenders. The popular voice justly cries out for vengeance, but it is only upon the guilty it ought to fall.

There is danger in all great excitements that the mind may be thrown off its balance, that the process of inquiry may be too rapid to be sure, that

the suspected may readily be believed to be guilty, that prepossession may supersede proof. How apt are we all upon hearing of the commission of some great crime to listen greedily to every circumstance which has a tendency to fix the guilt upon some individual, to shut our ears against exculpatory facts, and to pass sentence of condemnation before any hearing and without any trial.

This is a state of mind which disables us from acting impartially in the office of judge or juror. We are to stand indifferent between the Commonwealth and the accused; ever to presume that he is innocent until we have proof that he is not. We are to sift and weigh all the facts produced in proof, with a hope that they may all be consistent with his innocence. A Grand Jury especially, who by the very nature of their duty are prevented from hearing the accused, or any evidence in his favor, except what may be drawn from the witnesses produced against him, and should be cautious not to act hastily, or upon slight evidence.

They ought to be satisfied before they agree upon an indictment, that the evidence *as it appears before them*, is sufficient to convict him of the imputed crime, for if it should not be sufficient under those circumstances, what probability is there of a conviction when the party shall be put upon his full defence, with the privilege of adducing counter evidence in his favor, and of counsel to enforce it? And no citizen ought to be exposed to the anxiety and ignominy of accusation for a capital offence if there be no probable proof of his guilt. It is a most happy characteristic of our system of criminal justice that it requires deliberate and patient investigation. Let those who complain of the slowness of its pace, consider, that it is framed *for the protection of innocence* as well as for the punishment of guilt, and that more rapid movements might involve in ruin those who might afterwards be found not to deserve it. Occasions like the present sometimes arise, when a just indignation at some enormous crime, pervades the whole community, and the officers of justice are loudly called upon by the public voice to hasten the exercise of their functions, and to purify the land of the blood with which it has been stained, by an early condemnation of the supposed perpetrator; but the law moves not from its course, it gives time for deliberation, for the return of sober thought which has been suspended by agitation and excitement,—it calls for proofs—it gives reasonable opportunity for defence—it proceeds warily and cautiously—and *decides* only when it may be presumed there is little room to doubt the rectitude of its decision, and this is all which can be attained by human tribunals, for fallibility is stamped upon everything human.

Under the guidance, however, of a wise Providence, and with a due observance of legal formalities and rules, we may trust ourselves even with the lives of our fellow beings; for the law has committed them to our charge, and if we severally discharge our duty with honest hearts and with the use of all the light bestowed upon us, we shall stand approved to our consciences and to the Great and Just Judge, whose ministers and servants we are.

There is more than common occasion for recommending the exertion of your powers to throw off all preconceived opinions, and to bring your faculties to the examination of the evidence which will be submitted to you with entire self-collectedness and impartiality. The extraordinary character of the crime has seized upon all imaginations, and pre-occupied many judgments. An unusual publicity has been given to such discoveries and disclosures as have from time to time been made.

The self-execution of one who has been an immediate agent of the supposed cruel deed, has given additional force to opinions before, perhaps, strongly conceived.

Gentlemen! It is on such great occasions that superior wisdom is called for. In the ordinary course of crime, the machinery of justice will work steadily and regularly, with only its customary superintendence. But when great and astonishing events occur, which call for judicial investigation—when the public mind is agitated and disturbed, and the popular voice is audible, crying for vengeance, it is then that those who are clothed with the robes of magistracy, or who otherwise become functionaries of the law, are to divest themselves of human passions—to elevate themselves above the dense atmosphere which surrounds them, and imitate, in their humble measure, the wisdom, and impartiality of the God of Justice!

Gentlemen! We cannot but regret the unusual publicity that has been given to the facts and circumstances which have transpired on this mournful subject. We shall see, I fear, that it will have had a tendency to impede the course of inquiry; but we trust you, who represent the country in the first stage of this solemn proceeding, will assume the attitude of impartial judges of the evidence; that you will diligently inquire and true presentment make; that you will be influenced neither by prejudice nor favor; that you will present things, truly, as they come to your knowledge, according to the best of your ability and understanding.

It is not necessary upon the present occasion to discuss the various classes of homicide, in order to distinguish that which is justifiable, as in self-defence—that which is the effect of sudden provocation, which may be manslaughter,—and that which is the effect of malice aforethought, which is murder.

If it shall turn out in evidence that the house of the deceased was entered in the night time—that he was slaughtered in his bed; whether the object of the perpetrator was plunder, revenge, or the hope of reward from others who may have incited the deed, it is murder of the deepest die in regard to those who may have given the death wound, and any who may have been *present*, aiding and abetting the crime.

Such is the common law, and such is the provision of the statute of this Commonwealth, which enacts that if any person shall commit the crime of wilful murder, or shall be present aiding and abetting in the commission of such crime, or not being present shall have been accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done, every such offender who in the Supreme Judicial Court shall be duly convicted of either of the felonies and offences aforesaid, shall suffer the punishment of death.

It may be a subject of inquiry, what constitutes *presence* within the meaning of the second branch of this enactment, 'present aiding and abetting in the commission of such crime.'

And the construction of this phrase, which is taken from the common law, has been settled in ancient times by wise and learned sages of the law, and that construction adopted and sanctioned by successive judicial decisions down to the time of the adoption of our Constitution, so that the Legislature which enacted this statute, without doubt referred to this construction when they framed it.

By this construction it is not required that the abettor shall be actually upon the spot when the murder is committed, or even in sight of the more immediate perpetrator or of the victim, to make him a principal.

If he be at a distance, co-operating in the act by watching to prevent relief, or to give an alarm, or to assist his confederate in escape, *having knowledge of the purpose and object of the assassin*,—this in the eye of the law is being present, aiding and abetting, so as to make him a principal in the murder.

The distinction between a person thus situated and one who is denominated by the statute an accessory before the fact, is, that the latter is not only in every sense absent from the scene of crime, but is not an immediate participator in it; he may not know the time when and the place where it is committed. He has previously, perhaps days or months before hired, counselled or procured the deed to be done, but he has no immediate agency in the deed.

His crime is deemed by the law to be as great as his who strikes the blow; it is often in a moral point of view greater, as it may combine a greater number of desperate and diabolical motives, without the influence of which the crime would never have been committed. It denotes the savage heart of the murderer, without his bold and daring hand. It puts in peril his own soul and the souls of others, who, but for him might have gone free from the guilt of blood. Thus the law punishes the accessory before the fact in the same manner as it punishes the actual perpetrator—they are alike murderers.

There is at the common law a difference, and it is supposed to exist also under our statute, in regard to the form and time of trial, between those who are called principals, and accessories before the fact, it being held that unless there be a conviction of a principal there can be no trial of the accessory. This difference, if it exist, is a relic of the unwise refinement of ancient times, there being no good reason why an accessory before the fact to a crime *proved* to have been committed, should not be tried and punished, although the principal may have escaped by death or otherwise, the punishment which awaited his crime in this world.

But if occasion should arise to examine this point, and the common law should not be found to have been varied by our statute, the legislature will probably afford a remedy for future cases.

I have thus, gentlemen, I believe, discharged all the duty of the Court, in this stage of its proceedings, in regard to the principal subject which will require your attention. If before the passing of the act under which we assemble, other offences cognizable in this Court shall have been committed, and not yet have been before a grand jury, you are authorized but not required by the statute to inquire into and present them. In regard to such cases as well as to any questions of law which may arise upon the subject on which I have given you the charge, you will have the advice and assistance of able and experienced officers of the government, whose duty it is to facilitate your investigations, and to reduce the result to such form of presentment as the nature of each case may require.

Gentlemen—Your duty and ours may be arduous and embarrassing—that it may be discharged with clear understandings and firm hearts, let us look to the Dispenser of all light and wisdom for His blessing upon our endeavors.

The Court having been opened was addressed by Franklin Dexter, Esq., of Boston, as one of the Counsel for the prisoners in the following motion:

*Dexter.* Before the Grand Jury go out, I would respectfully move, that they be instructed as to what evidence they should receive. This was done in a celebrated case;—that of Aaron Burr.

*Chief Justice.* That case is remarkable for that, and another circumstance, not known to our law, that is, the challenge of grand jurors. With us the Court never instruct the grand jury upon the nature of the evidence to be heard before them. There will be a revision of their doings and it is unnecessary to go into the inquiry before hand.

*Solicitor General.* It is a sufficient answer to the suggestion of the gentlemen, that in the case alluded to, Chief Justice Marshall said that 'it was usual and the best course for the Court to charge the jury generally, and to give their opinion on incidental points as they arose, when the grand jury themselves should apply to them for information.*

*Dexter.* It is true that the remark was made by Chief Justice Marshall, but he did send special instructions to the grand jury before the question arose. He did direct that 'no affidavits nor papers, containing distinct substantive testimony against the accused should be sent to the grand jury.'†

*Chief Justice.* It would be a very convenient practice. The law reposes confidence in the officers of the government; they are not supposed to procure an indictment against a man upon improper evidence.

It is the opinion of the Court that they cannot go out of the usual course. They think it would be a good rule for the officers of the government to adopt, to offer no evidence to the grand jury, which they would not be willing to offer in Court.

*Dexter.* Before the jury retire, I wish to inquire if the English practice does not prevail here, to endorse the names of the witnesses examined before the grand jury upon the indictment.

*Solicitor General.* We have a better practice, and that is, to return the names of the witnesses examined before the grand jury, and that makes a part of the record of the case.

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* Vide Burr's Trial, Vol. i. p. 174.
† Burr's Trial, Vol. i. p. 199.

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## ENGLISH CASES.

### COURT OF KING'S BENCH—MAY.

Sittings in Banco.

*Doe on the Demise of Coombes v. Extance.*

This was an action brought to try the validity of a will.—It was tried before Mr Justice Bosanquet, at Taunton, and a verdict had for the defendant, thereby establishing the validity.

Mr Sergeant Wilde, on the part of the plaintiff, moved for a rule to show cause why a nonsuit should not be entered, or a new trial granted. His client was the nephew of the testator, who had resided many years in Somersetshire, and who was a shrewd man, and enjoyed good health up to the year 1826, previously to which he had made a will in favor of his relatives, leaving legacies and tokens of remembrances to his sisters. About this time he had been living with some of his friends. In the year 1826 he had an attack of apoplexy, which deprived him of the use of his limbs. After this attack he removed to his former residence in Somersetshire, and sent for a servant who had previously lived with him, and by whom he had a child. He continued very feeble up to the year 1828, when he had another attack, and as he was unable to utter any other words but 'yes, yes,' and 'No, no.' He died in the month of November, 1828, leaving a will in favor of his servant. The Learned Sergeant contended that, according to the evidence given at the trial, the testator was not in a state of mind to make a will, or manage his own affairs. He was scarcely able to write his name, and this was with his left hand, and was not competent to give instructions to an attorney. The witnesses to this disputed will were a clergyman, an attorney, and a medical gentleman; the former of whom said the testator understood what he was doing, and this the witness inferred from the circumstance of his attention to religious advice, for when receiving any, he showed great feelings, and shed tears. This witness, as another instance of the testator's intelligence, said that once, upon taking some physic, he made wry faces, and shook his head; and upon another occasion, when asked by witness if he was not afraid of disobliging his sisters by the will which he made, the testator replied 'ye—d—n ye.' The Learned Sergeant did not think this sufficient evidence of sanity. It appeared also that during the testator's residence with his servant maid, and shortly before his death, this woman, whose name is Hicks, was asked if the testator had made his will, to which she replied 'no, and he is very uneasy at not having done enough for me.' When asked if he would send for an attorney, the testator replied in his usual monosylable 'ye—d—n ye;' and 'dear, dear.' Now these were the only proofs of capacity which had been brought forward; and, in his opinion, they were insufficient to warrant the defendant, who was the husband of the servant-maid Hicks. The physician's account of the testator's health was, that it was very bad, but that he thought the testator knew what he was doing. Another will had been made on the day (10th November, 1828) previously to the execution of the disputed one. The former of these gave a vested interest to his nephews and nieces in his property of 300*l.* a year; and by the second the same interest was given to them, but only in the event of their surviving Elizabeth Hicks. There was some contradictory evidence respecting the manner in which the attorney received his instructions.

Lord Tenterden said the Court would grant the rule, but he thought it a pity that the parties had not settled this dispute out of Court, as the greater part of this little property would be consumed in litigation.

*Halford v. Kymer.*

This was an action on a policy effected at the Asylum Insurance Office, by a father upon the life of his son. It was tried at the late Sittings after Term at Westminster, before Lord Tenterden, who directed a nonsuit, on the ground that, by the 14th of George III., no person could insure upon the life of another unless he had a legal interest in such life, and in this case there was none.

Mr Pollock now moved for a rule to set aside such nonsuit, and enter a verdict for plaintiff, on the ground that, according to the fair construction of the Act of Parliament, this case came within its provisions. The words of the Act were, 'having a pecuniary or other valuable interest in such life.' He contended that the relationship of son to father gave, in itself, a valuable interest to the latter in the life of his son. There might be a valuable and therefore a legal interest in the life of a son, although there was no pecuniary interest. The Learned Gentlemen contended that, as under an Act of Elizabeth a son was compelled, if necessary, to support a father, the father consequently had a pecuniary interest in the life of his son. The Learned Counsel proceeded at great length, and with much ingenuity, to urge arguments in support of his application, but the Court frequently intimated to the Learned Counsel that they were opposed to him in opinion; but Mr Pollock said that he had the means of ascertaining that nearly a million of money depended on the decision of this case, as he knew that so great an amount as that which he had mentioned effected on policies similar to this now disputed by the Asylum Insurance.

Mr Justice thought that was a reason why the law should be sooner known. The act of Parliament was explicit, and the plaintiff could not in law recover, as he had no pecuniary or valuable interest in the life of his son.

The Judges all agreed that the action could not be maintained.—Rule refused.

Sitting at Guildhall, before Chief Justice Tindal and a Special Jury.

*Mount v. Larkins.*

Mr Sergeant Taddy, Mr Sergeant Russell, and Mr Wightman, appeared for the plaintiff; and Mr Sergeant Wilde and Mr Sergeant Spankie conducted the case on behalf of the defendant.

This action was brought upon a policy of insurance effected, to the amount of 2,000*l.* upon the freight of the ship Aquilar, on a voyage from Singapore, with leave to touch at several points in her way home. The plaintiff claimed as for a total loss. It appeared, from the evidence on the part of the plaintiff, that, after leaving Singapore in 1825, being then in good repair and seaworthy, the Aquilar encountered several storms, and, in consequence of the perils of the sea, was obliged to put in at the Cape of Good Hope. It was there surveyed, and found to have sustained such considerable damage that it would be impossible to repair her at that port. The Captain, under these circumstances, abandoned the vessel, which was sold and broken up, and the usual notice was given to the underwriter.

It was contended, on behalf of the defendant, that there was no proof of any absolute necessity for abandoning the vessel at the Cape of Good Hope—and, supposing she was in the damaged state described, that was not caused by the perils of the voyage from Singapore to the above port, but ought to be attributed to the great age of the vessel (about 24 years); besides, it was proved that the Captain had been guilty of barratrous conduct, and, instead of proceeding immediately on the voyage, amused himself in building a house at Sidney, and fitting out a schooner for fishing—thereby causing a considerable delay inconsistent with the policy, and sufficient to put an end to the contract. The evidence on the part of the plaintiff was also defective, inasmuch as the very surveys at the Cape had not been produced, neither was the log-book forthcoming; and it was finally contended that, under all these circumstances, there was not the slightest evidence to support the present action.

The Chief Justice having summed up,

The Jury found for the plaintiff subject to an opinion of the Court on the same.

*Sparrow v. Stapleton.*

Mr Sergeant STORKS applied for a rule to show cause why the nonsuit, which had been entered in this case, should not be set aside. It was an action for money had and received. The nonsuit was founded on the Statute of Limitations. The Learned Sergeant contended that the case was taken out of that Statute by a letter from the defendant in the following terms, and addressed to the plaintiff:—

Sir,—I have received your letter, and cannot attend to its contents, owing to my inability to pay, but when I go to Cambridge I shall settle all the debts which I owe.

This was the substance of the letter, which the Learned Sergeant contended implied a promise to pay the defendant, whose debt had been proved at the trial.

Lord TENTERDEN—I suppose the defendant never went back to Cambridge?

Mr Sergeant STORKS—Never, my Lord.

The COURT were of opinion that the letter did not contain any promise sufficiently distinct to take the case out of the Statute of Limitations, and refused the rule.

## MAINE.

### SUPREME JUDICIAL COURT.

Vol. 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Sherwood v. Marwick.*

Whether an action will lie against a vender for false and fraudulent representations respecting the ownership and character of the thing sold, where the conveyance was by deed with express covenants upon those points;—*quere.*

*Webster & al. v. Drinkwater.*

Where one, appointed on the part of the United States to superintend the execution of a contract for the building of certain public vessels, through misconstruction of its terms, required the performance of more than was in fact required by the contract;—it was held that he was not personally liable for such excess.

*Gilpatrick v. Sayward.*

A farm being purchased, and sureties given for part of the purchase-money, the deed was made, by consent, to the sureties only, for their indemnity against the note they had signed. Afterwards they refused to give up the deed to the real purchaser, on being discharged of their suretyship, without the payment of fifty dollars to each of them; which the purchaser paid, the farm being of considerable value, without making any objection to the amount. It was held that he could not recover back the money thus paid.

*Bixby v. Whitney.*

If arbitrators erroneously refuse to consider a particular demand laid before them, on the mistaken ground that it is not within the submission; the bond and award are no bar to a subsequent action upon the demand thus rejected.

*Clough v. Tenney.*

Case, and not trespass, is the proper form of remedy, for a father, for the offence of debauching his daughter, where the injury was done in the house of another.

*Moore v. Smith.*

The penalty not exceeding sixteen dollars per month, provided by *Stat.* 1821, *ch.* 51, *sec.* 11, for not filing a will in the probate office, is incurred, and may be sued for, at the end of every month, within a year next preceding the commencement of the action.

*Baylies and als. v. Bussey.*

The equitable claims of a tenant in possession under the betterment act, are not affected by a judgment in a petition for partition, even though he has appeared as respondent, and pleaded to the process.

*Sherwood v. Marwick.*

The doctrine that a principal is answerable for the fraud of his agent or factor, does not apply to special agents.

*Quimby v. Whitney.*

Where B. and W. lent their names each to the other, as indorsers of accommodation notes, negotiated at a bank, and also had mutual dealings; and a third person contracted to settle the account of B. with W. 'if there should be anything due W. from him, as well for any notes W. held of his own,'—'as also for certain notes which are in the bank, which W. is responsible for, by reason of lending or exchanging each other's names as security for the other;' it was held that W. by the terms of this contract, could not claim the *amount* of his liabilities for B.; but only the balance of them, after deducting the amount of B's. liabilities for him.

*Dingley v. Robinson.*

One having fraudulently obtained goods under pretence of a purchase, the creditor pursued him for satisfaction; and a compromise was so far effected, as that, for a valuable consideration, the creditor affirmed the sale from himself, and agreed that the debtor might sell the goods to A. Afterwards, the original term of credit having expired, the creditor sued the debtor, and attached the same goods as his property; and in an action of trespass, brought by A. against the sheriff for taking these goods, it was held that the terms of the agreement did not stop the creditor from impeaching the sale to A. as fraudulent.

*Perkins v. Dunlap.*

Where N. contracted for the purchase of an estate from A. and paid him 1200 dollars in part, and D. advanced the residue for him, being 500 dollars, and took the conveyance directly to himself, upon a verbal agreement that he should release the land to N. on payment of the 500 dollars; and then D. died, and his heirs refused to convey;—it was held that to carry into effect the original understanding of the parties, N. might be considered as having advanced the 1200 dollars to enable D. to purchase the estate, for which the estate of the latter was liable, as for money lent to the testator.

*Crane v. Roberts.*

R. agreed to pay for a quantity of hay, provided L. should pronounce it merchantable; and L. pronounced it 'a fair lot, say merchantable; not quite so good as I expected; the outside of the bundles some damaged by the weather.' *Held* that R. was not bound.

*Waterson and al. v. Getchell.*

R. agreed to cut all the timber from certain lands of W., and transport it to W's. mill, to be sawed into boards, of which R. was to receive a certain proportion; and further agreed that the ownership of the timber should remain with W., till certain debts of R. were paid, and all parts of the agreement were fulfilled. It was *held* that this was a valid agreement; and that a sale of part of the logs, after they were taken from the land, to a purchaser having notice of the terms of the contract, conveyed no title, against the owner of the land.

*Redington v. Farrer and al.*

In *assumpsit* against two or more, the plaintiff cannot amend by striking out the name of one of the defendants.

*Thompson and als. v. Prop. Andr. Bridge.*

The private statute of Massachusetts of *Feb.* 26, 1796, incorporating the proprietors of *Androscoggin* bridge, gives them no right to erect a toll house on the side of the bridge; nor does it transfer to the proprietors anything more than an easement in the land over which it authorizes them to build a bridge.

*Murray v. Ulmer.*

An action of trespass *quare clausum fregit*, originally brought before a Justice of the Peace and tried upon review in the Court of Common Pleas, upon the plea of soil and freehold, may be brought by appeal into this Court, though no plea of soil and freehold was filed before the magistrate, the defendant having been accidentally defaulted.

*Pierce ex parte.*

An appeal does not lie from a judgment of the Court of Common Pleas on a complaint against the kindred of a pauper under *Stat.* 1821, *ch.* 122, *sec.* 5.

*Fryeburg Canal v. Frye.*

Though the power of referees, appointed under *Stat.* 1821, *ch.* 78, does not extend to cases in which the title to real estate comes in question, yet a claim of damages occasioned by the making of a canal, not being of that character, is within the scope of their authority.

*Graves v. Fisher and al.*

It is no valid objection to a report of referees, that one of them had formed a previous opinion upon the case submitted to them, if his mind appear to have been still open to conviction, and no imputation of unfairness rest upon him.

*Bixby v. Whitney.*

Where two parties executed a bond, submitting to arbitration 'all debts, dues and demands heretofore subsisting between them;' and on the same day one of them gave the other a promissory note payable in specific articles at a remote day;—it was held that the note was not within the terms of the submission, it being, by intendment of law, given after the execution of the bond.

*Green v. Morse.*

It is not lawful to arrest a debtor, on mesne process, in any case where, after judgment, his body is not liable to be taken in execution.

*Clough v. Tenney.*

If one of two counts be bad, and a general verdict be rendered for the plaintiff, the court will not intend that the evidence supported the good count alone; but will arrest the judgment, on motion.

*Fox v. Adams and al.*

Where a general assignment of property, for the benefit of all the creditors of an insolvent debtor, was made *May* 25, and a further instrument was

executed *June* 2, giving priority to a large amount of debts due to the United States; it was held that the assignment still took effect from the first date, unaffected by any events intervening between that and the second agreement.

An assignment in trust for the benefit of creditors is not vitiated by a condition that the creditors shall accept the provision made for them in full, of their respective demands.

The time limited in such assignment for creditors to become parties to it, may be so short or so long as to justify a presumption of fraud, and thus defeat its operation.

Such an assignment, by an insolvent debtor in another jurisdiction, will not be permitted to operate upon property in this State, so as to defeat the attachment of a creditor residing here.

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*A hint to Constables and others.* In a case lately tried before the Superior Court, of indictment for assault and battery, against a police officer, the Judge decided that an officer arresting an individual, is bound to show his authority, when demanded; and, if it be dark, to avail himself of the most immediate convenient opportunity of obtaining light; that on his refusing or neglecting to do so, the arrest may be resisted; and that, after showing the warrant, the officer is not justifiable in using any cruelty or unnecessary severity or harshness in the execution of it, but is bound to enforce it with as much mildness and forbearance as the nature of the case will possibly admit.—*Augusta Chronicle.*

THE JURISPRUDENT.

BOSTON, SATURDAY, AUGUST 21, 1830.

## SUPREME JUDICIAL COURT.

SPECIAL TERM.

*Commonwealth vs. John Francis Knapp.*

Continued.

In such a case it comes from the prisoner to the public as a pure gift, a free donation, an unmixed and unsought gratuity. It comes like other gifts, freely and voluntarily.

Let us bring this case to the test of the principle. Was the Prisoner asked anything which it was in his power to withhold? Was he asked to part with anything he had a right to retain? Government had no occasion for anything he had. He was asked for no facts. His assent was of no consequence. It was no secret which Government wanted and which the Prisoner had power to withhold. Not at all. He would call upon the learned Counsel to explain what possible consequence it could be to Government whether he assented to the confession of Joseph or not. If so, it was no confession within any rule or principle of law. No facts were shown to prove that the Prisoner knew that the evidence obtained implicated him. He did not know what it was. The question was who should have the benefit of turning State's witness. It is said, and it is true, that a promise is extortion, and a threat is extortion in law. But who extorted any thing from the Prisoner? His Brother? Did he go to the cell of the Prisoner, to procure, to extort evidence for the Government. There had been an untrue phasis put upon the whole affair. The Government were not present in any way by its officers or agents. Was it matter of confession which could in any way criminate himself? Did it effect Joseph's confession? He put the question to the Court. No man could stand up here as a Lawyer and maintain it. If he had been hired with money, or been wrought upon by any other influences, to say what he was asked to say, it would not have rendered it inadmissible. It was in no sort such a confession as is protected by the humane and salutary maxim of law.

What is that thing, which, if obtained, must be obtained without threat or the hope of favor? Clearly something which may be used to prejudice the prisoner's case on trial. But the thing asked here could not if granted have been used, in any event, against the prisoner. It was merely an assent to a matter out of his power, and not calculated to criminate him in the least.

It could no more be used against him than if he had been asked and had answered which way the wind blew. Such an assertion, disclosure or assent, could not be regarded as coming within the protection of the law. The subject matter was not a subject matter to which the rule applied at all.

In the *second* place what was said to the Prisoner, if said with a view to draw only confessions, was not such a threat, encouragement or promise as the law requires to render the confessions inadmissible. The words were as he had stated them and as the Court had them. There was no threat used. There were no words of favor. Was there any promise of benefit? Whose benefit? The Prisoner's? Was there a prospect of better things offered him? Just the other way. Arguments were used to persuade him to consent to something which would be worse. It was considered as a hard case for the Prisoner. It was said there was no other chance for Joseph. He was to take his chance to save him. Favor to the Prisoner! The favor of being convicted and thrown upon the Executive clemency—and of being shut out from all other hopes this side of the Throne of Mercy. What kind of favor was this? That phrase which is found in 2 Starkie 48, contains all the humanity and all the wisdom of the law upon this subject. To render the confession inadmissible, something must have been said to induce the prisoner to believe that it would be better for him if he did or worse if he did not confess.

There is no authority to the contrary from Bracton downward. There is no dictum nor argument to be found against this position. Old Bailey does not furnish a case which is different. Although the confession may have been obtained through somewhat improper influences, still it may be admissible. Every person who confesses does it because he believes it better to confess than not to do it.

But the general impression or belief that it will be better on the whole, but not better as to the particular case will not exclude the matter confessed. The belief that it will be better for the Prisoner's distressed family, father or friends, either here or hereafter, is not enough to shut out the confessions. It must be better for him. Now there was no intimation that his chance would be better by confession. But on the other hand it was to be worse. The chance for him was put upon the ground of his youth and the secondary character of his guilt. We beseech your Honors to consider what proposition was suggested to him. As to N. P. Knapp, he went to the cell of his brother on a most important occasion to discharge a most painful duty. He discharged it with fidelity, and in all the depths of fraternal grief. He went not to hold out any hope to him from confession, but to induce him to give his assent that his brother might confess and save his life. He went to tell him that it was thought best to give Joseph the chance and leave him to the chance of the law and the favor of the Executive. That was the purpose, and the sole purpose. It was no part of the object to get Francis, the Prisoner to confess.

If the confessions were obtained on the supposition that the case was hopeless, that circumstance does not render them inadmissible. The favor of the Government had already been appropriated to another. There was nothing to hold out to the Prisoner. We say then the confessions should have been admitted.

It will be also considered that whatever favor there might have been held out, small as we think it was—too small to be seen by any eye or weighed by any scales, whatever it was, was addressed solely to the consideration of the assent to Joseph's confession—not at all to any of his own. There was none such either express or implied. What had the admission of facts made subsequently to do with the assent to Joseph's confession? The assent had no possible connexion with anything expected of the Prisoner or said by him. It was not the matter in course. We don't go upon the *time* but the *subject*. Suppose the Prisoner had written a letter to Joseph containing the facts disclosed, would it be excluded? Why strain the inducement?

Farther, the witness swears that there was no hope of favor or matter of menace addressed to him. The Prisoner did not so regard it. This is a question of law, pure law. The Court will not be inclined to carry the principle farther than it will bear. Where is there a case on this or the other side of the Atlantic, which sustains the position of the Prisoner's Counsel? Or where is the principle? When these are found and not till then will the Court rule out the testimony offered.

*Mr Gardner* remarked that he was surprised at the commencement of this argument to hear the motion on the part of the Government to introduce new Counsel.

The question was a very narrow one. It was almost as distinct as the construction of a written instrument. It was a question as to the meaning of words.

These words are said to relate entirely to the matter of the assent. The words used operated as a surprise upon the prisoner. They were calculated to entrap him. If so, any confession he may have made could not be used. The assent of Francis must have been thought important to the Government or it would not have been asked. It is said if conversation was had with a view merely to draw out a confession without promise or threat, though improperly, it is no objection to its admissibility. We contend that if anything was said calculated to influence the Prisoner in the slightest degree, his confession cannot be used. So is the law. He would refer the Court to the same book and page cited by the gentleman on the other side—2 *Starkie* 48, *Hawkins, Book* 2 *ch.* 46, *Sect.* 36. Did the words used alarm his fears, excite his hopes, or agitate his mind? May such an effect be fairly inferred? The Court could not measure the influence. If by any reasonable inference it could be so construed, the Court were bound so to construe it. It is said there was no inducement. How was the conversa-

tion introduced? Was not the communication itself a sufficient inducement. It was, in effect, saying if you will consent you will save both lives. You will save Joseph and save yourself. It was a great question of life and death. They stood there against the whole power of the Commonwealth officers—the Committee of Vigilance, almost the whole Essex Bar, and the distinguished gentleman who is brought in to the aid of the Government. The array was great against them, but they trusted the issue of this question to the Court and the law.

Mr Dexter remarked that there was one consideration of great importance in the discussion of this question. The Counsel for the Government suggest that if this point be ruled against the Prisoner, it may be heard hereafter and the judgment of the Court, if wrong, set right. There was no way of bringing this question again before the Court by Bill of Exceptions or otherwise. The question was now before a full Court. If settled against the Prisoner now, it is settled forever. The opinion expressed by the Court was not a hasty opinion. The Court will never decide hastily in a case of this kind. It must have anticipated many of the questions which have already and will come before them in the course of this trial. He would stand by the opinion of the Court as clearly and fully expressed. If the Court see fit to revise that opinion as to one point, he would ask them to do so in one other respect. If the confessions are admitted, the witness should be confined to the *words* and *language used*, and should not be permitted to state inferences, impressions or substance. On this point he would refer the Court to *Hobart*—294—2 *Hawk, ch.* 46, *Sect.* 36. Confessions are not evidence unless the words are given by the Witness. The question has been argued with great power and learning. With a degree of eloquence which he could not hope to imitate. He was almost ready to say that it would be worse for the Prisoner to have the confessions ruled out upon such an argument than to have them ruled in without it. He would endeavor to answer briefly the points made by the Government.

The true position is this—that confessions when not voluntary are not evidence, because they are not *credible*. It is not on the ground that the matter confessed is the property of the accused. Not on the ground that he gives to the Government a secret which he has a right to retain. If the matter confessed were the most obvious truth—a matter known to every body—as obvious as that the sun shines—it could not be evidence as a confession, if not obtained without fear, or the hope of favor. The fact may be shown otherwise, but cannot be proved as an admission or confession coming from the accused. The fact that the Government do not want it, that it may be proved *aliunde*, makes no difference. Nor does the circumstance of its being common—public property, vary it. The argument was strong, but the position was unsound. It was *vox*, he would not add *et prœterea nihil*, but *felix audacia*. It is said that the Government did not want the assent or confession of the prisoner. If so, why was the assent asked and urged? It was material to the Government. The Counsel say there were no promises. Were there no improper inducements held out? If the confession were obtained to save his brother, or the feelings of his father, they should not be used; the motives were improper. We agree that the hope or fear should apply to the particular case, but it need not apply altogether to the individual. It need not be purely—entirely selfish. The witness and N. P. Knapp went not there as the Government represents, to tell the prisoner of his inevitable fate—but to hold out to him the hopes of pardon—of escape—to urge these as the reasons and motives for yielding his assent to Joseph's disclosure. Such hope was held out to him—such expectations were indulged by the Prisoner in that hour of his affliction and alarm.

The Court will consider the circumstances of the case. They will consider whether he would have been likely to make such disclosures as are now proposed to be introduced, if no such promise had been made, or encouragement given. The thing was altogether improbable in itself. The witness himself thought at the time that the encouragement was improper. That is conclusive upon the matter. How then can the Government ask for these confessions?

*Mr Webster* made a short reply and the Court adjourned for deliberation.

The next morning on the opening of the Court, the judges separately gave their opinions, which were the same as on the former occasion. The confessions were ruled out accordingly.

Mr Webster then suggested that there was probably some misapprehension as to the fact of the assent of the prisoner having been given to Joseph's confession. The Court had gone upon the ground that there was evidence of such assent. There was none. He moved the witness might be called to that point. Mr Colman was then called and after examining him, the Court was of opinion that there was no such evidence, and as their opinions were formed upon that assumption, they unanimously ruled in the confessions and the witness was permitted to state them to the Jury.

## TRIAL OF KNAPP.

On entering the Court House on Thursday morning, we could hardly believe that we were in the highest Judicial Tribunal of the State, in solemn session upon the life of a fellow-being. It seemed to us much more like a brilliant assemblage at the Atheneum Gallery, or in the Julien, listening to the wonderful Trumpeter, or staring at the exhibition of *Maelzel's Carousal*. We were on the point of exclaiming against the propriety of Ladies' appearing on such an occasion—when we were whispered that they came by *invitation*, and that the beautiful daughters of ———, the blithe and laughter-loving Misses ———, and the discreet and modest Mrs ——— were before us. There was no saying a word. We had nothing to do but to listen and look—and if we may judge from appearances, some of the 'good men and true,' could but now and then think of the ladies in the case. While the Government Counsel was laboring away a full hour upon *constructive*, some of the twelve seemed to us to have much the clearest impressions from the *actual* presence.

There was, and how could it be otherwise, a prolonged gentle hum from the delighted auditors the day through, occasionally only interrupted by the heavy voice of the sheriff—'Silence there, gentlemen and—Ladies too.' The Presiding Judge would ever and anon, too, give a timely admonition to those who talked too loud or too long. Both were in vain. The gallery, boxes and pit buzzed on. Not an eye moistened with a tear for the fate of the unhappy Prisoner. Not a bosom swelled with a sigh, or a heart raised a prayer for his safe deliverance. All seemed eager and impatient to swell the already impetuous current that was hurrying him onward to the gulf of his ruin. They came not to throw a mixture into the cup of his misery, or to yield a feeling of sympathy to the condition of a man hanging by a thread between life and death; but it was to witness the strength, and to inflame the ardor of the combatants. The fate and crime of the Prisoner were lost in the admiration of the power and skill with which he was attacked and defended. The shafts of the assailant were hurled with a fearful force and accuracy, while the shield of defence was held before the mark with a steady and dexterous hand. The multitude gave a smile of satisfaction or a look of disappointment as the arrows rattled on the armor of the victim, or, coming short of their aim, fell harmless at his feet.

If the Prisoner escape hanging, it will not be for the want of zeal in the prosecutors or of disposition in the public. No man ever stood at the Bar of a Court who could expect less from human pity or sympathy. Nothing can save the parties accused but the unyielding rules of law. They are called 'technicalities.' Be it so. They are such as every man is entitled to who lives under our Government. They are not to be made to yield to the exigencies of this case, to punish the guilty. If so, they will next be laid aside to endanger or destroy the innocent.

☞We learn by a gentleman who left Salem last evening, that the Jury returned a verdict of GUILTY at twenty minutes past 6. [Courier.

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EMINENT BRITISH LAWYERS—*by Henry Roscoe, Esq., Barrister at Law.*

This is a very neatly executed volume from the Cabinet Cyclopædia of Dr Lardner. It contains interesting Biographical notices of some of the most distinguished English Judges and Jurists. The following Biographical Table will exhibit the Contents of this volume.

Sir Edward Coke, Lord Chief Justice, born in Norfolk, 1550—died 1634.

John Selden, born 1584, in Sussex—died 1654.

Sir Matthew Hale, Lord Chief Justice, born 1609, in Gloucester—died 1676.

Lord Guilford, Lord Keeper, born 1640 in Cambridgeshire, died 1685.

Lord Jeffries, Lord Chancellor, born 1648 in Denbigh—died 1689.

Lord Somers, Lord Chancellor, born 1650, in Worcester—died 1716.

Lord Mansfield, Lord Chief Justice, born 1704 in Perth—died 1776.

Sir J. E. Wilmot, Chief Justice Common Pleas, born 1709 in Derby—died 1792.

Sir William Blackstone, Lord Chief Justice born 1723, in Wiltshire—died 1780.

Lord Ashburton, Solicitor General, born 1731, in Devonshire—died 1783.

Lord Thurlow, Lord Chancellor, born 1736, in Suffolk—died 1806.

Sir W. Jones, Chief Justice in India, born 1746, in London—died 1794.

Lord Erskine, Lord Chancellor, born 1750, in Scotland—died 1823.

Sir Samuel Romilly, Solicitor General, born 1757 in London—died 1818.

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## New Publications.

English Common Law Reports, Vol. 16. Reports of Cases argued and determined in the English Courts of Common Law, with tables of the cases and principal matters; edited by Thomas Sergeant and John C. Lowber, Esq's. of the Philadelphia Bar, vol. 16, containing Downing and Ryland's Reports, vol 8, and the 4th and 5th vols. of Moore's Reports.

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VOL. I. BOSTON, SATURDAY, AUGUST 28, 1830. NO. V.

## MERCANTILE LAW.—No. II.

[Continued.]

Bills may of course be cashed by all who have money at command. There, is, however, a distinct class of men, whose peculiar business it is to deal with money as an article of profit. The origin of *bankers* seems to have been twofold. In the insecurity of property which prevails in countries imperfectly civilized, it was a natural and very common practice for those who had accumulated a sum of money to place it for safe custody in the hands of some opulent tradesman of undoubted credit. Of course he would not suffer the money to be idle, but would employ it as capital in trade, taking care to retain in his hands sufficient to answer the calls of the owner. At the same time the extravagance and necessities of the landed proprietors continually compelled them to borrow from the wealthy tradesman, even at an exorbitant rate of interest. By degrees also the monied men found it equally advantageous, without embarking in trade themselves, to lend out capital to others who were willing to do so, upon such terms as might enable both to derive a profit from the employment of it. A separation thus took place of the tradesman and the monied capitalist, and the receiving of deposits and advancing of money on security, which the latter began publicly to profess, became a distinct and lucrative business. Again, in the infancy of foreign commerce, it was usual for the merchants of different countries to repair in person to the great fairs and markets, where the principal transactions were carried on. At that time payments were made in specie, and each merchant having only the money current in his own country or uncoined metal, there was a difficulty in effecting the exchange. Hence it became a gainful trade to give the current money of the place, or such other money as the merchant might wish for, in exchange for foreign coin or bullion, and the person who carried on this traffic, having stalls or benches *(banques)* upon the places of commercial resort, were thence called bankers. Of course, if a substantial and well-known merchant applied to them for money, these men would not hesitate for an adequate consideration to furnish him with it in the way of loan, and thus by degrees the practice grew up among them of making advances on mercantile securities. But whatever might be the origin of the system, the bankers of this day form a very important section of the mercantile community. Their profit, as we have seen, is derived from the advantageous employment of capital in the way of loan; and these loans are made either on personal security by bond, grant of annuity, promissory note or bill, or on security of land by mortgage, or of goods by pledge. But the most extensive and perhaps the most profitable mode in which bankers employ their capital, is in the discounting of bills. A sketch of the mode of dealing between a London banker and his customer will at once illustrate the mutual advantages of the system, and convey the requisite information to the reader. A tradesman makes a deposit with a banker, who thereupon enters his name in his books, or as it is technically termed, opens an account with him. Each day the tradesman sends to the bank whatever cash or bills are received in the course of his business. These are placed to his credit in account, the bills, if not at maturity, being *entered short*, i. e. in a column short of that in which the cash receipts are entered, to be carried into this latter column if subsequently paid. On the other hand, the customer makes no payment but through the medium of his banker. If bills are brought him to accept he makes them payable at his banker's; if payment is required in cash, he gives a cheque or order upon his banker for the amount. These, when presented at the bank, are immediately honored, and the sums paid upon them are debited to the customer in account. Again, if the latter wants cash for a bill, he sends it to the bank, where it is immediately discounted. If his credit be good, the banker will even permit him occasionally to over-draw his account, taking his promissory note or bill for the balance. These securities again he will renew, when at maturity, by taking a fresh note or bill, with this difference only, that this latter he cashes, and debiting his customer with the bill due, he places to his credit the sum for which the substituted bill is drawn *minus* the *discount*, which constitutes his profit in the transaction. When, however, the balance is considerable, he requires further and more effectual security, either by mortgage, or more generally by pledge. Thus it is that the holder of a bill of lading a dock-warrant, or other instrument of a like nature, frequently deposits it with his banker on account of advances either made or to be made; for as the property which these documents represent cannot be transferred without the possession of them, they are an effectual security for repayment to the amount which that property is worth. Thus the banker has the use of the floating balance, when it is in his favor, and the profit to be obtained by discounting: the customer, besides the regular keeping of his accounts, has the advantage of safe custody for his money, the convenience of remittance, and a ready means of obtaining cash when he is in want of it. The transactions of London bankers, though necessarily much complicated, are carried on with great punctuality and exactness. They are also considerably simplified by a method which they have by common consent adopted, called *clearing*, which method is this:—At half past three o'clock a clerk from each banker attends at a place called the clearing-house, where he brings all the drafts on the other bankers, which have been paid in his house that day, and he deposits them into their proper drawers (a drawer being here allotted to each banker); he then credits their accounts separately with the articles which they have against him, as found in the drawer. Balances are then struck from all the accounts, and the claims transferred from one to another, until they are so wound up and cancelled that each clerk has only to settle with two or three others, and their balances are immediately paid. Such drafts as are paid into a banker's too late for clearing, are sent to the houses on which they are drawn, to be *marked*, which is understood as an engagement that they will be paid the next day.

The course of dealing among country bankers (for there are banks established in almost every provincial capital and trading town) is somewhat different; with them it is not an uncommon practice to allow an interest upon deposits, and on the other hand to charge a commission for their trouble. Again, many instead of cash issue their promissory notes payable at sight. By this contrivance (the operation of which is sufficiently obvious) they are enabled to make large advances to their customers, and by extending their dealings beyond their actual capital, to obtain sometimes an exorbitant profit. But besides all these, there is a national bank, called the *Bank of England*; to understand the working of which, it is necessary to premise that the government of this country is indebted to a certain number of its subjects, in a vast sum of money, advanced at different times, to meet the public exigencies. The greater part of this debt is funded, that is, certain annual funds, to be raised by taxes upon the people, are assigned in perpetuity to pay the interest of it. It is through the medium of the Bank of England that this interest, or, as it is generally termed, the dividends upon these funds, are paid to the public creditors, in proportion to their respective shares in the stock. The shares are transferable, and consequently whoever is desirous of investing a sum of money in government security for the sake of the interest which it bears may do so by purchasing from a proprietor of stock such share as he may want, at the price which it is then worth in the market. Of course the value of a share fluctuates with the state of the security, and is consequently affected by political incidents. Hence it has become a practice to traffic in the buying and selling of shares,—a practice which has received the appropriate name of stock-jobbing. The wants of government in their ordinary expenditure also not unfrequently anticipate the annual income. In the interval, therefore, between the voting and the raising of the supplies, money is procured, when necessary, upon the faith of the funds assigned, by an issue of *exchequer bills*, i. e. of orders upon the Treasury, to be paid when the money raised from the taxes is brought in. For these bills the Bank of England gives cash, deducting a discount, calculated upon the probable period which will intervene before payment. But its transactions are not confined to dealings with the government. It has private accounts also with individuals of unquestionable credit, and for such does not refuse to discount ordinary bills of exchange. Its chief profit, however, arises from its large issue of promissory notes; and such is the universal confidence in the stability of the institution, that these are everywhere received as readily as specie, and form a very considerable part of the circulation of the country. We have no space for details, which might be carried to an almost indefinite extent; and here therefore we shall conclude this short and necessarily imperfect account of the modes and instruments by which payments are made, and money transactions in

general carried on in this great and busy commonwealth.

[To be continued.]

## COMMONWEALTH OF MASSACHUSETTS.

*Commonwealth* v. *J. F. Knapp.*

INDICTMENT.

*The first Count* in the Indictment charges, John F. Knapp with the murder of Joseph White with a bludgeon—and Jos. J. Knapp and George Crowninshield as accessaries before the fact.

The *second* charges the said John Francis Knapp with the murder of Joseph White with a dirk, and Jos. J. Knapp and George Crowninshield as accessaries before the fact.

The *third* charges Richard Crowninshield, Jr, with the murder with a bludgeon, and John F. Knapp as being present, aiding and abetting. Alleges the suicide of the said Richard, and that Jos. J. Knapp and George Crowninshield were accessaries before the fact.

The *fourth* is the same as the third in every respect, except that it charges the murder to have been committed with a dirk.

The *fifth* charges John F. Knapp, and some person unknown, with the murder. That the person unknown gave the blow with a bludgeon, and that the said Knapp was present, aiding and abetting.

It also charges Jos. J. Knapp, and George Crowninshield, as accessaries before the fact.

The *sixth* is the same as the *fifth* in every respect, but as to the weapon, which is alleged to be a dirk instead of a bludgeon.

—

CONCLUSION OF THE ATTORNEY GENERAL'S ADDRESS TO THE JURY.

The Counsel for the Government do not confidently expect that the evidence which will be given you, will justify the belief that the prisoner at the bar actually gave the blow on the head, or the stabs in the heart of the deceased, for he, who, it will appear, did the deed, wretched man, like his great prototype, who betrayed the Saviour of the world for thirty pieces of silver, smitten with the stings of conscience, has gone and hanged himself; though less scrupulous than Judas, he has never returned the wages of his iniquity.

It is, however, altogether immaterial, whether the prisoner at the bar, actually gave the mortal blows, provided he was present, aiding and abetting the person, who inflicted them. He is charged both ways.

And this naturally brings us to the consideration of the law of abetments.

By the very ancient common law, before the reign of Henry IV, of England, he alone who gave the stroke was considered as the *principal* offender, and those who stood by in aid and assistance of him who actually committed the felony, were held to be only accessaries; and these aiders and abettors at the time of the felony, had the same right, that accessaries before the fact now have, that of not being tried till he that struck the blow should be tried and convicted; so that if he who actually committed the murder, died before he was tried and convicted, those who were present, aiding and assisting, could never be tried, and of course escaped punishment. But this principle was found to be so repugnant to the common understanding of mankind, that in the time of Henry 4th, all the judges of both benches concurred in altering that principle of the ancient common law, and settled it more conformably to reason and morality, common sense and public justice, by making the abettor at the fact a principal.

Had these judges advanced one step further towards common sense, and decided, that when he that gave the blow, and he that abetted him had died, or was otherwise not capable of being tried and convicted, the accessary before the fact, (the felony or murder being proved,) should be amenable to justice, as for a substantial offence, they would have left their common law much more perfect on this subject than it now is; for in moral turpitude the guilt of him who hires the assassin to do the deed, and absents himself, is of a darker grade, in my apprehension, than his who has the courage to do it.

The celebrated Mr Peel, in the bill which he brought before the House of Commons, contemplating amendments or alterations of some of the rules of the common law, makes this very case one of the amendments, and constitutes the offence of an accessary before the fact in felony a substantive crime, and triable independently of the principal, under certain conditions.

Whether our statute against murder will not be ruled by this Court to have altered the common law in this respect, as was suggested to be possible in the opening Charge of our lamented Chief Justice at this term, whose afflicting death is so deeply felt, will be tested, if it should ever become necessary in these trials. Permit me here to read his lucid opinion on this point. [See No. iv. pages 26 and 27 of this paper.]

But at present we are considering the case under the principles of the common law, as it now stands, and from the time of Henry 4th, to the present day, the common law is settled, that, as Lord Hale observes,* 'all that are present, aiding and assisting, are equally principals with him that gave the stroke, whereof the party died; for though one gave the stroke, yet in interpretation of law, it is the stroke of every person that was *present, aiding and assisting*, and though they are called principals in the second degree, yet they are principals; and therefore if there be an indictment of murder against A., that he feloniously struck B., whereof he died, and that C. and D. were present, aiding and abetting to A. in the felony and murder aforesaid, and A. appears not, but C. and D. appear, they shall be arraigned, and receive their judgment, if convict, though A. neither appears, nor be outlawed. And he further says, if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, judgment shall be given against them all, for it is only a circumstantial variance, for it is the stroke of all that were present, aiding and abetting; he cites Mackally's *case*.

I will read also from 1 East. P. C., 350, 351, to the same point:

'In appeal where several are present at the fact, and one only actually does it, and the others abet him, the Plaintiff may either elect to suppose in his declaration that all did the fact, or show the special matter. For in these cases all the parties are principals, and the blow of one is in law the blow of all. For which reason an indictment that A. gave the mortal blow, and B., C., and D. were present and abetting, is sustained by evidence, that B. gave the blow, and A., C., and D. were present and abetting. Upon the like indictment, evidence that E. though not named therein, gave the blow, and that A., B., C., and D. were present and abetting, would be sufficient; or even that a person unknown gave the blow.' And 1 Hale, 440.

You perceive, therefore, Gentlemen, that it is altogether immaterial in law, whether the prisoner now on trial gave the mortal blow, or was only aiding and abetting to him who gave it—and that the indictment may charge him either way.

There are three kinds of abetments to felonies. —The *first* is an abetment at the time the felony is committed, that is, being *present*, *aiding*, and *assisting* or *consenting* to him who actually commits the felony; and this constitutes a *principal offender*.

The *second* is an abetment before the felony is committed, by *counselling*, *hiring*, and *procuring* the felony to be done, and being absent when it is committed, and this constitutes an *accessary before the fact.*

The *third* is an abetment after the felony is committed, and that is harboring, concealing or maintaining the principal offenders or their accessaries before the fact; and this constitutes an *accessary after the fact.*

The prisoner at the bar stands indicted of the first kind of these abetments, that is as a *principal offender*, and if he be not convicted, by the common law as it now stands in England, the accessaries before the fact cannot be tried, and must escape punishment.

It is therefore necessary to consider what, in law, constitutes an abettor at the time the murder is committed; and according to Lord Hale, to make an abettor to a murder a principal in the felony, two things are requisite.

The *first* is, he must be *present.*

The second is, he must be *aiding* and *abetting.* I will read you the authorities on both these points. As to the *first*, being present—

'As to the first: if divers persons come to make an affray, &c, and are of the same party, and come into the same house, but are in several rooms of the same house, and one be *killed* in one of the rooms, those that are of that party, and that came for that purpose, though in other rooms of the same house, shall be said to be present.—*Dalt. cap.* 93 *p.* 241.

The Lord *Dacre* and divers others came to steal deer in the park of one *Pelham*. *Rayden*, one of the company, *killed* the keeper in the park, the lord *Dacre* and the rest of the company being in other parts of the park, it was ruled, that it was murder in them all, and they died for it.—*Crompi.* 25. *a. Dalt. ubi supra*, 34 *H.* 8. *B. Coron.* 172.

The like in case burglary: though some stood at the lane's end or field-gate to watch if any came to disturb them, *Co. P. C. p.* 64. 11 *H.* 4. 13. *b.*, yet they are said to be burglars, because present, aiding and assisting to the burglary.

So if A. being present, commands B. to kill C., and he doth it, both are principals.—13 *H.* 7. 10. *a.*

If many be present, and one only give the stroke, whereof the party dies, they are all principals, if they came for that purpose.—21 *E.* 4. 71. *a.*'—1 *Lord Hale*, 439. 4 *Hawk.* 201, 202.

As to the *second* point:—

'And consonant to this is Mr *Dalton*, *p.* 241, in these words: 'Note also, that if divers persons come in one company, to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them, in do-

* 1 Hale, P. C. 437.

ing thereof, kill a man, this shall be adjudged murder in them all that are present, of that party, abetting him, and consenting to the act, or ready to aid him, although they did but look on.'—1 *Hale*, 441.

'When the law requireth the presence of the accomplicate at the perpetration of the fact, in order to render him a principal, it doth not require a strict actual immediate presence, such a presence, as would make him an eye or ear-witness of what passeth.

'Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations, to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it. For it was made a common case with them, each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise.'—*Foster*, 349.

Which is, if he be *consenting* to the felony, or *ready to aid* him who does it, although he does but look on. If they have the same object in view, if they came for the same purpose. It is the *intention of the mind* therefore, that constitutes the abettor to a felony, if he be present in contemplation of law, though he do nothing.

And now, gentlemen, let us hearken to the testimony; and the government are first bound to prove the *corpus delicti*, that is, that the deceased Mr White came to his death by the hand of external violence.

Having proved the death by the hand of external violence, we shall then proceed to prove to you that the death was effected by a wicked conspiracy and combination of individuals, of which the prisoner at the bar was one, to destroy the life of the deceased, and to this point, we shall offer Joseph Jenkins Knapp, jr, to redeem the pledge of the Government given for his protection, on condition of his testifying the whole truth aud nothing but the truth on this trial. He refuses to testify. And now, Gentlemen, every one must be satisfied that the pledge of the Government, given for his protection, is fully redeemed; he has now forfeited that proffered protection, and stands accused as an accessary before the fact to this murder—he has an unquestionable right to take the stand he has, for the Constitution of the Commonwealth provides, that *no subject shall be compelled to accuse, or furnish evidence for himself.*

As we cannot prove this vile conspiracy and combination to murder the deceased by the disclosure of this accomplice in the crime, by the blessing of God we will prove it by other testimony in the case.

And, if in the opinion of the Court we shall be able to shew that such a conspiracy existed, another principle of law will be relied on, that when a conspiracy to do an unlawful act is proved, the acts of any one of the conspirators, done in effecting the object of their combination may be given in evidence against any other of the conspirators. Phillips on Evidence, [76.]

*Evidence and opinion of the Court as to confessions of the Prisoner, in relation to the club; and the proof of a conspiracy.*

The Court direct Mr Colman to state all that was said in relation to encouragement.

Early in the interview, Phippen said that Joseph had decided to make a confession, &c, (as above,) and afterwards repeated this, and appealed to me. Frank then asked me to use my influence, or interest, for him. I told him that I could promise nothing, but that I thought his youth would be in his favor.

I have stated all the encouragement that was given. There was not the least encouragement given to him, either by me or in my hearing, to relate facts within his own knowledge. Soon after this interview, I found the club under the North steps of the Church, in Howard-street. I went there on the 20th of May, about 1 o'clock, with Dr Barstow and Mr Fettyplace. The steps are of wood—under the lower one there is a rat-hole—in it I found this club.

*Webster.* Who told you it was there?

*Dexter.* I object to this question. The finding of the club is all that can be given in evidence. This question is introduced to criminate the prisoner and therefore it is not admissible; for it is criminating him by his confession of that fact, and no part of the confession is evidence. (Cites *Leach, Cr. Law*, 300.) I call the attention of the Court to the principle, which is to give his confession against him, which has already been ruled out. (*Cites, Phill.* 83.) In this passage is the origin of the doctrine.—(*Leach*, 300. 2 *Stark.* 50.) The case cited by Starkie does not support him and it is against the principle.

*Court.* We are very clear that it is competent for the Government to prove that this club was found in consequence of information from the prisoner.

*Webster.* We now expect to prove a conspiracy, between the two Knapps and the two Crowninshields, to commit this murder; having done that, we propose to prove acts done by all, in pursuance of the common design.

*Gardiner* objects to this course, because it is never pursued except in conspiracy and treason. [6 *T. R.* 527.]

*Webster* cites *Stark.* 210 and 6 *T. R.* 527.

*The Court.* We are satisfied with the course pursued by the Government.

*Evidence as to a pretended Robbery.*

*Stephen C. Phillips, sworn.* I was one of the Committee of Vigilance. The two Knapps came before the Committee at their request to give an account of a robbery, said to have been attempted upon them at Wenham.

*Dexter.* I object to any proof of this robbery.

*Webster.* It is always competent to prove, what persons under suspicion do, to divert that suspicion. I cite to this point. 1 Stark. 492-493.

*Dexter.* Such evidence is just as if that of a generally bad character was given to the Jury—besides, it is not within the rule laid down by the Court in relation to anonymous letters. This is, also, a distinct crime.

*By Court.*—It is now proposed, by the Counsel for the Government, to prove that the prisoner got up a fictitious robbery. This is objected to, on the other part, because it is a distinct offence, and has no relation to the crime now charged.

It is now clear, that the Government may prove that the Defendant took measures to divert suspicion from himself, and it would seem to follow, that any evidence which tends to this point is admissible. The Court will take care in charging the the Jury to give such evidence its proper direction, and its weight will be left to them.

*Mr Gardiner* distinguished the several classes of offenders connected with the crime of murder. *First*, he who strikes the blow, being the principal in the first degree. *Second*, he who is aiding and abetting, being the principal in the second degree. *Third*, he who hires and procures, and is considered the accessory before the fact. All these are subjected to the same punishment. How was the prisoner charged in the Indictment? First, as the person who struck the blow—next as being present, aiding and abetting the person who struck the blow. This person, in some of the counts, is alleged to be Richard Crowninshield, Jr, in others a person unknown. This is the distinction of the Common Law. He who is a principal in the second degree, in England, is, under the Statute, an accessory before the fact. The Government was bound to prove, that the prisoner gave the blow, or was present, aiding and abetting the murderer. He thought the real inquiry was, whether the prisoner was there, aiding and abetting the murderer. The evidence which the Government had produced is of a very weak nature, and is liable to great error. They first attempt to prove a conspiracy; then, in support of that, they show you, that the murder was committed—that three men were in the vicinity of the murder, at the time it was committed. They also shew a combination of a great number of facts. But all these avail nothing, unless they bring you irresistibly to the conclusion, that the prisoner gave the blow, or was present aiding and abetting the murderer. He stated that these circumstances are so connected together in this conspiracy, if the Jury should come to the conclusion that one is untrue, the whole case must fall to the ground.

He then referred to one or two cases of circumstantial evidence, as illustrating this principle. (The case of the uncle mentioned by Lord Coke. 1 *Stark.* 502—3 and 5.) Even when a party has confessed, there are cases which show that innocent men have been executed upon their own confession.—(2 *Starkie*, 43, and notes. 4 *Bl.* 357.]

The whole evidence of the conspiracy rests on two conversations. One, overheard by Leighton, between the prisoner and his brother, at Wenham, the other heard by Palmer, between the Crowninshields. So far as these conversations tend to anything, it is to disprove the charge. As to the weight of this testimony, he intended to show that these witnessess were not entitled to credit. The Government having proved a conspiracy, they prove the murder, and ask you to infer, that it was done in pursuance of a conspiracy. Their whole evidence, if it proves anything, shows the prisoner to have been an accessory before the fact. The circumstances of the club and dirk might have been communicated by others to the prisoner. All the other circumstances in the case afford no presumptiom that he was aiding and abetting. As to evidence, relating to personal identity, he referred to *Crow's* case, in the Appendix to Phillips's Evidence, p. 78. Sir———Davenport's case in State Trials.

The only question is, was John Francis Knapp constructively present? Even if he were in Brown-street, he was not present, except by a mere fiction of law. To make a man liable as constructively present, he must be in a capacity to render assistance, and must be there for that purpose, and must actually assist. To show that the man in Brown-street could not be considered in law, as present, he referred to some cases in the books, relating to the subject of constructive presence.

He stated, that no person, knowing a felony, can be said to be present, at the commitment of felony, unless he be where he can aid, with the intent and ability concurring, and is actually aiding, at the fact. In this, as in other questions of law that have arisen, there is not so much difficulty in ascertaining the principle, as in applying it. (He cited 2 *Stark.* 7, 8. *Charge of Chief Justice Parker. Foster*, 350. 1 *Hale*, c. 34, p. 439. *Hawkins*, b. 2. c. 29. *Russel*, 29, 627, 1025.)

Lord *Dacre's* case is better reported by Moore, p. 86. 2 *Stark. Ev.* 7, 8, *and cases there cited.* 1 *Hale*, 533. 1 *Hawkins*, 34. *Russell*, 1025. 1 *Hale* 463. *Russell*, 325. 2 *Hawkins* (442) b. 2, c. 29. *S.* 10. *Aaron Burr's.* 4 *Cranch*, 490. *Trial* 426.

The whole tendency of modern cases on this subject has been to narrow the principle. *Russell* and *Ryan*, 343 and 25. *King* vs. *Sowers.* Same 99. *The King* vs. *White.* Same 113, 363. *The King* vs. *Stewart & Dickens*, 421. *The King* vs. *Kelley. Russell*, 22 *new ed.*

Mr Gardiner went on to state that they proposed to introduce evidence to shew that the man, seen in Brown street, was not the prisoner at the bar, but some other person; that the prisoner was in a different place during the evening; and that Brown street was not a situation in which aid and assistance could be given to the murderer.

Mr *Dexter* stated that there was one question which he wished to present to the Court, and that was whether principals in the second degree at the common law, were not made accessories before the fact, by our Statute of 1784, c. 65, and entitled to all the privileges of accessories before the fact, in the form and time of trial. This Statute is entitled 'An Act against accessories to crimes and felonious assaulters,' and describes principals in the second degree at the common law, and declares that they shall be considered as accessories before the fact. He cited *Stat.* 184, c. 123. This Statute is not repealed by the general repealing Act of 1805, c. 88. And the law does not favor repeals by implication, 2 *Cranch*, 23, 386. 3 *Wheat.* 631. 5 *Wheat.* 96. 6 *Dane*, 588.

The Act of 1804, above cited is consistent with that of 1784; and the law does not favor repeals by implication. Note to *Stat.* of 1784, c. 65. *Russell* 30, n. 31. 3 *Mass. R.* 253. 17 *M. R.* 92. 1 *Paine* 400.

The *Attorney General* and *Mr Webster* said the Statute of 1784 was virtually repealed by the Statute of 1804, and that if it were not, the description of accessories before the fact, in that Statute, was not the common law definition of a principal in the second degree. The words 'being present' are not used in that Statute. 6 *Dane*, 588—9.

The Act of 1784, c. 65, means being absent. As the law stood when that Act was passed, a man who should hire, procure, abet or assist, was an accessory. A man should abet, &c. '*being present*,' was a principal in the second degree.

## ENGLISH CASES.

### ADMIRALTY COURT,—MAY.

Before Sir C. Robinson.

*The General Palmer.*

This was an appeal from the decision of the Commissioners under the Salvage Act.

The King's Advocate and Dr Jenner appeared for the owners; and Drs. Dodson and Adams for the salvors.

It appeared that the General Palmer East Indiaman, homeward bound, was, on the 23d of November last, lying off Margate, when a gale sprung up, which gradually increased until she parted her small bower anchor; he then let go her best bower, and finding that she was still riding hard, he made Lloyd's signal No. 71, for an anchor and cable. Two boats, the Liberty and the King George, put off to board her. The Liberty actually boarded, but the King George having ascertained the size and weight of the cable and anchor required, returned to procure it. When it was procured, it was found to be so large that in such a sea the King George could not carry it without great danger of sinking, and the Queen lugger was therefore employed for that purpose. The crews of three vessels then assisted, and the gale continuing, it was deemed advisable to run for Whitstable Bay, about twenty miles distant, where she was run on the mud, and got off the following day at high water. For this service they claimed salvage on the vessel and cargo, which was admitted to be worth 30,000*l*, and the commissioners who sat at Margate awarded then 1,000*l*. The owners objected to this decision as being too much for the service performed, the ship having only made a signal for a cable and anchor, though it was subsequently resolved to run for Whitstable Bay. They made a tender of 500*l* which was refused by the salvers, being 21 in number, the latter contending that the service performed was attended with risk and peril, and that it was by no means inadequate to the sum awarded by the Commissioners.

Sir C. Robinson, in giving judgment, thought, he said, that the services of the salvers had been exaggerated, for the only danger they had risked was from the high sea. Under all the circumstances, he thought the justice of the case would be amply satisfied by awarding 500*l*, to be divided between the crew of the three vessels, and 100*l* additional to be divided amongst the crew of the Liberty alone.

### COURT OF COMMON PLEAS—MAY.

*Burton v. Horne and Another.*

Mr Sergeant Wilde said, that the action in this case was brought against the defendants, who were coach proprietors, to recover the amount of a parcel, which had been forwarded to their care, to be sent by coach to Coventry. The Jury found a verdict for the defendants. He (the Learned Sergeant) now moved for leave to set aside the verdict, and that a new trial be granted, on the ground that the evidence of one of the witnesses for the defence could be contradicted as to a material point. The affidavit upon which the present application was made, stated that at the moment the witness alluded to was giving his evidence at Guildhall, he was under the care of a constable upon a charge of embezzling money belonging to the defendants, his employers; and that after he gave his evidence he was taken before the magistrates at Guildhall, and was liberated upon the charge of embezzlement, although his employers had a letter of his, in which he admitted his guilt and pleaded distress; the book-keeper told the magistrates that it was not the intention of the defendants to prosecute. This witness swore upon the trial that he had frequently delivered parcels to a Mr Giles in the street; but that gentleman in his affidavit positively denied having ever received parcels from him in that manner. It was such a witness as that who was put into the box, with a heavy charge hanging over his head, and whose interest of course it was to free himself from the consequences of such a transaction. Besides, he should contend that there was sufficient proof of gross negligenc in this case, as it appeared that the parcel in question, which contained Bank notes, had never been put into the coach; and that they were actually changed in London before the coach reached Coventry. In a case in which it appeared that a lost parcel had been put into one coach instead of another, the Jury found that the defendant was guilty of gross negligence; and there could be no doubt that not sending a parcel at all was equally as gross a neglect.

The Chief Justice observed, that if the affidavit now produced were unanswered, it was one which very nearly impeached the administration of justice.

The Court granted a rule Nisi.

Sittings before the Chief Justice and a Special Jury,

*Dalton v Irvine.*

Mr Sergeant Taddy and Mr Hutchinson appeared for the plaintiff; and Mr Sergeant Wilde and Mr Richards for the defendant.

This was an action brought by the plaintiff, a broker in the City, to recover from the defendant, the owner of the ship Albion, a sum of money which he claimed as commission for procuring a charterparty for that vessel. It appeared that the defendant had, in the usual manner, employed the plaintiff to procure employment for his ship, and that the plaintiff had entered into a charterparty with a third person, by whom the vessel was to be freighted. One of the articles of the charter party mentioned that a quantity of logwood, not exceeding twenty tons, should form part of her cargo; and for the freight of this logwood the sum of one guinea per ton was stipulated to be paid. The defendant, on observing this stipulation in the charterparty, insisted upon its being altered, and said that, unless 6*l*. per ton were paid for the logwood, he would not sign the charterparty. The plaintiff remonstrated with him, and said that the sum charged in the charterparty was that which was usually demanded, and that he was convinced the freighter would not pay more. The defendant insisted on his getting that part of the charterparty altered, and the plaintiff accordingly applied to the freighter, who would not agree to the proposed alteration, and the defendent then definitely refused to sign the charterparty; as he also refused to make any payment to the plaintiff on account of having procured the charterparty, the present action, in the nature of a claim for commission, was brought. The facts already stated were proved; but other evidence was given to show that the custom of the trade, in business of this kind, was to pay the commission when the charterparty had been regularly signed by both parties, and not till then. The defence was, that by this custom no commission could be claimed, for the charterparty had not been signed, and the defendant had derived no benefit from the plaintiff's services. It was contended that the advantage of the trade required the strict enforcement of this custom, and that a broker was bound to make such a charterparty as would secure to the shipowner a beneficial employment of his vessel. As the plaintiff had not done this, he was not entitled to claim his commis-

sion. In reply, it was urged that it was quite sufficient if a broker made such a charterparty as usual in the trade, and that a shipowner had no right to reject a charterparty merely because one of its stipulations (though quite usual in the trade) was not sufficiently profitable to please him. It was then argued, that if the plaintiff could not maintain his action for the commission, he was at least entitled to recover a reasonable compensation for his work and labor: but to this it was answered that the claim here was for commission, and that the evidence went to show there was no other mode of payment but that of commission, which only became due on the signing of the charterparty.

The CHIEF JUSTICE left it to the Jury to say what was the custom under which both parties must be supposed to have acted; and the Jury, after a short consultation, returned a verdict for the defendant.

## DIGEST OF RECENT ENGLISH REPORTS.

On an indictment for administering a drug to a woman to procure abortion, *she not being quick with child*, if it appear that the woman was not with child at all, the prisoner must be acquitted.—*Rex* v. *Scudder*, 3 Carr & Payne. 605.

Where a person agrees to make an article of certain materials for a stipulated price, but uses materials of a better kind, he cannot therefore charge more than the stipulated price, or require the article to be returned, because the buyer will not pay the increased price.—*Wilmot* v. *Smith*, 3 Carr & Payne, 453.

The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbor's lights thereby, must be confined to cases where all the four walls belong to the party; and will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbor.—*Shadwell* v. *Hutchinson*, 3 Carr & Payne, 615.

If an apprentice absent himself from his master, and his master take him back, and an action be afterwards brought for such absenting, the taking back, to constitute a defence, must be pleaded specially. *Wright* v. *Gillon*, 3 Carr & Payne 583.

A sheriff's officer having a warrant to arrest a party for debt, went to the party and read his warrant to him, and then having taken a fee, proceeded to the party's attorney, to let him know that bail might be put in: afterwards the officer returned that he had arrested the party: By Lord Tenterden, C. J., this is no arrest.—*George* v. *Radford*, 3 Carr. & Payne, 464.

By the terms of a reference under a judge's order, the award was to be made by the first day of Trinity Term, or such further day as the arbitrator should appoint *by indorsement* on the order. The arbitrator enlarged the time once by endorsement, but the enlarged period being nearly elapsed, another judge's order was obtained (afterwards made a rule of Court,) authorising a further extension of the time. The arbitrator made his award beyond the time of the first, but within the time of the second enlargement, but without any further indorsement: Held that the award was good.—*Leggett* v. *Finlay*, 2 Bing. 255.

[Gaselee, J. 'I was disposed to think at first that this enlargement was made without authority; *but upon hearing the circumstances of the case*, I think a sufficient authority has been shewn.']

The declaration stated, that two persons had been appointed arbitrators, with power to appoint an umpire in cases of difference; that not agreeing, they appointed one; and that the arbitrator and umpire awarded. It appeared, that the umpire was appointed before the arbitrators had inquired into the matters referred, or differed in opinion, and the award ran thus: 'We the said arbitrators do award,' &c.—it was signed, however, by the umpire, as well as by the arbitrators. These several matters were made grounds of objection; but the objections were overruled; and it was also decided, that although the award was in substance the award of the umpire, the misdescription in the declaration was immaterial.—*Bates* v. *Cooke*, 9 Barn. & Cress. 407.

By an order at Nisi Prius an action at law, a suit in equity, and all matters in difference between the parties, were submitted to a barrister. The arbitrator adjudicated upon the action by ordering the defendants to pay a sum of money; and upon the suit in equity, by ordering the bill to be dismissed, and each party to pay his own costs: Held that he thereby decided on the matters included both in the action and the suit, and that the award was good.—*Pearse* v *Pearse*, 9 Barn. & Cress. 484.

If it appear on the trial that a witness for the defence is one of the bail, the judge will make an order for striking his name out of the bail-piece, on the sum sworn to and an additional sum for costs being deposited with the associate, so as to render him a competent witness.—*Bailey* v. *Hale*, 3 Carr & Payne, 560.

A. draws, and B. accepts, a bill for the accomodation of C., the first indorsee. Neither A. nor C. has any effects in the hands of B., yet this does not supersede the necessity of notice of dishonor to the drawer from a subsequent indorsee, who was ignorant of the concoction of the bill.—*Norton* v. *Pickering*, 1 Danson & Loyd, 210.

When the acceptor of a bill positively refuses payment, notice of dishonor may be given during the same day on which the bill becomes due.—*Clowes* v.——, 1 Danson & Loyd, 212.

A bill accepted for differences on time bargains in stock, is valid in the hands of an indorsee without notice.—*Greenland* v. *Dyer*, 2 Man. & Ryl. 422.

A writing obligatory, whereby the lender's money is secured to him though the ship be lost, is not a *bottomry* contract, though so understood and treated as such by the parties; and the lender's interest being described as on *bottomry* in a policy of insurance on the risk, the misdescription was held to be fatal.—*Simonds* v. *Hodgson*, 6 Bing.114.

In an action for money had and received, being the amount of cheques fraudulently obtained from the plaintiff, by the person from whom the defendants received them; Held that it must be left to a jury to say, whether the defendants exercised reasonable caution; and per Lord Tenterden: 'It cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date, does so at his peril.' And per Littledale, J.: 'Though the rule of law (that a party taking a negotiable instrument has it with no better title than the person from whom he takes it,) is so with respect to bills of exchange and promissory notes, I think it cannot be applied to cheques.'—*Rothschild* v. *Corney*, 9 Barn. and Cres. 388; 1 Danson, and Loyd, 325.

[In Bayley on Bills, 4 Edit. 124, the rule is said to be, in general, applicable to cheques; and it was so laid down by Lord Kenyon, 7 T. R. 423.]

A. and B. were sureties for C., a collector of taxes, who became a defaulter: the obligees sued A. and recovered: Held that in an action for contribution by A. against B., A. could only recover half the amount of the verdict against him, and neither half of the taxed costs of the plaintiffs in the former action, nor half of his costs of defending such action: Held also, that the half of sums received by A. after the verdict against him, from C., must be taken in reduction of the amount of that verdict, and could not be applied in payment of the costs.—*Knight* v. *Hughes*, 3 Carr and Payne, 467.

Where the jury, in returning a verdict, say that they find for the plaintiff as to one part of the declaration, he will not be allowed the expenses of witnesses called to support a different part, although the verdict be entered for him generally.—*Cocks* v. *Peachey*, 1 Man. and Ryl. 420.

Where a right is vested in a particular person or corporation, the withholding of that right and thereby compelling the party to sue for it, is an injury for which damages may be recovered; and if damages may be recovered, costs will follow. Thus the President and College of Physic are entitled to costs if they succeed in an action for the penalty imposed by 10 Hen. 8., on persons practising without license in the City of London; and under 4 Jac. 1. c. 3. which gives costs to defendants in all cases in which a plaintiff is entitled if he succeed,) the defendant in such an action is entitled to costs in case the action fails.—*The College of Physicians* v. *Harrison*, 9 B. and C. 524.

## MAINE.

### SUPREME JUDICIAL COURT.

Vol. 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Chapman & al. v. Shaw.*

Where a note, payable in twelve months, was given as the consideration for a written engagement of the payee to convey certain goods to the maker at a future day, and the payee forthwith indorsed and sold the note for its amount in money, after which the original contract was rescinded; it was held that the maker of the note might recover the amount of the payee, though the twelve months had not elapsed.

*Webster & al. v. Drinkwater.*

The party committing a tort, cannot be charged as on an implied contract, the tort being waived, unless some benefit has actually accrued to him.

*Gardiner Man. Co. v. Heald.*

One tenant in common may have *assumpsit* against his co-tenant, who has sold the common property, and received all the money.

*Smith v. Sayward & als.*

Where one was employed as the agent of certain others, to purchase for them a piece of land, and take the conveyance to himself, concealing his principals; and a third person, at the request of the principals, became surety for the agent in a promissory note for the purchase money; which note the surety paid; it was *held* that the surety alone might have *assumpsit* against the principals, for the money thus paid.

Held also, that this was an original undertaking, and not within the statute of frauds.

Held also, that the benefit accruing to the principals was a sufficient consideration to support the promise.

*Crosby v. Allyn.*

An actual entry, by the officer, on real estate, seems not to be necessary to constitute a valid attachment.

An attachment of 'all the debtor's right, title and interest in any real estate in the town of B,' is a good attachment of his tenancy in common in a particular tract in that town.

The lien created by attachment of a tenancy in common follows the estate, if it be changed from common to several property pending the attachment.

*Holbrook v. Baker.*

A chattel mortgaged, is not liable to be attached or seized in execution for the debt of the mortgagor, the money due to the mortgagee not having been paid, nor legally tendered.

*Strout & al. v. Bradbury & al.*

Property lawfully in the possession of a deputy sheriff by attachment, cannot be taken out of his possession by another deputy of the same sheriff, under another writ.

*Fryeburgh Canal v. Frye.*

A proprietors' committee having in their behalf entered into a submission of demands to referees, under the statute, representing themselves as duly authorized so to do, and the proprietors having been heard upon the merits before the referees, making no objection to the submission;—upon error brought by them to reverse a judgment rendered upon the award, the Court presumed that the committee had due authority, though the want of it was assigned for error.

*Titcomb v. Thomas.*

A bill of exchange payable to the order of the drawer, and not indorsed, may be assigned, for a valuable consideration, by delivery only; and for the benefit of the assignee an action lies against the acceptor, in the name of the drawer, as on a bill payable to himself.

The interest of one of several joint assignees of such bill may be transferred to others by delivery of the bill, and payment by them of his share of the money due upon it.

*Bangor Bank v. Hook.*

The damages on a protested bill of exchange are not given as a liquidated arbitrary mulct; but as a compensation to the holder, for the expense of remitting the money to the place where the bill ought to have been paid. And therefore if the holder receive part of the money of the acceptor, this diminishes the damages, *pro rata.*

The indorser of a bill of exchange is not liable for the costs of a suit commenced by the holder against the acceptor; nor for any commissions paid on the collection of part of the money of him.

*Saco v. Osgood.*

Where one gave bond to a town, conditioned to support its paupers for five years, and to save the town harmless from all damages, cost and expenses which might happen or accrue for on account of the liability of the town to be called upon to support or provide for poor persons; and after the expiration of the five years, a suit was commenced against the town, for supplies furnished to a pauper by another town, accruing partly before and partly after the expiration of the term; in which suit the defendants prevailed;—it was held that the obligor was liable for his proportional part of the expenses of defending this suit, within the condition of the bond.

*Baker v. Haley & als.*

Bonds for ease and favor being those only which are given to purchase an indulgence not authorized by law; a bond given for the debtor's liberties, under *Stat.* 1824, *ch.* 281, is good, though it does not strictly conform to the rules indicated in the statute.

Such bond may properly be taken to the officer making the arrest.

*Given & ux. v. Simpson & al.*

The language of the *Stat.* 1821, *ch.* 50, giving to this court equity jurisdiction in 'all cases of trust arising under deeds, wills, *or in the settlement of estates,*' is applicable only to express trusts, arising from the written contracts of the deceased; and not to those implied by law, or growing out of the official character or situation of the executor or administrator.

*Lewiston v. N. Yarmouth.*

The Resolve of March 19, 1821, rendering valid a certain class of marriages, so far as it has a bearing upon questions of settlement under the pauper laws for expenses incurred subsequent to its passage, is constitutional.

*Allen v. Sayward.*

The word 'give,' in a deed of bargain and sale, in this State, does not import a covenant of warranty.

*Emery v. Chase.*

By a grant of land by deed of feoffment, 'reserving' to the grantor 'the improvement of the one half of the premises, with necessary wood for family use, during his own natural life, and the life of his wife'—it was held that the estate passed, one moiety to the use of the grantee and his heirs in fee, and the other moiety to the use of the grantor and his wife for their lives, and the life of the survivor of them, with remainder in fee to the grantee and his heirs.

*Graves v. Fisher & al.*

If a lot be granted fronting on, and bounded by a river, the side lines are to be continued to the main stream, though they thereby cross a point formed by the junction of one of its branches with the principal river.

*Cutts v. King.*

By the use of the term '*about,*' in describing the length of line in a deed of conveyance, it is understood that exact precision was not intended; but if the place where the monument stood, by which the distance was controlled and determined, cannot be ascertained, the grantee must be limited to the number of rods or feet given.

*O'Brien v. Dunlap.*

Where several issues are made up and tried in the same cause, some of which are found against the 'party prevailing,' he is still entitled to his full costs upon all the issues, by the provisions of *Stat.* 1821, *ch.* 59, *sec.* 17.

*Gibson v. Waterhouse.*

If judgment is arrested for one bad count, the defendant is entitled to his full costs on all the issues, as the party prevailing.

*Hathorne v. Cate.*

If in *assumpsit* the defendant files his account in offset, in consequence of which the plaintiff's damages are reduced below twenty dollars, the plaintiff is still entitled to full costs; this case not being within the intent of *Stat.* 1821, *ch.* 59, *sec.* 30.

*Bean v. Mayo & al.*

A covenant in a deed that the land is free from incumbrance, is broken by the existence of a mortgage previously given by the grantor to the grantee.

But in such case, the condition of the mortgage not being broken, nor the mortgage discharged by the grantee, the damages are but nominal.

*Scott & al. v. Whipple & als.*

An indenture, in which several persons are represented as parties of the one part, is the deed of as many persons of that part as execute and deliver it, though it is not signed by them all.

*Ross v. Gould.*

A mere mistake of the party in possession of land, as it will not constitute a disseisin, so it will not be construed into an abandonment of the possession; especially where it was caused by the owner of the fee.

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## NEW HAMPSHIRE.

### SUPERIOR COURT OF JUDICATURE.

Vol. 4 contains the cases decided from January, 1827, to May, 1827.

*Moses vs. Norris.*

A carrier is answerable for all losses happening otherwise than by inevitable accident.

But trover will not lie against a carrier for goods which have been lost, the proper remedy being an action on the contract and not trover.

*Barron vs. Davis.*

Pine timber, which has been put into Connecticut river and suffered to float down in such manner as to be liable to forfeiture under the statute of June 10, 1808, cannot be lawfully seized as forfeited, after the owner has regained the possesaion of it and has it in his custody.

*Dow vs. Norris.*

Where a statute gives a penalty incurred under it to an individual, the right of an individual to a penalty incurred under the statute is a civil cause within the meaning of the clause in the bill of rights which prohibits the passing of retrospective laws for the decision of civil causes.

And such right of an individual cannot be taken away by a repeal of the statute under which the penalty was incurred.

The power of the Legislature to raise taxes under the constitution and to authorize guardians to sell the land of their wards.

*Sabin vs. Philbrick.*

Where judgment was rendered in a cause in the court of common pleas in favor of the plaintiff by an agreement in which it was stated that this was done merely for the purpose of bringing the cause to this court; and it was here agreed that the plaintiff should have judgment for the same sum he recovered in the common pleas, it was held that plaintiff was entitled to double costs on the appeal.

*Roby vs. Marsh.*

When a plaintiff appeals from a judgment of the court of common pleas in a personal action, and recovers in

this court less than $50, he is entitled to the costs of the court below, and the defendant to the costs of the appeal.

*Rumney vs. Ellsworth.*

In actions of assumpsit commenced in the court of common pleas, if the amount of the sum in controversy between the parties exceeds the sum of thirteen dollars and thirtythree cents and the plaintiff recovers more than six dollars, he is entitled to full costs.

But if in such a case the amount of the sum in controversy appears upon the face of the declaration, or by the proof to be less than thirteen dollars thirtythree cents, the suit will be deemed vexatious and the costs will be limited under the statute of June 29, 1819.

*Swasey vs. Wilmot.*

In assumpsit on a promissory note for $55,11, the defendant filed a set-off in the court of common pleas, where the cause was tried and judgment rendered for the defendant, from which judgment the plaintiff appealed to this court where the cause was again tried and a verdict returned in favor of the plaintiff with $25,54 damages. It was held that the defendant was entitled to the costs of the appeal.

*Barron vs. Ashley.*

Where a plaintiff brought an action of trespass for taking and carrying away a large number of logs from Connecticut river and its banks, and it appeared upon trial that all the logs taken had been put into the river under such circumstances as to be forfeited to any person who should take them, with the exception of one log for which the plaintiff recovered $2, it was held that he was not entitled to full costs.

In such a case the plaintiff could not have had that reasonable expectation of recovering more than $6, which was intended by the statute.

*Pritchard vs. Atkinson.*

A justice of the peace has no jurisdiction to try an action of covenant broken, founded on a covenant, that land is conveyed free of incumbrances, when a public highway is assigned as a breach of the covenant.

In such cases, therefore, the plaintiff is entitled to full costs, however small may be the amount of the damages assessed.

*Webster vs. Atkinson.*

No parol evidence of an expressed intention nor of the acts of the parties can be admitted to explain a patent ambiguity in a deed.

But in some cases to aid in giving a construction to an instrument, parol evidence is admissible to show the situation and circumstances of any person or thing to which the instrument relates.

When a grant of a third part of a tract of land is made without any limitation of the same third in severalty, the grantor and grantee will hold their parts in common.

It is not necessary, however, in order to convey a part in severalty, that the limitation should be in express terms; but it may be collected by implication from the language used.

The construction of a deed must be made upon the entire instrument and be such that the whole deed and every part of it may take effect, and one part must be construed by another so that all the parts may agree.

*Emerson vs. Murray.*

An endorsement made upon an instrument before it is executed may be parcel of the obligation. But before an endorsement can be considered as parcel of a deed, it must be shown affirmatively to have been upon the instrument when executed.

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Lemuel Shaw, Esq. of this city, has been put in nomination by the Governor for the vacant office of Chief Justice of the Supreme Judicial Court of this Commonwealth. His nomination will probably be confirmed.

## THE JURISPRUDENT.

BOSTON, SATURDAY, AUGUST 28, 1830.

*Greenleaf's Reports.*—While Maine constituted a part of Massachusetts, it furnished its full proportion of talent in the Profession, and some of the best Judges on the bench of the Supreme Court.

The County of Cumberland in an especial manner, has for many years been distinguished for its eminent men. Upon the separation, unlike other new States, Maine started with a Judicial System, already organised in fact, and a practice established and matured. There was also a body of law in the Reports of Massachusetts, which could easily be adopted to the exigences of its new condition and which would be of essential aid in explaining its own laws, and illustrating the principles of its Government. Up to the year of the separation, the decisions in the Reports may be regarded as the law of Maine, excepting in those cases where the new Constitution and legislative enactments have varied it. Those cases are comparatively few.

Maine may then be considered as having not merely the Cases in Greenleaf's Reports, but the whole series of decisions in the first 16 Vols. of the Mass. Reports, to make up her Judicial Learning.

Greenleaf's Reports may properly enough be regarded as a *New Series*, and whoever is desirous of keeping up his acquaintance with N. England Decisions, and more especially is disposed to follow out the cases reported in the Mass. Reports, in all their applications and illustrations, will find great aid from the Reports of Mr Greenleaf. He is not merely a reporter. He has long been an eminent Lawyer in his state, and now stands in the first ranks of his profession. He has a full and perfect knowledge of the cases which he reports; and his legal discrimination and judgment, enable him to give the points decided, their full and just statement.

We cannot better conclude this short notice of these reports, than in the language of the Jurist for July, 1830.

'The volume before us, like those which preceded it, bears ample testimony to the correct judgment and sound learning of the judges who preside in the Supreme Court of Maine. The opinions delivered, are generally clear and logical, and show a faithful and attentive examination of the questions presented for consideration.

The court is fortunate in having so accomplished a reporter as Mr Greenleaf, who is familiar with law both theoretically and practically, and who comprehends the full effect and bearing of the arguments and decisions which he records. Without this extensive legal skill and sagacity, there is always danger that a reporter will misrepresent the opinions advanced by counsel and the court, that his statements of cases will be clogged with a load of irrelevant matter, while important particulars are omitted, and that his abstracts will be inaccurate and unsatisfactory.

Mr Greenleaf appears to have aimed throughout his volume to present cases in as condensed a form as was consistent with rendering them clear and intelligible. The statements of facts are carefully confined to those circumstances which relate to the questions of law presented to the court; and we are never troubled with those repetitions of which we have sometimes had occasion to complain in other reporters. Indeed, in a very few instances, Mr Greenleaf's study of brevity has led him to omit in his statements circumstances which would have rendered the cases more easily and readily intelligible.

The arguments of counsel, where they are given, are usually stated with sufficient clearness and precision.

The abstracts are, in most instances, well made, presenting the points decided by the court, with great brevity and accuracy. In some few instances, however, the reporter has neglected points which were raised at the bar, and decided by the court. We question the expediency of such omissions, for although the points thus neglected are usually of familiar principles, yet it is often convenient, especially for the younger members of the profession, to be able to find from the index, that certain principles have been recognised by the judges under whom they are practising.'

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## COVENTRY AND HUGHES' DIGEST.

This digest published in England in 1827, begins to appear in our libraries. This and Harrison's index include a complete series of legal reports down to Hilary term, 1829. The work of Coventry and Hughes is entitled 'An Analytical Digested Index to the Common Law Reports from the time of Henry III. to the Commencement of the reign of Geo. III. with tables of the Names and Titles of Laws.' The work is in two volumes of 1666 pages, and imported from England, costs twenty dollars or over. The compilers say, in their preface, 'To render the work more extensively useful, the whole of the modern matter to be found in the valuable notes to many of the reports, has been faithfully embodied, and references have also been made to cotemporaneous Reports in the Courts of Equity, and also to important recent decisions and statutes, showing the alterations which have been made in particular branches of law.'

These volumes include the following eightyseven sets of reports, namely:

Alleyn, Anderson, Andrews, Barnard, Barnadison, Barnes, Bendloe, Bailee and Dalison, W. Blackstone, J. Bridgman, Orl. Bridgman, Brownlowe, and Goldesborough, Bulstrode, Bunbury, Burrow, Burrow's Settlement Cases, Carter, Carthew, Cases Temt. Hardwicke, Cases of Practice in C.P., Clayton, Coke, Comberback, Comyns, Cooke, Croke, Cunningham, Davies, Dyer, Fitzgibbon, Foley, Fortescue, Foster, Freeman, Gilbert, Godbolt, Gouldsborough, Hardress, Hetley, Hobart, Holt, Hutton, Jenkins, Sir Th. Jones, Sir Wm. Jones, Keble, Keilwey, J. Kelyng, Sir Wm. Kelynge, Kenyon, Latch, Leonard, Levinz, Ley, Lilly, Littleton, Lutwyche, March, Modern, Moore, Noy, Owen, Palmer, Parker, Plowden, Pollexfen, Popham, Practical Cases in K. B., T. Raymond, Ld. Raymond Ridgeway, Rolle, Salkeld, Saunders, Saville, Sayer, Shower, Siderfin, Skinner, Strange, Styles, Vaughan, Ventris, Willes, Wilson, Winch, Year Books, Yelverton.—*Jurist.*

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## New Publications.

A Sermon on the Decease of Hon. Isaac Parker, Chief Justice of Massachusetts. By J. G. Palfrey, A. M.

MR PALFREY'S SERMON. This day published by GRAY & BOWEN, No. 141, Washington Street, a Sermon preached in Brattle Square Church, Boston, August 1st, 1830; the Lord's Day after the decease of the Hon. Isaac Parker, Chief Justice of Massachusetts. By J. G. Palfrey, A. M. Pastor of the Church in Brattle Square. Aug. 28.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By William Hilliard, Jr. Counsellor at Law. Revised by Benjamin Rand, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

The work will be published with despatch.

The work will be printed on a beautiful small type, and good paper, and will be comprised in four or five volumes, (probably not exceeding four,) royal octavo size, each volume to contain about 1000 pages; and will be delivered to subscribers at $5 per volume, in good law sheep binding, which is a very low price for a law work embracing so great a quantity of matter.

After publication the price of the work will be raised to $6 per volume.

RECOMMENDATIONS.

From Hon. Joseph Story, Judge of the Supreme Court of the U. S.; and Hon. Isaac Parker, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan itself suggests.

ISAAC PARKER.

PICKERING'S REPORTS, No. 1, Vol. 8th, this day published by HILLIARD, GRAY & CO. July 10.

GRAY & BOWEN have in press A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By George Crabb, A. M. Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

'This little volume contains definitions of all terms of art and science, with such additional explanations in some cases as serve to illustrate something more than the bare meaning of the word. It is drawn up with special regard to brevity, in order to comprehend within a convenient space all words on which the reader may wish for immediate information. Although so small in bulk, yet this book will be found to contain a vast number of words which are not to be met with in any other works whatever, the explanation of which is nevertheless highly necessary for those who are not in the constant habit of hearing them used in ordinary discourse. Of this description are the Latin phrases now adopted into our language, as "Sine quâ non," "Ne plus ultra," and the like. The historical essays on each science, which have been expressly composed for this Dictionary, serve to show the progress of the arts and sciences from the earliest periods to the present.'

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

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Terms.—Not less than 24 numbers of a 12mo size, containing 24 pages each, will be published in a year, at $1,50, payable in advance. July 10.

CARTER AND HENDEE have in Press, SELF EDUCATION; or, The Means of Moral Progress, *Translated from the French of M. Le Baron Degerando.* To this work was awarded the honor of being 'crowned' by the French Academy; a distinction annually confered on one or two works, deemed the most useful that have been published during the year. And a late Review remarks; 'We have no ethical work of any living English writer to be compared with that of Degerando.'

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Common Place Book of American Poetry. By George B. Cheever.

THIS DAY PUBLISHED,— By GRAY & BOWEN, a second, and cheap edition of '*British Opinions on the Protecting System*, being a Reply to Strictures on that System, which have appeared in several recent British Publications.' Reprinted with a few alterations from an article in the North American Review, for January, 1830.

NEW LAW BOOKS.— JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

CONDENSED REPORTS of CASES decided in the SUPREME COURT of the United States, from the organization of the Court at August term 1791, to January term 1828. Edited by Richard Peters, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

This work is intended to contain the opinions of the Supreme Court, *in the language of the Judges*, in every case decided in that court from the establishment of the Government of the United States, to the commencement of Mr Peters's Reports at January term 1828. The reported decisions in the Circuit and District Courts of the United States, upon similar points, are also collected and digested in the work, as notes; and abstracts of those Cases, and also of the collateral decisions of the Supreme Court are given, so that the Professional Gentleman and the Student will be in possession of all the adjudicated Law of all the Courts of the United States, in an authoritative, condensed, and arranged form.

The work will be contained in not more than six volumes; the first volume is now published; the second volume will be published about the 1st of August, and the balance of the work during the present year and 1831.

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Sugden on the Law of Vendors in 1 vol. 8vo.

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CHANCERY REPORTS. JOHN GRIGG, has in press the Decisions of the English Chancery Reports, upon the plan which has been adopted and successfully executed with the 'English Common Law Reports.' The work will comprehend, in a condensed form, all the Reports which have *not* been republished in the *United States*; and it will be continued, so as to present to the profession, annually, the Chancery Reports as they shall hereafter appear in Great Britain.

The work will also contain references to the decisions of the chancery courts of the United States, and of the several states. July 10.

NORTH AMERICAN REVIEW. Complete sets of this work (thirty volumes in all) can now be had, on application to the Publishers, on liberal terms. The number and variety of the topics discussed in this work, and the high reputation it enjoys both in this country and Europe, render it a most valuable addition to the library of literary men. A General Index of the first twentyfive volumes has also been published, in a style to match with the current volumes of the work.

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## MERCANTILE LAW.—No. II.

[Continued.]

For the sake of distinctness, we have all along supposed these various negotiations to be carried on immediately between the parties directly interested. It must, however, have been obvious that transactions so extensive between persons removed at great distances from each other, could not be managed either so conveniently or so beneficially without the intervention of some third party between the principals in the contract. To conclude bargains with advantage, it is necessary to be always on the spot, to catch the favorable turns in the market; while on the other hand the superintendence of a large establishment forbids the frequent absence of the proprietor. Again, in foreign trade it is desirable, if not indispensably requisite, to have agents resident abroad, to receive consignments of goods exported, to dispose of them advantageously for the owner, to purchase and ship off such foreign commodities as he may want in return, and to make and receive the necessary payments and remittances. It may readily be supposed, therefore, that mercantile agents have long constituted a separate and important class. These, under the general name of brokers, comprehend several distinct kinds. Those who are concerned in the sale and purchase of commodities, are either *brokers* specifically so termed, or *factors*. The former have not the possession of goods, but simply conclude the bargain in the name, and on the account of some other person. When the agreement for sale or purchase has been made, the broker gives to the seller a memorandum of the sale, to the buyer a memorandum of the purchase, and the delivery of these notes (which are called *bought* and *sold* notes) at once binds the bargain, and confers on the principal the same rights and liabilities, as if the transaction had been carried on by himself in person. Factors are contradistinguished from these, principally by having possession of the goods, and dealing with them as their own, and in their own names. They are persons specially appointed to receive and make consignments of goods, on account of merchants residing either in another country, or in some distant part of the same country. In the former case they are called *foreign*, in the latter *home factors*. The direct profit of brokers and factors consists generally in a commission of so much per cent, on the amount of their sales or purchases. Occasionally, however, they render themselves answerable to their principal for the credit of the person to whom the sales are made, and are then said to act under a commission of *del credere* or guarantee, in which case an additional premium is stipulated for in consideration of the self-imposed liability. In London the brokers are licensed by the lord mayor, who administers to them an oath, and takes a bond for the due performance of their office. In addition to these, there are *ship* and *insurance* brokers—a body of men engaged in the buying, selling, and chartering of ships, the procuring of freight, and the negotiating of insurances;—*bill brokers*, who undertake all transactions relating to the purchase or discounting of bills of exchange, whose business it is to be perfectly acquainted with the course and rate of exchange between different countries, and to facilitate the remittance of money beyond sea, by procuring in return for cash or otherwise, bills payable in the country to which the remittance is to be made;—and, lastly, there are *stock* and *share brokers*, employed, as the name imports, in the transfer of shares in the public funds, or the joint stock of a company.

We have more than once had occasion to mention the importance of capital in trade; indeed it may almost be said that the chance of profit increases in a geometric ratio to the amount of capital. It follows, therefore, that if two or more agree in investing each a particular sum in a common trade or adventure, the profit of each will be greater than if he had pursued it separately on his own individual account. Again, the management of an extensive establishment requires a combination of skill and attention; and as common sense points out that those who have a direct interest in the success of an undertaking will be more zealous in their endeavors, it seems a natural and obvious expedient to secure this union of efforts by a community of profit and loss. From these two considerations undoubtedly arose the practice of *partnerships* in trade; and so beneficial and even necessary has the system been found, that there are now few trading establishments of any magnitude in this country carried on by single individuals. A partnership, then, is a voluntary contract between two or more persons for joining together their money, goods, labor, skill, or all or either of them, upon an agreement that the gain or loss shall be divided proportionably among them. In general all the partners appear ostensibly to the world, and constitute what is called the house or firm. It is, however, by no means uncommon for monied capitalists to embark considerable sums in trade, without taking any part in the management of the concern, or suffering their names to appear. Such persons are called *dormant* or *sleeping* partners, and when discovered are liable in common with the rest to the creditors of the firm. There are also *special* partnerships formed for a single adventure, and the consequences and liabilities of these are confined to the transactions thence arising. The number of partners of course is regulated for the most part by the amount of capital, and the degree of active exertion required. Hence, when undertakings have been projected of such magnitude as to call for an extensive combination of means, large partnerships have been formed, under the name of *companies*, for the prosecution of the design. In this way it is that great public works, alike useful to the community, and profitable to the adventurers, have been planned and executed, not, as in other countries, by the act of government, but by the voluntary efforts of individuals. It is to these that we are indebted for our admirable canals, magnificent bridges, roads, docks, piers, and other monuments of the wealth and greatness of England. By companies lands have been colonized, dominions acquired, and commerce spread into the remotest corners of the earth. But we are warned to withdraw from a topic, on the advantages and abuses of which we could gladly dwell. It is time we should hasten to a close; and we shall therefore content ourselves with observing, that of these companies some are formed and regulated by deed entered into by the parties, and are in fact no other than extensive partnerships; and that others are incorporated either by act of parliament or royal charter. Of the former are most of the companies established for the working of mines, whether in England or abroad, or for other speculations of a like nature. As instances of the latter, it will be sufficient to mention the different dock companies, the Bank of England, and the East India Company. It would be impossible here to enumerate the details of management and the different privileges of each of these important bodies. Thus much, however, is common to all. The capital in all is divided into a certain number of shares, in general transferable, whereof each partner may hold one or more, up to a specified limit, and in all the management of the company's affairs is committed to a body of directors chosen periodically from the proprietors at large.

We have now completed the sketch which we promised of the progress and operations of trade; and though in a subject so comprehensive, much has necessarily been omitted, and much left imperfect, yet upon the whole, perhaps it will be found sufficient for the purpose which we have had in view, of conveying to the student a clear and accurate notion of the connexion and principles of the whole.

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## JOHN SELDEN.

If a reputation for learning be one of the most difficult to acquire, it is certainly the most easy to retain. Men are very well disposed to take on trust the merits of the most renowned in this respect; and thus, while the names of Selden and others are scarcely ever mentioned without some addition indicative of their vast acquirements, their works are to be found only in a few well-stored libraries slumbering beneath the accumulated dust that checks with reverential dread the approaches of the curious. 'The great dictator of learning,' as his contemporaries styled him, is perhaps more neglected than any of his compeers, on account of the uninteresting nature of his subjects and the terrific titles he has conferred on them. The 'History of Tithes' might be important as disproving the divine right of the clergy thereunto, at a time when those opinions were general, now peculiar to Sir Harcourt Lees and Mr Fletcher: the Titles of Honor may still instruct a herald or amuse a maiden lady of good family; but we should be at a loss to conceive how ponderous volumes of elaborate inquiry into all the antiquities of Syria and Palestine, and minute chronicles of the traditions, customs, laws and manners of the Hebrew nation, could ever please any number of readers, unless remembering that the days are not so long gone by when it was held as important to ascertain how beards were worn or nails cut in

some country, in some century A. C., as to discover the deepest truths in morals or the soundest principles in legislation. The few works of Selden, too, that bear legal titles, are purely historical, and breathe only an antiquarian spirit. The student, who is anxious to learn the opinion of so celebrated a man from his 'Discourse,' touching the office of Lord Chancellor in England, feels disappointed at finding under that title a mere tracing of its existence from early Saxon times until the dignities of Lord Chancellor and Lord Keeper were united by statutes in the 28th Henry III. The tracts on testaments and intestates' goods, are framed on a similar principle, so that his services to future members of his profession may be summed up in his notes to Fleta, Fortescue, and Hengham. Yet Selden was a lawyer of the profoundest knowledge, and an advocate of the first ability; his speeches in parliament, and his vindication of the personal liberty of the subject, first clearly defined the bounds of royal prerogative on many points; and if, as Clarendon says, he was far more distinguished as a speaker than a writer, we may venture also to affirm, that, notwithstanding his entire devotion to literary labors, his life will be found far more instructive than his works. His biography has been undertaken by many hands, yet none seem to have clearly understood his character. He has been called by one party an infidel, a time-server, a bitter foe to church and king; by the other, a profound philosopher, a willing martyr. He was none of these. His chief characteristic was moderation; his sole defect was love of ease. But Selden's nature will be easily developed by referring to the chief events of his life.

John Selden was born at Terrington, in Sussex, at the end of the year 1585. He passed the common routine of education in those times at Oxford and the Temple. Learning alone, we may safely conclude, did not procure him in early youth the illustrious friendships of Cotton, Spelman, Camden, Usher, Drayton, and old Ben, but he appears throughout a prolonged life to have been a man of that happy moral constitution, whom to know was to admire and love. His History of Tithes first introduced him, at the age of 33, upon the perilous arena of public life, where a thousand symptoms told already of a fast coming and a fearful conflict. This result was probably neither expected nor desired by the author. There is an honest earnestness and mild simplicity in every page of this somewhat tedious work, that clearly indicates his object was to elicit truth rather than to provoke controversy. His after life demonstrated that he was in inmost heart a friend to the established church; and the vindicative malice of his antigonists only proves how completely that Romish spirit still prevailed in England, which recognized no difference between friend or foe when an unlicensed hand was stretched forth to strengthen or to shake the fabric of ecclesiastical dominion. That Selden recanted and made submission for his offensive publication before the high commissioners is certainly on record, but his repentance was expressed rather for publishing than holding such opinions; and we may in common charity believe that so gentle and amiable a person was grieved in very truth at having awakened so much ill-feeling in those critical times. Who can doubt the pure intentions of the writer, who reads the following extract from his preface, where he seems for a moment to escape from the trammels his idolatrous veneration for antiquity had cast around him, to catch a glimpse of the real and essential truth beyond the mists of prejudice and time, and to kindle with a more sound and profitable philosophy than he could gather from his Rabbins or his Eutychius. After contending for the right of the laity to give opinions on church matters, he goes on.

'If it be clear then, as I hope none hath the impudence to deny it, that neither the divine, nor civilian, nor canonist, by the course of their own appropreed studies, can come to what is necessary in the knowledge of the 'History of Tithes,' it will be as clear that none of them could challenge the meddling with it as a right especially belonging to any of their profession. But neither, indeed, is it proper to any one alone of those that are most commonly made professions. The truth is, both it and not a few other inquiries of subjects too much unknown, fall only under a far more general study; that is, of true philology, the only fit wife that could be found for the most learned of the gods. She being well attended in her ἐγκύκλια διακονήματα or daily services of inquiry by her two handmaids, curious diligence and watchful industry, discovers to us often from her raised tower of judgment many hidden truths that on the level of any one restrained profession can never be discerned. And every profession takes from her to itself, as was long since observed, some necessary part not elsewhere to be sought for, not much otherwise than as the subaltern sciences do from their superiors, or as they all do from that universality or first philosophy which is but the more real part of true philology and establishes principles to every faculty that could not of itself alone know how to get them.' v. 3. p. 1073. Ed. 1726. If philology, a term often applied to researches of little use into idioms and forms of construction, be here received in the extended sense the author means it, the ideas conveyed in this passage are still finer than the language that clothes them.

A dispute about a herring fishery first introduced Selden to the notice of king James I. He himself modestly attributes the favorable reception he experienced to the influence of the all powerful Buckingham, with whom Jonson had interceded in his behalf. But James was probably annoyed so much by the publication of the Mare Liberum of Grotius to vindicate the right of the Dutch and other nations to use the sea round Britain, that on hearing Selden had in part prepared a reply, he was willing to overlook his delinquencies on the tithe question, although he forbade peremptorily any further contention on the subject with Mountague, then engaged in confuting the 'History.' 'Quod confutationis futuræ puto non exiguæ per se confutationis instar fuit,' says Selden with some triumph, in his Vindiciæ. The Mare Clausum, such was the title of the vindication of our maritime dominion, was not, however, published for some years. It is characteristic of the meanness and weakness of James, that he took the author with him to his closet with the design of affixing his imprimatur to the work, when he paused suddenly, 'remembering,' as he said, 'that some things were therein spoken of the North Sea, which might, perhaps, displease his brother the King of Denmark, which he should be unwilling to do just now, when he already owed him a power of money and was shortly about to beg the loan of more.'

In 1621 Selden was employed by the commons, though not yet a member of that house, to draw up the famous protestation in favor of their liberties and privileges. For this offence he was imprisoned by the king. This short durance of five weeks would scarcely deserve notice, were it not that a letter still exists, sent in his excuse to Buckingham by Archbishop Williams, wherein the writer speaks of an inclosure, in Selden's hand, disavowing any disapprobation of that power and judicature lately usurped by the commons. Much outcry has been raised at this apparent tergiversation and poltroonery, but it must be remembered that he had drawn up the protestation as a hired advocate only, that he had not then intermeddled with political disputes, and may at least be supposed at that time to have adopted no decided opinions on the state of public affairs. When his attention was once turned to these matters, we shall see how resolutely he adopted the cause of the people. His quiet neutrality during the session that he sat in parliament for Lancaster, at once evinces his love of ease, and his then undecided state of feeling.

But the time at length came for his displaying to an admiring nation qualities hitherto concealed. The zealous patriotism that distinguished all his actions in the first parliaments of Charles the First, and the undaunted resolution that he manifested beneath the royal displeasure, must insure him the gratitude and admiration of all ages. In 1627 he defended in the most able and conclusive argument the cause of Sir Edward Hampden, one of the gentlemen imprisoned for refusing to submit to the imposition of forced loans. In 1628 he was employed by parliament to search their records previous to drawing up their four resolutions respecting the freedom of the person, and the necessity of their co-operation for imposing taxes on the subject. On the dissolution of 1629, he shared the imprisonment of those members whom the rash and most unfortunate Charles esteemed most seditious and refractory. Selden's conduct on this occasion marks it as the most brilliant epoch of his life. Inspired by the magnitude of the occasion, he seems for a time to have cast off his habitual love of ease, and by his dignified yet powerful remonstrances he confounded argument and silenced insolence, while, in refusing to accept of bail or to make any humiliating submissions to the judges whom he deemed unjust, he carried the spirit of uncompromising heroism even farther than any of his follow-sufferers. The cause of his final release after three years' imprisonment is most curious. It was effected by the Earls of Arundel and Pembroke, who, being involved in a dispute about the title to an enormous property, thought no other man in England capable of managing their cause. With his habitual love of literary labor, he had availed himself of the time spent in bondage to complete some of his most elaborate works.

Thus far the co-operation of Selden in deed and spirit with the cause of the people had been entire and unflinching, but the moderation and prudence of his character began to operate most powerfully, when he discerned the omnipotence of the parliament, and their intention to profit by it to the uttermost. He was not gifted with that far-seeing and untaught philosophy which might have revealed to him amid the terrors of an approaching civil war the magnitude of the ultimate good that posterity must derive from the contest, but as a shrewd and well judging man he perceived that a revolution must take place, that the foundations of government must be subverted, and he perhaps anticipated that a worse and more despotic system would arise from the ruins of the present. The lover of ease and order was of ne-

cessity averse to tumult; the temperate and benevolent politician thought that certain misery in fact was too dear a price to pay for an uncertain good in prospect. His hatred too of bigotry and puritanism, of which his Table Talk affords ample proof, had, perhaps, great influence on his conduct, when he saw how thoroughly the cause he had adopted was tainted with religious intolerance. In all this his head may be judged wrongly, but his heart was right. Selden might lag behind, but he did not desert his party; he might wish to prevent the downfall of royalty, but he accepted no favors from the court. He dedicated some learned works to Laud, because the archbishop was a patron of learning; he assisted in 1633 in getting up a masque for the entertainment of the court, because he loved the stage and loathed the sentiments of Prynne's Histriomastix; but he was still an inflexible and uncorrupted patriot.

The strongest act of Selden in opposition to the popular party was his vote against the attainder of Lord Strafford. That he should have sought to stay the punishment of that bold bad man may at first appear extraordinary. Mr Godwin, in recording this note, observes, with no very great liberality, 'Such after all is the best of lawyers.' We will go farther than the philosophic author of the History of the Commonwealth, and venture to affirm that Selden's conduct proceeded from what is generally complained of as the worst fault of lawyers—a high estimation of the value of precedent. But did he not vote rightly and most wisely? Strafford was a dangerous man, but he was arraigned under Edward the Third's famous Statute of Treasons, and he had committed no act that came within that statute; he was therefore arraigned unjustly. 'But,' say the pleaders for his punishment, 'his death was necessary, for his energy and wisdom might have insured the triumph of the royal party.' A strange opinion, as it seems to us, that the genius of any single individual can long check a revolution of which a people have and feel they have a need. But grant it for a moment true, and admit, that utility, not justice, should be the regulator of political conduct; it may be doubted whether the example of a House of Commons forcing the statutes to bear what interpretation might best suit them, in order to punish an obnoxious individual, was not fraught with more danger to the cause of liberty and happiness, than the suffering Strafford to exist. The house itself was well aware how frightful a precedent they had introduced by this act of attainder. They in consequence inserted a proviso, that 'no judge or other magistrate shall adjudge anything to be treason in any other manner than they would have adjudged if this act had never been made'—an admirable scheme, teaching future parliaments how to steal the steed, and lock the stable door in the same moment. Mr Godwin nevertheless would seem to think that this proviso neutralized all the dangers of the act. Yet only four years afterwards, Laud, in the extremity of age and weakness, was dragged forth to public execution under a similar bill, with a similar proviso tacked to it. Encouraged by this specimen of a secure method for quelling an enemy, the Commons now employed it to remove a powerless and imbecile old man, who, even granting him to have been (as some writers assert) a wretched compound of superstition, vanity and cruelty, should have been left like a fangless bloodhound to linger out the trifling remnant of his days, unregarded or despised.

[To be concluded.]

## CHIEF JUSTICE PARKER.

Sketch of his character as an advocate and lawyer—by an eminent Judge of the Supreme Court of the United States.

Mr Chief Justice Parker brought with him to the Bench the reputation of an able, active and learned advocate. He had well earned that reputation by a course of long and honorable practice in the then District, now State of Maine. His talents (high as they were,) were not his only recommendation. He possessed what talents may adorn, but what talents, however shining they may be, never can supply, the *mens conscia recti*, an inflexible integrity, a deep-rooted and enlightened virtue. His private life was without reproach, his honor without stain, his political and civil career straightforward and steady. His manners were frank, modest, and winning, without ostentation and without affectation. Nature had given him a mild temperament, a quiet and moderated cheerfulness, an ingenuous countenance, and social kindness, which pleased without effort, and was itself easily pleased. But his most striking characteristic was sound sense, which, though no science, is, in the affairs of human life, fairly worth all, and which had in him its usual accompaniments, discretion, patience, judgment. In his professional harangues he was persuasive and interesting; he had the earnestness of one, who felt the importance of fidelity to his client, and at the same time the sincerity of one, who felt the dignity of truth, and of that jurisprudence, whose servant he was, and whose precepts he was not at liberty to disown, and was incapable of betraying. In the sense sometimes affixed to the term, he did not possess eloquence, that is, he did not possess that vivid imagination which delights in poetical imagery, or in rhetorical flourishes, in painting the passions or in exciting them into action. He was not addicted to a rich and gorgeous diction, or to color his thoughts with the lights and shades, or the brilliant contrasts of a variegated style. But in a just sense, if we look to the means or the end, to his power of commanding attention, or his power of persuading, and convincing the understanding, he might be deemed truly eloquent. His reasonings were clear, forcible and exact; his language, chaste, pointed and select; his fluency of speech uncommon; his action animated; so that in their actual union they gave a charm to his arguments, which won upon the ears and captivated the judgment of his audience.

Such was the reputation and character, which he brought to the Bench. He took his seat among distinguished men; and he sustained himself as a worthy and equal associate. He did more, and accomplished what few men do accomplish; he moved on with a continual increase of reputation, even to the very hour of his death. He lived through times, happily now past, of peculiar delicacy and difficulty, in the midst of great political changes and excitements, when the tribunals of justice were scarcely free from the approaches of the spirit of discord, and the appeals of party were almost ready to silence the precepts of the Law. During this period, his firmness, moderation, patience, and candor secured to him the public confidence. When the office of Chief Justice became vacant by the lamented death of Mr Chief Justice Sewall, all eyes were turned towards him as the successor. His appointment gave universal satisfaction. And yet, if he had died at that period, half of his real merits would have remained unknown. His ambition was now roused to new exertions by the responsibility of the station; his mind assumed a new vigor; his industry quickened into superior watchfulness; and he expanded, so to say, to the full reach of his official duties. It was a critical moment in the progress of our jurisprudence. We wanted a cautious, but liberal mind, to aid the new growth of principles, to enlarge the old rules, to infuse a vital equity into the system as it was expanding before us. We wanted a mind to do in some good degree what Lord Mansfield had done in England, to breath into our common law an energy suited to the wants, the commercial interests and the enterprise of the age. We wanted a mind, which, with sufficient knowledge of the old law, was yet not a slave to its forms; which was bold enough to invigorate it with new principles, not from the desire of innovation, but the love of improvement. We wanted sobriety of judgment; but at the same time a free spirit, which should move over the still depths of our Law, and animate the whole mass. Such a man was Mr Chief Justice Parker. And whoever in this age, or in any future age, shall critically examine the decisions of the Supreme Court during the sixteen years, in which he presided over it, will readily acknowledge the truth of these remarks. There was in his mind an original intrinsic equity, a clear perception of abstract right and justice, and of the best mode of adapting it to the exigencies of the case. He felt, as Lord Ellenborough before him had felt, that the rules, not of evidence merely, but of all substantial law, must widen with the wants of society; that they must have flexibility, as well as strength; that they must accomplish the ends of justice, and not bury it beneath the pressure of their own weight. There is in this respect much, very much to admire, and, if it were possible in our reverence for the dead, to envy, in his judicial career. Few men have ever excelled him in the readiness of grasping a cause, of developing its merits, or of searching out its defects. He may have had less juridical learning than some men; but no man more thoroughly mastered all that was before him, or expounded with more felicity the reasons even of technical doctrines. He had an almost intuitive perception of the real principle pervading a whole class of cases, and would thread it through all their mazes with marvellous ability. His written opinions are full of sagacity, and juridical acuteness, at the same time that they possess a singular simplicity and ease. He rarely fails to convince, even when he questions what seems justified by authority. His judicial style is a fine model. It is equally remarkable for propriety of language, order of arrangement, neat and striking turns of expression, and a lucid current of reasoning, which flows on to the conclusion with a silent but almost irresistible force. In his more studied efforts, in some of those great causes, in which the whole powers of the human intellect are tasked and measured, he was always found equal to the occasion. There are not a few of his opinions on some of these intricate subjects, which would bear a close rivalry with the best in Westminster Hall in our own times. There are some, which any Judge might be proud to number among those destined to secure his own immortality.

But we must stop. The time for mourning over such a loss cannot soon pass away. We have lost a great magistrate, and an excellent citizen. Vain is the voice of sorrow, and vainer still the voice of eulogy. They cannot recal the past. His place cannot be easily supplied; for it is difficult to combine so many valuable qualities in a single character. To sum his up in one sentence,

we may say, that, as a Judge, he was eminent for sagacity, acuteness, wisdom, impartiality and dignity; as a citizen for public spirit, and elevated consistency of conduct; as a man for generosity, gentleness, and moral purity. His fame must rest where it is fit it should; upon the printed Reports of his own decisions. These will go down to future ages; and though perhaps beyond the circle of the profession they may not attract much general observation, (for the misfortune of the profession is, that great Judges and great Lawyers cannot enjoy a wide-spread popular favor,) they will yet be read and honored by the jurists of succeeding times with undiminished reverence, when those of us, who have known and loved him, shall be mingled with the dust, that now gathers round his remains. They will often recal to the classical reader the beautiful eulogy of Cicero upon a great character of antiquity, so applicable to his. Erat in verborum splendore elegans, compositione aptus, facultate copiosus; eaque erat cum summo ingenio, tum exercitationibus maximis consecutus; rem complectebatur memoriter, dividebat acute, nec praetermittebat fere quidquam, quod esset in causâ, aut ad confirmandum aut ad refellendum.

## ENGLISH CASES.

### VICE-CHANCELLOR'S COURT—MAY.

*Tyler v. Drayton.*

Mr Sidebottom was heard on the same side with Mr Horne and Mr Knight, for the defendent Drayton.

Mr Pepys appeared as Counsel on behalf of Mr Sergeant Wilde. Before he commenced his speech for the Learned Sergeant, he stated that the Learned Sergeant was desirous of being himself heard, together with his two Counsel, and wished his Honor to appoint a time for that purpose.

The Vice Chancellor said that it was contrary to the usual rules of the Court to permit a party to be heard as well by himself as by his Counsel. It would, therefore, be advisable either to permit Mr Sergeant Wilde to be heard alone or by his Counsel.

Mr Pepys then spoke on behalf of Mr Sergeant Wilde, and urged nearly the same points as had been touched upon by the Learned Counsel who had preceded him. With respect to Mr Sergeant Wilde's own case, the facts were clear and undisputed, that the Learned Sergeant had, previous to his being called to the bar, assigned all his interest in the business with Mr Knight to the latter gentleman for 6,000*l*. The Learned Sergeant, therefore, had no interest of any kind in the question, whatever he might formerly have had. The Learned Counsel, in the course of his speech, touched upon the agreement between Drayton and Jenkins in 1807 followed up by that of 1816, and contended that, under all the circumstances, there was no gross inadequacy of price—that it was a bona fide fair and open transaction, and could not now be impeached. The Learned counsel, at considerable length, detailed the different transactions in the case, and dwelt with much force upon the sale which had been made of a portion of the estate by Drayton and others, with respect to which it was not even pretended that there was any inadequacy of price. Upon the whole, he urged that the bill ought to be dismissed with costs.

Mr Jacob spoke at much length on the same side, and occupied the remainder of the day.

Mr Sergeant Wilde, just previous to the conclusion of Mr Jacob's speech, entered the Court, and, somewhat to the surprise of all present, took his seat between the Solicitor General and Mr Agar. When Mr Jacob had finished his address,

Mr Sergeant Wilde rose, and in a low tone of voice stated that, in consequence of what he had heard from his Learned Counsel, Mr Pepys, by whom his cause had been so ably advocated, he wished to address a few words to the Court. He was desirous, in the first place of setting himself right with the Court in one particular. He had always understood that every Barrister had a right to address the Court as well in his own behalf as on the part of others.

The Solicitor General was not anxious that the Learned Sergeant should be prevented from addressing the Court; indeed he was desirous that ample opportunity should be afforded to the defendants, and he should, therefore, offer no opposition.

The Vice-Chancellor then directed that Mr Sergeant Wilde should be heard on Tuesday next.

*Tyler v. Drayton.*

Mr Sergeant WILDE entered into a detail of the case at considerable length, and observed that he should have been unfeignedly proud to have attended at his Honor's bar upon any occasion but the present; but for any man to appear in his own cause—for an individual standing as he did at the bar, it was most peculiarly painful, and he trusted that it would be considered that nothing but a strong sense of duty would have compelled him to quit the interests of those clients committed to his care in the Court where he usually practised. He must in the outset beg to assure the Court that nothing was more distant from his mind in thus appearing than the supposition that the Learned Counsel appearing on the part of the defendants had not done everything that talent, ingenuity, zeal, and learning could have done—he was fully sensible of this; but, although he was so, he could not but think that those who were generally engaged in defending others could not, in the multiplicity of their avocations, be so well acquainted with all the circumstances as others might be, and that the man whose honor had been unjustly attacked should not be backward in defending himself. For that purpose it was (he was going to say) that he presented himself face to face with his opponent. Unfortunately, however, his opponent was not here. He (Mr Sergeant Wilde) was not brought before the Court upon the record. He was not here to advocate any pecuniary interest he might have at stake in this case, nor was it his intention to discuss any point relating to pecuniary questions; he had no doubt all such questions had been most ably and fully discussed by those much more acquainted with the technicalities of the Court on that subject than he was; but even if that had happened, which was not at all likely—namely, that there had been any omission—he should feel himself degraded, when he had so much deeper an interest at stake, in embarking in pecuniary questions. He could not find anything upon the face of the record that would justify him in intruding upon the Court and had it not been for the attack upon him he never would have done so. Where that attack had come from he could not say—whether from instructions or otherwise he could not tell; but certain he was they were not to be found upon the record. He never dreamt that he was more than a formal party; he had not the remotest conception that he should have to stand before the Court to defend the part which he had taken in the transactions. The record concealing from him that there were any imputations against him, he had now to approach it, not for the purpose of answering anything alleged there, but to answer that which had been said at the bar, which was not upon the record, and which was not warranted by anything in the case. He had no doubt that the Learned Solicitor General, in stating what he did, had acted under a strong impulse of duty. He knew of no feelings more likely to lead an honorable man into warmth of expression than those which an Advocate would feel in taking care not to sacrifice the interests of his clients. He did not expect forbearance where the client was to suffer, but he was sure the Solicitor General would never have stated what he did if all the facts of the case had been in his memory. Thus deceived in the shape of the record, scarcely having looked at the evidence in the case, never having seen his Counsel, or paid one moment's attention to it, he was surprised on his Counsel informing him that facts had been so misstated and so distorted; he could safely say the information of this was the most painful moment of his life. Upon this he ordered as correct a transcript of the speech of the Solicitor General to be procured as possible, and he there found that Learned Gentleman commenced, as he (Sergeant Wilde) would have expected by the known view he took of his case, by expressing his regret at the occurrences that had taken place in this case, and the parties connected with it, but making a covenant with himself that nothing should fall from him but a dry statement of facts. He (Sergeant Wilde) lamented that that course had been deviated from, for, in the very beginning of that Learned Gentleman's speech, he found sarcasm, invective, and declamation—everything but a plain, clear statement of the facts of the case. He did not mean to say that some of the circumstances that existed in the case had not been detailed, but the order of them had been so perverted, the facts so distorted, and the whole deriving such a coloring from the statements made, that it would have been impossible for any person really to have known what the case was. Under such circumstances he thought it necessary to appear before the Court. There was nothing here to show the Court that the individual whose estate was the subject of consideration was not as capable as any one to understand, and was perfectly aware of the nature of the transaction; nor was there anything to show that undue advantage had been taken of him. He (Sergeant Wilde) had never profited one shilling by this transaction, and never could. The transaction which had been the subject of consideration before the Court was one which took place in 1807, and which was again the subject of certain deeds and transactions in 1816; and the question was as to the capacity of Jenkins' mind to do what he had done, and as to whether he had been fairly treated in the course of these transactions. The Court would not fail to have observed that this was not the complaint of the individual who was interested in the transactions; it was not Griffith Jenkins that was now before the Court—not the soldier of

whom the Court had heard so much: it was not the unfortunate wretch whom the Solicitor General had so much pitied and commented upon; it was not the unfortunate man who had suffered military punishment sooner than agree to the propositions of his unfeeling grandfather; it was not the alleged maniac that was upon this record; but it was his aunt—that aunt who had suffered him to be in that distress—that aunt who had permitted him to pass his life without that kindness and protection on her part which she ought to have bestowed towards him—that aunt who only feels for his misfortunes when she is a suitor in this Court, claiming his property. Griffith Jenkins, who was a young man of good education, had powerful friends, possessing property, influence, and information. The Solicitor General had designated him as the most unprotected and profligate of men. But by whom was he unprotected? Why, by those very individuals who ought to have afforded him protection. No complaint whatever came from Griffith Jenkins as to this transaction—not even a murmur comes from him. If he had felt dissatisfied with what had been done, all the Courts of England were open to hear the complaint, and the arm of Justice would have wielded her sword in his favor; but his whole life passed without his feeling that injury had been done him, by those who were brought before the Court upon the present occasion. The Solicitor General commenced by professing to give a history of the transaction; he (Mr Sergeant Wilde) had had much more experience in the profession than, perhaps, his appearance would bespeak, and he had never known a case, till the present, where the Counsel, having all the facts of the case before him, had kept the Court in the dark as to what the case really was; nay, more, had actually had the boldness to call upon his adversaries to say if he had exaggerated or omitted anything. (The Learned Sergeant here went into a long history of the case, the facts of which are before the public.) He could not but designate the whole of the Solicitor General's address, every iota of it, as being composed of sarcasm, satire, and intentional misrepresentation; it was libellous and slanderous from beginning to end. He (the Solicitor General) should recollect that he was dealing out poison that would be circulated through every part of the empire. It was true that, when he (Mr Sergeant Wilde) came into Court the other day, the Learned Solicitor General had done him the honor of extending his hand to him; but if only half of what that Learned Gentleman had been represented to have said of him was true, smarting as he was under attacks as unfounded as cruel, how could he consistently accept that hand? When, however, he found that he had done him justice—when the atonement he could make for the injuries he had inflicted had been made—he should be most happy to take that hand, which, till that period, he must refuse.

The Court was crowded to excess during the whole morning.

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## DIGEST OF RECENT ENGLISH REPORTS.

*Hetherington* v. *Graham.*

Adultery is a bar to dower, though the wife did not elope with the adulterer, but left her husband's house and lived apart from him by his consent, and afterwards lived in adultery. 6 Bing. 135.

*Broad* v. *Pitt.*

No communications made to an attorney are privileged, but such as are made for the purpose of the attorney's either commencing or defending a suit. 3 Carr & Payne, 518.

*Rex* v. *Browne.*

An indictment for perjury tried before the Lord Chief Justice, at Westminster, charged the perjury to have been committed on a trial at Nisi Prius, at the King's Bench sittings. The prosecutor, to prove the trial at Nisi Prius, put in the *Nisi Prius* record, with the minute of the verdict indorsed on it by the associate. There was no *postea* drawn up, and the associate stated that none could be drawn up, as a rule for a new trial was pending: Held, to be sufficient proof of the trial at Nisi Prius. 3 Carr & Payne, 572.

*Kemble* v. *Farren*

Where it appeared on the record, that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, evidence of the declarations of one of such proprietors was held admissible on the part of the defendant. 3 Carr & Payne, 623.

*Affalo* v. *Fourdrinier.*

A. & B. were sued on a bill of exchange accepted by them while in partnership. Before the action, B. became a bankrupt, and, upon his pleading his certificate in bar, the plaintiff entered a *nolle prosequi* as to him, and proceeded against A. alone. Held that B., having released his interest in the surplus of his effects, was a competent witness for A. 5 Bing. 306.

*Jones* v. *Hunter*

Parol evidence held to be inadmissible of the terms of partnership, of which a rough sketch had been made in writing by one of the partners, and shewn to and approved of by another, although it was intended subsequently to extend it into a formal deed, and that had not been done. 1 Danson & Loyd, 214.

*Scott* v. *Beavan.*

If a party be sued in England on a judgment recovered in Jamaica, the amount is to be estimated at the par of exchange between England and Jamaica, and the defendant is not entitled to deduct the premium which bills on England bear in Jamaica. 1 Danson & Loyd, 301.

*Doe dem. Ambler* v. *Woodbridge,*

Ejectment on a clause of forfeiture in a lease for breach of any of the covenants. The lease contained a covenant not to use the rooms for any other purpose, than as bed or sitting rooms. They were used for other purposes up to the time of the trial; but the lessor, after he knew of such improper using, had received rent. Held, that there was a continuing breach every day during the time the rooms were so used, and that, consequently, fresh acts of forfeiture had done away the effect of the waiver by receipt of rent. 6 Barn. & Cress. 376.

*Mitchenson* v. *Begbie.*

The plaintiff contracted by charterparty with A. to take in a cargo of wheat at 4*s.* 6*d.* per quarter. A. when the ship arrived, had no cargo ready, upon which the captain bargained with B. to take a cargo at 6*s.* a quarter; and signed bills of lading by which the wheat was to be delivered to the defendants or assigns, they paying freight at the larger rate: in these bills no reference was made to the charterparty. It did not appear whether the captain had made this bargain as agent of the plaintiff or of A., but a sub-charterparty was entered into between A. & B.; but the time at which it was executed was not proved. Held, that the plaintiff was only entitled to recover 4*s.* 6*d.* per quarter of the defendants. 6 Bing. 190.

*Goring* v. *Edmonds.*

The defendant had guaranteed the payment of the price of certain goods sold by the plaintiff to his (the defendant's) son. The plaintiff made several applications to the son, and more than a year after the time of payment received a bill which was dishonored, but never applied to the defendant for nearly two years after the time of payment, nor gave him notice of the dishonor of the bill, nor of the state of the account. Held that the defendant was notwithstanding liable. 6 Bing. 94.

[N. B. The defendant, when applied to, admitted his liability; but this circumstance, though observed upon by Tindal C. J. in his address to the jury, is not alluded to in the decision of the court.]

*Newbury* v. *Armstrong.*

The following guarantee: 'To Mr J. N. Sir,—I do hereby agree to bind myself to be security to you for J. C., late in the employ of J. B., for whatever you may entrust him with while in your employ to the amount of 50*l.* in case of any default to make the same good,' signed by the defendant—was held sufficient within the statute of frauds; and per Tindal C. J. 'It may fairly be implied, that J. C. had left one service, and that the guarantee was given in consideration of his being taken into another. We ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life.' 6 Bing. 201.

*Hargreave* v. *Smee.*

The guarantee on which the case turned was as follows: 'Mr J. H. (the plaintiff) I do hereby guarantee the payment of goods to be delivered in umbrellas and parasols, to John and Edward Augustus Smee, at No. 38 Milk street, according to the custom of their trading with you, in the sum of 200*l.*' (signed by the defendant). The custom of their trade was found to be to make up monthly accounts. Held a continuing guarantee. 6 Bing. 244.

[It is worthy of remark that Park and Burrough, J. strongly reprobated the doctrine, laid down by Best, C. J. in Evans v. Whyle, 5 Bing. 485; that guarantees ought to receive a strict construction. Gaselee, J. had, as usual, 'great difficulty in deciding the case,' and was 'rather inclined to come to a different conclusion.']

*Kay* v. *Groves.*

Assumpsit on the following guarantee: 'I hereby agree to be answerable to Mr K. for the amount of five sacks of flour, to be delivered to T., payable in one month,' (signed and dated Nov. 18, 1828.) At the trial before Tindal, C. J., it was proved that on the 19th Nov. 1818, the plaintiff delivered five sacks to T.; on the 21st, five more; on the 24th T. sent back three and a half out of the first five; and three and a half other sacks were supplied to him that day. The C. J. left it to the jury to say, whether the delivery on the 24th was in substitution of any part of the delivery on the 19th, or whether it was made un-

der a new contract. The defendant having paid into court the price of a sack and a half, the jury found for the defendant; and on an application for a new trial, the case was held to have been rightly left to the jury: Gaselee, J. observing, 'If the delivery on the 24th was at a month's credit, it does not correspond with the guarantee, which was for a month's credit from the 19th.' 6 Bing.

*Bain* v. *Case.*

In assumpsit on a policy of insurance, the jury ought not to allow the plaintiff interest, unless it be proved that he applied to the underwriters to settle the loss after it happened, and notified to them the ground of such application. Lloyd's list is evidence against the assured, if it be shewn that the broker read it before the policy was effected. 3 Carr. & Payne, 496.

*Parry* v. *Aberdein.*

Action on a policy on goods, containing the usual warranty of 'free from average unless general, or the ship be stranded.' The ship on her voyage was so much damaged by a storm, that the crew were obliged to desert her; upon hearing of which, the insured gave notice of abandonment. The ship, however, was towed into port by some fishermen, nearly the whole of her hull being under water; and the goods were so much damaged by water, that they would have been worth nothing at the port of destination. Held, that though the goods remained in specie and were sold for the benefit of the salvors for a small sum, the plaintiff was entitled to recover as for a total loss. 9 Barn. & Cres. 411.

*Nelson* v. *Salvador.*

Warranty to sail on or before a day certain, is not complied with by being ready to sail, and proceeding a short distance along the moorings; nor is strict performance dispensed with by an unavoidable necessity preventing it. 1 Danson & Lloyd, 219.

*Hunter* v. *Leathley.*

A broker who has effected an assurance as the agent of the assured, is bound to produce the policy on the trial of an action on it by the assured, though he have a lien upon it for premiums. 1 Danson & Lloyd, 226.

*Harratt* v. *Wise.*

A policy of insurance on goods to a foreign port, was effected after notice in the London Gazette, that that port was in a state of blockade. The ship having sailed before this notice, and been captured, with the goods on board, for the alleged breach of the blockade: Held, that the assured, having given notice of abandonment, might recover on the policy, unless it were shewn that the captain had notice of the blockade in the course of the voyage. 1 Danson & Lloyd, 234.

*Winder* v. *Wise.*

If a ship, having sailed for a blockaded port before public notification of the blockade in this country, receive at any time during her voyage, intelligence of the blockade, but nevertheless continue her voyage to the blockaded port, and be captured in an attempt to enter it, a policy of insurance on the ship or her cargo is discharged. 1 Danson & Lloyd, 238.

*Naylor* v. *Taylor.*

A policy of insurance on goods to a foreign port, effected after notice in the London Gazette, that that port was in a state of blockade, though the ship sail after such notice, is not illegal, if it be part of the agreement, that inquiry shall be made as to the continuance of the blockade. 1 Danson & Lloyd, 240.

## MAINE.

### SUPREME JUDICIAL COURT.

Vol. 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Peters & al. vs. Foss.*

Where one, having entered into lands not his own, submitted to the title of the true owner, with whom he made a verbal contract for the purchase of the lands; and afterwards mortgaged them to a stranger; it was held that the mortgage was no disseisin of the true owner, the possession not having been changed.

*Hallowell vs. Saco.*

The domicil is not affected by the forming of an intention to remove, unless such intention is carried into effect.

*Richmond vs. Vassalborough.*

In a question of domicil, evidence of the party's conduct afterwards as well as before, may be received to ascertain his intention on a particular day.

It is of no importance, in a question of domicil under *Stat.* 1821, *ch.* 122, whether the occupancy of the house in which the pauper dwelt was by right or by wrong.

*Nason vs. Allen.*

The right of a widow to have dower assigned in the lands of her husband cannot be taken in execution for her debt.

*Thompson & al. vs. Prop'rs. Adr. Bridge.*

A recovery in a writ of right does not affect any claim of the tenant to an easement in the land.

The grant of a saw-mill, 'with a convenient privilege to pile logs, boards and other lumber,' conveys only an easement in the land used for piling.

*Green vs. Thompson.*

If in an action of trespass *quare clausum fregit*, before a justice of the peace, the defendant justifies under the plea of title in himself, and thereupon removes the cause, by recognizance, into the Court of Common Pleas, where he suffers judgment by default, before issue joined;—this judgment does not estop him from contesting the title of the same plaintiff, in a writ of entry subsequently brought for the land.

*Allen vs. Sayward.*

The covenant of lawful seisin in fee, and good right in the grantor to convey, does not operate to estop him from setting up an after-acquired title in himself, against the grantee.

*Clement vs. Durgin.*

In a prosecution by complaint against the owner of part of a mill-dam, for flowing lands, the owner of another part of the same dam, in severalty, is a competent witness for the respondent.

Where a commission issues to any judge or magistrate of another State, to take depositions in a cause pending in this Court, the official certificate of the judge or magistrate is received as *prima facie* evidence of his authority.

*Howard vs. Chadbourne.*

In an action brought by a mortgagee, against a stranger, to recover possession of the lands mortgaged, the fact that the demandant had assigned his interest to a third person, cannot be given in evidence under the general issue, but must be specially pleaded in bar.

In such a case, the mortgagor was admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt. *ib.*

*Reed vs. Jewer.*

If a bill of sale absolute on its face, was in truth made for collateral security only;—or if the possession of a chattel remains in the vendor, after sale;—neither of these circumstances is conclusive evidence of fraud, *per se*; but is only a fact to be considered by the jury in determining the question of fraud.

*Ross vs. Gould.*

A deed, imperfectly executed by an attorney as the deed of his principal, is nevertheless admissible in evidence, in aid of the grantee's entry, to show the extent of his claim of title.

Though a deed may be read in evidence to the jury, after the preliminary proof by the subscribing witnesses, yet if the genuineness of the instrument is in controversy, the burden of proof is still on the party producing it, to satisfy the jury, beyond a reasonable doubt, that it is genuine.

*Emery vs. Chase.*

Where, in a deed, a valuable consideration is expressed to have been paid, parol evidence is not admissible to prove another and different consideration intended, or promised and not performed.

## NEW HAMPSHIRE.

### SUPERIOR COURT OF JUDICATURE.

Vol. 4 contains the cases decided from January, 1827, to May, 1829.

*Farrar vs. Farrar.*

The cancelling of a deed does not revest property which has once passed under it by transmutation of possession.

But where a grantee has voluntarily, and without any misapprehension or mistake, consented to the destruction of the deed with a view to revest the title, he cannot be permitted to show by parol evidence the contents of the deed so destroyed, and in this way the destruction of a deed may have the effect of a reconveyance.

A mere agreement to cancel a deed without actually cancelling it, cannot, however, have this effect.

*Morse vs. Shattuck.*

When a consideration of money is expressed in a deed made for the purpose of conveying land, no averment can be admitted to the contrary for the purpose of defeating the conveyance.

But for the purpose of assessing the damages in an action of covenant broken on such a deed for the breach of the covenant of seisin, the true consideration may be shown by parol evidence, although a different consideration is expressed in the deed.

*Colby vs. Kenniston.*

J. K. in 1808 conveyed a tract of land to C. and in 1816 conveyed the same land to B. K. In a writ of entry against B. K., he having shown that there was no deed on record from C. to J. K., and that the latter had absconded and gone to parts unknown, was permitted to show by parol evidence the existence of a deed from C. to J. K.

He who takes a conveyance of land, knowing that another person has a previous conveyance by

an unrecorded deed, is guilty of a fraud and cannot hold the land.

And where, in such a case, the first purchaser is in the open visible possession of the land, this is notice to all the world, that he has a deed.

*Barker vs. Clark.*

The owner of three closes, A B and C, had a way by which he used to pass between the closes A and B, through the close C; he afterwards conveyed the two closes A and B, with their appurtenances—it was held that the way through the close C, did not pass.

*Hall vs. Hall.*

Where a wife has committed adultery, a subsequent cohabitation with her by the husband, with a knowledge of her guilt, is a remission of the offence, and a bar to a divorce.

THE JURISPRUDENT.

BOSTON, SATURDAY, SEPTEMBER 4, 1830.

*Harrison's Digest*—is a continuation of Coventry and Hughes', and is entitled 'An Analytical Digest of all Reported Cases determined in the House of Lords, and several Courts of Common Law, both in bank and at Nisi Prius, and also the Crown Cases reserved from Michaelmas Term, 1756, to Hilary Term, 1829; including the manuscript cases from the best modern treatises, not otherwise reported;' in two volumes, 1775 pages; price, imported, from sixteen to twenty dollars. The last two hundred pages of the second volume consist of Addenda of cases reported during the time of the work's being in the press, and also of cases overlooked by the compiler and omitted in the previous part of the work; for the omission of which the magnitude of the undertaking, and press of business, are offered as an apology.

The following is a chronological list of the reports comprised in the Digest; the dates having reference to the reign; it will be recollected that the reign of Geo. III. commenced 1760, and that of Geo. IV. 1820.

*In the House of Lords.*

Brown's Reports to 40 Geo. III; Dow, 53 to 58 Geo. III; Bligh, 58 Geo. III. to 3 Geo. IV.

*King's Bench.*

Wilson, 16 to 26 Geo. II.
W. Blackstone, 20 Geo. II. to 10 Geo. III.
Burrow, 30 Geo. II. to 12 Geo. III.
Lofft, 12 to 14 Geo. III.
Cowper, 14 to 18 Geo. III.
Douglas, 18 to 21 Geo. III.
Term Reports, 25 to 40 Geo. III.
East, 40 to 53 Geo. III.
Maule and Selwyn, 53 to 57 Geo. III.
Barnewall and Alderson, 57 Geo. III. to 3 Geo. IV.
Barnewall and Creswell, from 3 Geo. IV.
Dowling and Ryland, from 3 Geo. IV.
Chitty.
Smith, 44 to 46 Geo. III.
Burrow's Settlement Cases.
Caldecott's Do.
Kenyon's Notes.
Nolan.

*Common Pleas.*

Wilson, 20 Geo. II. to 14 Geo. III.
W. Blackstone, 10 to 20 Geo. III.
H. Blackstone, 28 to 36 Geo. III.
Bosanquet and Puller, 36 to 44 Geo. III.
New Reports, 44 to 47 Geo. III.
Taunton, 47 to 59 Geo. III.
Marshall, 54 to 57 Geo. III.
Moore from 57 Geo. III.
Broderip and Bingham, 59 Geo. III. to 3 Geo. IV.
Bingham from 3 Geo. IV.

*Exchequer.*

Anstruther, 32 to 37 Geo. III.
Forrest, 41 Geo. III.
Wightwick, 50 and 51 Geo. III.
Price from 54 Geo. III.
M'Cleland and Younge, 5 to 7 Geo. IV.
Younge and Jervis, from 7 Geo. IV.
M'Cleland, 4 and 5 Geo. IV.

*Nisi Prius.*

Peake's R., 32 to 37 Geo. IV.
Espinasse, 33 to 47 Geo. III.
Campbell, 47 to 56 Geo. III.
Starkie, 54 Geo. III. to 4 Geo. IV.
Ryan and Moody, from 5 George IV.
Holt, 55 to 58 Geo. III.
Gow, 58 and 59 Geo. III.
Carrington and Payne from 3 Geo. IV.
Dowling and Ryland's N. P. Cases.

In the 'Addenda,' besides cases from some of the preceding reports, there are those from Manning and Ryland (abridged M. & R.) K. B.; Moody and Malkin (M. & M.) K. B. and C. P.; Moore and Payne (M. & P.) C. P. Burrell and Ryan's Crown Cases reserved (B. & R. C. C.;) Ryan and Moody's Crown Cases reserved (R. & M. C. C.)

*Jurist.*

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*Petersdorff's Abridgment.*—The design of this work is to give a practical and elementary abridgment of the cases determined in the courts of King's Bench, Common Pleas, Exchequer and at Nisi Prius from the Restoration in 1660 to Michaelmas Term, 4 George 4th.—with important Mss. Cases. Such decisions are noted as have been affirmed, recognized, qualified or overruled. There are also copious notes and references to analogous adjudications, &c. The object is to give the material facts, pleadings, and judgments in the several cases reported as accurately and yet as concisely as possible. The general arrangement of Titles is alphabetical. But the cases in the subdivision of Titles are referred to chronologically to illustrate the gradual progress of settled principles. There are references also to the different Books in which the same case is reported—to the cases in which the same point has been determined or affirmed—to such cases or elementary writers as recognize or advert to the same rule or principle—to those cases which are at variance with the decision abridged or which have expressly overruled it. It is proposed to issue occasional Supplements to render the abridgment as complete a *Substitute for the Reports* as possible. Such a work is certainly a desideratum to those professional men, and they are many, who cannot have access to the full English Reports. We think the plan of this work much preferable to anything of the kind which we have seen, and so far as a very slight examination will enable us to judge, we should think it well executed. The following is an alphabetical List of the Reports Abridged: Andrews, Anstruther, Barnardiston, Barnes, Barnewell and Alderson, Barnewell and Cresswell, Bingham, Blackstone William, Bosanquet and Puller, Bosanquet and Puller, New Reports, Broderip and Bingham, Bunbury, Burrow, Burrows, S. C., Caldecott, Campbell, Carter, Carthew, Cases Practice, C. P., Cases Temp, Hardwicke, Chitty, Comberbach, Comyns, Cowper, Coke, Croke, Douglas, Dowling and Ryland, Durnford and East, Dyer, Dow, East, Espinasse, Fitzgibbon, Forrest, Foster, Fortescue, Gow, Hardress, Holt, Holt, N. P. C. Jones, Thomas, Jones, William, Keble, Kelying, Kenyon, Leach, Levinz, Lofft, Lutwyche, Marshall, Maule and Selwyn, Modern Reports, Moore, J. B, Nolan, Parker, Peake, Peere Williams, Pollexfed, Practical Register, Price, Raymond Thomas, Raymond, Ld. Salkeld, Reports, Sayer, Saunders, Sessions Cases, Shower, Siderfin, Skinner, Smith, Starkie, State Trials, Strange, Style, Taunton, Vaughan, Ventris, Wightwick, Wiles, Wilson.

The above work is to be found, where amid their great variety of valuable Books, pretty much everything else appertaining to the Law may be had, at Hilliard, Gray, & Co.'s who will supply any number of copies that may be wished. We can but think many of our worthy Brethren in the Country who complain of dull times, would find better business and more liberal fees if they were to call a little oftener upon our accommodating neighbors and replenish their scanty libraries, from their richly stored shelves. No man can be a good Lawyer without Books,—many cannot with. My Lord Coke, Blackstone, the Statutes, State Reports, and Complete Justice, have constituted the entire stock in trade of many a village Lawyer who has lived and died on bad terms with a world which could neglect genius and undervalue high professional attainments.

Few, if any, Lawyers, are made ultimately poorer by buying Books. It much more frequently happens that our intelligent community yields them back a treble recompense of reward.

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AMOS AND FERAD'S LAW OF FIXTURES.

An American edition of this work has been recently published in New York, with notes of American cases, of which we shall probably speak more particularly hereafter. The subjects of the work are the right to remove fixtures; as to fixtures for trade, agricultural purposes, or ornament or convenience; as between landlord and tenant; as between tenant for life or in tail, or their personal representatives; in respect to ecclesiastical persons; and between heirs and executors; the rights and liabilities of parties in respect to land increased in value by the annexation of personal chattels; remedies, &c.

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Mr Shaw has been, by an unanimous vote of the Executive Council, appointed Chief Justice of the Supreme Judicial Court of this Commonwealth, and will immediately enter upon the duties of his office. He goes from a profitable and laborious practice to the Bench, with a firm constitution and with a perfect knowledge of the nature and extent of the duties which he has undertaken. He has a large space to fill in the public eye, and he will be a fortunate man and a remembered one, if he shall so bear his office—so administer the Law, and so dispense justice to his fellow-citizens, as worthily to sustain the high dignity of the Court over which he is called to preside. Thrice happy, if in himself he may but that 'Light relume,' which so lately and so long, from the place he now holds, shed its benign illumination over our happy Commonwealth.

BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep, $3,50—Calf, $4,00.

NEW LAW BOOKS.—JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

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July 10. ISAAC PARK ER.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, SEPTEMBER 11, 1830. NO. VII.

## MERCANTILE LAW.

[Continued.]

### NO. III.

Having now surveyed the nature and general properties of the principal transactions of trade, in their relations to each other, and their connexion with a whole, we proceed, as was proposed, to reconsider them in detail, with reference to those municipal regulations, by which they are severally modified, controlled, or enforced. Yet we cannot help pausing for a moment on the threshold, whilst we endeavor to impress on the mind of the student (for whose benefit these elementary dissertations are mainly intended) a few plain but important principles as to the object, business, and character of law in its application to the mutual dealings of men in their ordinary intercourse with each other. Nor let him despise as commonplace, what appears self-evident when enunciated; but let him remember that *that* is not a principle, which requires demonstration, and that to be simple and easy of apprehension is the universal character of truth. Indeed a little deeper reflection will teach him, that without a familiar acquaintance with the axioms, on which the system rests, he can neither justly appreciate it in theory, nor apply it correctly in practice.

Let it be borne in mind then, that there are certain rights of man in society, which are not created but merely protected by law. Such is the right of him, who, at the request of another, bestows his labor or the produce of it for his benefit, to receive from that other a compensation or equivalent in return. It is evident that this is a right which does not derive its force from any positive declaration of mere human authority, but springs at once from that state of equality in which men are placed, if not by nature, at least by the primary and constituent principle of society.

In England this equality of civil rights is fully recognized; and the business of law therefore, as applicable to these, is simply to give effect to natural justice by preserving or restoring that equality. This it endeavors to accomplish, either by way of prevention, imposing wholesome checks on the evil passions and selfish desires, which are continually tending to disturb it, or by way of remedy, compelling a compensation, when it has been disturbed. Redress of wrongs, adjustment of differences, correction of injustice, and other expressions of the like kind, are merely varieties of phrases signifying the restoring of equality. To give one simple illustration. A nobleman employs a coachmaker to build him a carriage; i. e. to bestow his labor and his goods for his benefit. Now, whatever may be the difference of rank and political privileges between the parties, there is none in respect of this particular transaction: they deal on a footing of perfect equality, and the nobleman must give in return a benefit equal to that which he receives. Suppose then, that, having obtained the carriage, he refuses to pay what it is worth; it is plain that the condition of equality is destroyed, and that one has an advantage over the other. The law therefore steps in to adjust the difference, and by compelling the payment, restores the equilibrium.

Law then, as regards the ordinary commerce of men, is a collection of rules, having for its object the maintaining of equality, or, what is the same thing in other words, fair dealing and justice. These rules at first are few, simple, and very general. But to adapt them to the infinite diversity of cases, which in the progress of society are continually arising, it is soon found necessary to qualify, limit, or extend them, until they branch off into a multitude of subordinate rules, severally applicable to particular classes of facts. Again, the application of a general rule to some particular case may sometimes militate against an established principle. The most important must then prevail; and hence examples of one rule not unfrequently become exceptions of another; and even with this continual multiplication of rules, accommodated as far as possible to the ever varying combinations of circumstances, such is the imperfection inherent in the very nature of legislation, that it is impossible for the most perfect code to be provided with a remedy, exactly appropriate to every case which may occur. But where law stops, equity begins; and tribunals are established in this, as in, every other highly civilized community, proceeding however not arbitrarily, but upon settled principles of conduct, for the purpose of supplying this deficiency, and enforcing that equity, which is beyond the reach of law.

With these preliminary observations we enter at once upon the more intermediate subject of our inquiry; and first in order comes the contract of sale with its incidents. But the slightest glance over our last article will shew that contracts of various kinds enter into every part of commercial dealing. It will therefore save much repetition, if we begin with a comprehensive view of the legal qualities of contracts in general.

The law of England leaves every one, who has the power of choice, at liberty to form whatever engagements he pleases, and for the most part requires the fulfilment of them, so long as they are not at variance with the general interests of society, or unfairly prejudicial to those of individuals. We do not say in all cases, because there are certain classes of persons, whose rights are not recognized by the law, and in whose behalf it refuses to interfere. Such are the subjects of a foreign state in an open hostility with our own, technically styled *alien enemies;* and such are persons outlawed, attainted of treason or felony. These, so long as the disqualification continues,* are disabled from suing in our courts, and consequently from compelling the performance of any engagement entered into with them, either before or subsequently. Yet this disability does not exempt them from liability to the claims of others; for it is apprehended that even an alien enemy, if amenable to the jurisdiction of the court, may be sued upon a contract, made before the commencement of hostilities.*

Civil engagements pervade the whole system of society,† but our present inquiry will be limited to those which have in view a direct interchange of commodities, money, or labor. These, which from their reciprocity have received the name of contracts, have been classified as follows: 1. Stipulations mutually to give: 2. Stipulations mutually to do or forbear to do: 3. Stipulations on the one part to give in consideration of something to be done or forborne, and on the other to do or forbear in consideration of something to be given.‡ Under these three heads all the various contracts, which come under the cognizance of municipal law, will be found to range themselves. Now these compacts may be formed, either by the express agreement of the parties, in which the terms are settled by mutual consent; or the benefit may be conferred by the one and enjoyed by the other, without any express stipulation for a return. In the latter case, the law, presuming that what reason and justice dictate was also intended by the parties, supplies the formal words of contract, and by an equitable fiction supposes the party benefited to have promised an adequate compensation. Thus, if I order a coat from my tailor, or he send me one home, and I choose to wear it, without any stipulation as to price, the law considers me as having undertaken to pay him whatever sum it is reasonably worth. But where there is an express agreement, it interferes no further than to require the performance of the contract, in the terms upon which it was concluded. These may be unequal; yet the law, wisely considering that the adjustment of equality may be safely left to the opposing interests of the parties,§ merely says, 'Fides est servanda.' 'You must do what you have stipulated to do, or render an equivalent.'‖ Thus con-

*In the case of an alien enemy, the disability does not attach if he come into this country under letters of safe conduct, or trade by license from the crown. It is removed also in his case by the cessation of hostilities, and in the case of outlawry and attainder by reversal and pardon.

* The invalidity of the contracts of alien enemies, made in time of war, does not arise, as is erroneously supposed, from any incapacity in them to contract, but from a notion that such agreements are contrary to public policy, a topic which belongs more properly to another division of our subject. Neither are persons outlawed or attainted, correctly speaking, incapable of contracting, but rather of deriving personal benefit from the contract.

† The Roman lawyers classed all the relations of civil society into obligations *ex contractu*, or *ex quasi contractu*. We are in general averse to definitions; but if we were disposed to define a contract, it would be thus: a mutual engagement, voluntarily and deliberately entered into, between two persons at least, to do something beneficial each for the other. One advantage of this definition, which we shall not stop either to justify or explain in detail, is the separation of the contract into two distinct engagements, whereof both may be void, or the one may be binding and the other not, according as both, or either, are wanting in some of the legal requisites.

‡ This classification is adopted from the civil law: 1. do ut des: 2. facio ut facias: 3. do ut facias: 4. facio ut des: the only alteration being that we have united the two last, of which one is evidently the converse of the other.

§ The maxim of the civil law is 'contractus legem ex conventione accipiunt.' Ours is still stronger: 'modus et conventio vincunt legem.' It must be recollected that the implied obligation in all cases gives way to the declared. 'Expressum facit cessare tacitum.'

‖ The common law of England exerts no authority to compel the specific performance of an agreement. It

tracts are distinguished into *express* and *implied*, and both are equally obligatory in law.

It follows from what has been already said, that in every contract, whether express or implied, there must be an agreeing between two parties at least, and a reciprocity of benefit; i. e. something to be done on the one hand, and a consideration for doing it on the other. The subject, therefore, naturally divides itself into the *act of agreeing*, which includes of course the parties; the thing agreed, and the consideration.

But before we enter into the detailed investigation of each of these topics, it may be as well to premise, that agreements,* in form, may be made either by word of mouth, or by writing, or by the formal sealing and delivering of a written instrument, or by a solemn acknowledgment, made before a competent judicial tribunal, and placed upon record. The two first of these are classed under the same head, the only distinction, recognized by the common law, being between agreements by *parol* or simple contracts, which comprehend the two first, agreements under *seal*, technically called *deeds* or *specialties*, and agreements of *record*. It is evident that these are in an ascending scale of importance, in proportion to the solemnity of the undertaking. Out of this difference many important distinctions arise, of which the most material are the following: 1. That, whereas in every simple contract, with one exception, the consideration must be proved, in a deed or record, it is incontrovertibly presumed: 2. That a deed is binding on the heirs of the contractor if named, and a record on his lands; whereas a parol contract extends only to the personal property of the contractor, and binds only himself and his personal representatives.

It was said, that the law gives the liberty of forming engagements to all who have *the power of choice*. Freedom of choice, however, is essential to the validity of every engagement, and indeed is implied in the very notion of an agreement. Now choice is a combined exertion of the understanding and the will. It follows, therefore, that where there is in either party an *incapacity* to understand or to will, there can be no contract. Hence, by the law of England all, who from their birth have been destitute of reason, and all, in whom subsequent disease, or other causes, have produced either permanent or occasional derangement, are declared incapable of contracting. It has been customary to distinguish the two classes by the names of *idiots* and *lunatics*. And though the latter name belongs in strictness to those only who are visited by periodical and intermittent fits of insanity, it may still for convenience be retained, if its legal definition be sufficiently extended. Let it be understood, then, to embrace all cases of adventitious insanity, however induced, or however varied in its symptoms. For instance, a man may by continual drunkenness destroy his intellectual energies, and become incapable of judgment. Yet such a one, however culpable the origin of his malady, is still within the protection of the law, as a man of unsound mind, so that the engagements made by him during his continuance in that state are altogether void. There is one obvious distinction between the engagements of an idiot, and those of a lunatic, viz. that the former are always and from the first absolutely null; whereas those of the lunatic are avoided only upon an inquisition finding the fact of lunacy—inclusively, however, and by the relation to the time from which the incapacity of mind is found to have commenced.*

Not that the lunatic, even before the inquisition, can be compelled to perform an engagement stipulated during a period of insanity.

merely takes cognizance of the wrong done by the nonfulfilment of it, and calls upon the wrong doer to make good the loss, which may have been occasioned to the other party by his breach of good faith. In many cases, however, it is obviously desirable that the agreement should be literally performed in kind. Here, therefore, the courts of equity step in, and supply the defect of jurisdiction by decreeing and enforcing a specific performance. It may be worth remarking that the compensation assigned by the courts of Common Law, for all violations of contract, is a sum of money, not unaptly called the *damages*: money being selected as the most convenient measure for estimating the quantum of compensation We may also take this opportunity of noticing an inaccuracy (though not a very important one) of Blackstone on the subject of implied contracts. 'There is also,' he says, 'one species of implied contracts which runs through, and is annexed to, all other contracts, conditions, and covenants, viz., that if I fail in any part of the agreement, I shall pay the other party such damages, as he has sustained by such my neglect or refusal.' Com. vol. ii. p. 443. The learned commentator has evidently mistaken a remedial consequence annexed by the law, for an implied undertaking of the party.

* We are not unaware that the term agreement will be found employed in the course of this inquiry in two different senses, one as expressive of the act of agreeing, and the other of the whole effect and result of that agreeing: it is in this latter sense that it is frequently used to denote the instrument which attests the contract. This inaccuracy must be imputed to the imperfection of language, not the fault of the writer: for, however much we may regret it, it seems better on the whole to adhere to the customary modes of expression.

* The proposition is here broadly laid down, that the contracts of a lunatic are, without exception, absolutely void, from the period at which the inquisition finds the lunacy to have commenced; and the authorities in support of it, if authority were wanted in a matter so obvious, are, 1 Ch. Ca. 113. 2 Atk. 412. 2 Strange, 1104. 3 Camp. 126. A recent case may seem at first sight to be somewhat at variance; we apprehend, however, that a careful consideration of the principle of that case will show, that it forms no exception to the general rule. We allude to Baxter v. the Earl of Portsmouth, 5 Barnew. & Cress. 170. and more fully reported in Chitty, jun. on simple contracts, p. 256. The form of action was indeb. assump. The defendant during the period between 1818 and 1823, had hired carriages of the plaintiff, suitable, as was proved, to his rank, and had thereby incurred the bill which was subject of the action. For the defence an inquisition was put in, finding the defendant a lunatic from the 1st Jan. 1809 continually to the date, which was subsequent to the time of incurring the bill. The Ch. J. (Abbott) at the trial thought that the plaintiff was not barred of his action by this plea, the benefit having been actually received, and no fraud practised by him and the Court of King's Bench subsequently confirmed this opinion. Now the result it is impossible to quarrel with: it was what reason and equity pointed to: still it may be doubtful, whether the court did not rather usurp the jurisdiction of an equitable tribunal; and at all events the reasoning by which it arrived at its conclusion, appears to have been very questionable. The learned judges who gave their opinion, drew a distinction which, for the purpose to which it was applied in the argument, was irrelevant to the question; viz. whether the transaction were a fair one on the part of the tradesman or not. Now the principle of the rule as to the contracts of lunatics is not a presumption of fraud, but a deficiency in that which is essential to a contract, viz. assent of the understanding, and the rule itself is, not that the contract may be rendered void, but that it never was a contract at all. Their reasoning, therefore, ought rather, as it seems to us, to have been this: 'The plaintiff proved the letting of his carriages, and that the defendant made use of them. The presumption of law then applies, that the defendant undertook to pay for them what they were reasonably worth. The defendant, however, (or those who represent him,) proposes to set up a defence, which, *if admissible*, would overcome the presumption. But this would be against good faith and honesty, and he is therefore precluded, or *estopped*, from setting it up. To be sure, if fraud had been practised upon him, (for it is in this view that that question becomes material) we would have admitted it: but here there is no pretence of fraud.' It cannot be objected to this mode of reasoning, that the contract here was an *express* contract; because the plaintiff declared in indeb. assump. and relied, therefore on the implied promise in law. See an analogous case mentioned hereafter, where a husband is held liable for necessaries furnished to his wife after express notice.

## JOHN SELDEN.

Concluded.

From the commencement of the revolution until his death the conduct of Selden was distinguished alike by moderation and integrity. It is remarkable that in 1642 he was esteemed to be so well affected toward the court then held at York, that Charles had thought of offering him the great seal, but was advised that there was no chance of his accepting it. Perhaps the motives of his refusal would have been no better than Clarendon suggests. 'He was in years,' says that historian, 'and of a tender constitution; he had for many years enjoyed his ease which he loved: he was rich, and would not have made a journey to York, or have lain out of his bed for any preferment, which he had never affected.' It is indeed much to be feared that his constitutional indolence did in those times too much limit his exertions; and we find that his good deeds were confined to redeeming the library of his friend Usher, or recovering the Arabic lectureship for Pocoke, in times when the weight of his character and the vigor of his eloquence might have gone far to moderate the extravagances or turn to best account the successes of the victorious party. The parliament, however, though he was too rich to need, and too disinterested to solicit remuneration, thought the name of Selden worthy to be numbered among those who in the year 1647 received large sums in reward of their past services. From this time he took little part in public life. Luckily for mankind he declined to answer the Icon Basilike, though requested by Cromwell to do so, and thus left it to the handling of a far mightier genius. His death did not take place until the mature age of 70, in the house of Elizabeth, countess of Kent, to whom many supposed that he was united in stricter bonds than those of friendship. His expressions on his death-bed of his own sinfulness and humble confidence in the atonement of Christ must utterly confute Hume and others, who have dared, without a shadow of proof, to stigmatise his name with infidelity. Perhaps Clarendon's short character was no exaggeration, 'that he was a person whom no character can flatter or transmit in any expressions equal to his merit and virtue;' but his memory was too great for his judgment, and his love of ease still stronger than his love of liberty. His works are nearly all too dull to open, unless for purposes of reference, with the exception of his Table-talk, from which we have ventured to cull the choicest apothegms for the entertainment of the reader.

'*Bible.*

'*Scrutamini scripturas.* These two words have undone the world. Because Christ spoke them to his disciples, therefore we must all, men, women, and children, read and interpret the scripture.' v. iii. p. 2009.

'Henry 8th made a law that all men might read the scriptures except servants, but no women, except ladies and gentlewomen, who had leisure and might ask somebody the meaning.' p. 2010.

'*Bishops.*

'The bishops being put out of the house, where will they lay the fault now. When the dog is beat out of the room, where will they lay the stink.' p. 2014.

*'Books.*

'The giving a bookseller the price of his books has this advantage. He that will do so shall have the refusal of whatsoever comes to his hand, and so by that means get many things, which otherwise he never should have seen.' p. 2015.

*'Ceremony.*

'Of all people ladies have no reason to cry down ceremony, for they take themselves slighted without it. And were they not used with ceremony, with compliments and addresses, with legs and kissing of hands, they were the pitifulest creatures in the world. But yet methinks to kiss their hands after their lips, as some do, is like little boys that after they eat the apple fall to the paring from the love they have to the apple.' p. 2017.

*'Damnation.*

'To preach long, loud, and damnation, is the way to be cried up. We love a man that damns us, and we run after him to save us. If a man had a sore leg, and he should go to an honest, judicious surgeon, and he should only bid him to keep it warm and anoint with such an oil (an oil well known) that would do the cure, haply he would not much regard him, because he knows the medicine beforehand an ordinary medicine. But if he should go to a surgeon that should tell him, Your leg will gangrene within three days, and it must be cut off, and you will die unless you do something that I could tell you, what listening there would be to this man. Oh, for the Lord's sake tell me what this is, and I will give you any content for your pains.' p. 2025.

*'King.*

'The king's calling his friends from the parliament because he had use of them at Oxford, is as if a man should have use of a little piece of wood, and he runs down into the cellar and takes the spigot; in the mean time all the beer runs about the house.' p. 2039.

*'Libels.*

'Though some make light of libels, yet you may see by them how the wind sets. As take a straw and throw it up in the air, you shall see by that which way the wind is, which you shall not see by casting up a stone. More solid things do not show the complexion of the times so much as ballads and libels. p. 2042.

*'Marriage.*

'Marriage is a desperate thing. The frogs of Esop were extream wise, they had a great mind to some water, but they would not leap into the well, because they could not get out again.' p. 2044.

*'Peace.*

'King James was pictured going easily down a pair of stairs, and upon every step there was written, *peace, peace, peace.* The wisest way for men in these times is to say nothing.' p. 2052.

*'Power.*

'They that govern most make least noise. You see when they row a barge, they that do drudgery work, slash, and puff, and sweat, but he that governs sits quietly at the stern and scarce is seen to stir.' p. 2057.

*'Predestination.*

'They that talk nothing but predestination, and will not proceed in the way of heaven till they be satisfied on that point, do as a man that would not come to London, unless at his first step he might set his foot on the top of Paul's.' p. 2062.

*'Wife.*

''Tis reason a man that will have a wife should be at the charge of her trinkets and pay all the scores she sets on him. He that will keep a monkey should pay for the glass he breaks.' p. 2028.

*'Wisdom.*

'Wise men say nothing in dangerous times. The lion you know called the sheep to ask her if his breath smelt. She said, Aye. He bit off her head for a fool. He called the wolf and asked him: he said, No. He tore him in pieces for a flatterer. At last he called the fox, and asked him: Truly he had got a cold, and could not smell.' p. 2078.

*'Words.*

'Words must be fitted to a man's mouth. It was well said of the fellow that was to make a speech for my lord-mayor, he desired to take measure of his lordship's mouth.'

## ENGLISH CASES.

HOUSE OF LORDS.—MAY.

*Doe, on the Demise of Birtwhistle, v. Vardill.*

This case came before the Judges today on a writ of error brought by the plaintiff.

The action, brought by the lessor of the plaintiff, John Birtwhistle, was an action of ejectment, in order to recover against the defendant, Agnes Vardill, possession of certain lands and tenements, with the appurtenances, within the several parishes of Carlton, Skipton, Long Preston, Gisborne, and Kirky Malhamdale, in the country of York, and was tried at the Lent Assizes, at York, in 1825, before Mr Justice Bayley, when a special verdict was returned for the defendant, of which the following is the substance:—

That William Birtwhistle, being seised in his life-time in his demesne as of fee, of and in one undivided part, the whole into three equal parts to be divided of the premises in question: that he died on the 12th of May, 1819, so seised, without leaving any issue of his body: that all his brothers had died in his life-time unmarried, and without issue, except Alexander, who married and had issue as hereafter mentioned: this Alexander Birtwhistle went from England to Scotland in the year 1790, and became domiciled there, and remained until his death: that one Mary Purdie and he cohabited together: that a son was born on the 15th of May, 1799: that on the 6th of May 1805, Alexander Birtwhistle and Mary Purdie were married, according to the laws of Scotland: and that on the 5th of February, 1810, Alexander Birtwhistle died in Scotland, leaving to his son John, who had from the time of his birth dwelt there, the lands and tenements of which the father was seised. The Jurors went on further to say 'that if a marriage of the mother of a child with the father of such child takes place in Scotland, such child born in Scotland before the marriage is equally legitimate, by the law of Scotland, with children born after marriage, for the purpose of taking land, and every other purpose.' They also found 'that John Birtwhistle, when he died did demise one undivided third part of the tenements mentioned in the declaration to his son.' The defendant, it appears, was in possession of the property at this time, and so continued to be. In other words, the verdict was in favor of the defendant, who was declared not guilty of the trespass.

In Easter Term, 1826, the special verdict came on for argument before the Court of King's Bench: the question for argument being, 'Whether the subsequent marriage in Scotland between the father and mother, both being domiciled there, of a child born to them in Scotland before such marriage, has the retrospect effect of legitimating that child, so as to qualify him to inherit lands in England, holden by the tenure of fee-simple? The Court unanimously held that such subsequent marriage did not legitimate such child, so as to enable him to inherit such lands in England, and directed judgment to be given for the defendant.

It was now contended, on behalf of the plaintiff in error, that when the fact of the marriage of the parents is ascertained—as it was by Jury in the present case—the law of Scotland takes no cognizance of the circumstance of a child having been born before or after the marriage, except in the case of a legal impediment to the marriage; that, by the law of Scotland, consent makes marriage; the ceremonies prescribed and observed are but matter of order; that the child was born 'ex justis nuptiis,' and was entitled to all the rights of lawful children, and, in that character, entitled to succeed to the real estate as his father's heir; that where the estate or matter of right exists in one country, and the facts which give the 'status' have taken place in another country, that is a question of international law, and depends not on the municipal rules of the country in which the point of right is tried; that, because, although it is a rule of the laws of nations that the 'lex loci rei sitæ' regulates the succession to real estate, yet when the fact by which that law determines the succession revolves into a 'questio status,' the Courts of the country where the real estate is situate are bound to assume the 'status' of the individual as matter of fact, upon such evidence of the law of the country where the birth, marriage, and domicil existed. It was further urged that the Statute of Merton (20th Hen. VIII. cap. 9), the title of which is, 'He is a bastard that is born before the marriage of his parents,' was not repugnant to the claim of succession made by the lessor of the plaintiff, and, at any rate presented no obstacle to the plea in law maintained by him; for, although there was reference in the Act to the right of inheriting, yet, from the title, the Statute had relation simply to the question of personal 'status.' But it was insisted that this Statute could only relate to persons who were situated under the law of England as to personal 'status.' In support of the view taken by the Learned Counsel for the plaintiff, the cases of 'Sheddan v. Patrick,' 'the Earl of Stralhousie v. Bowes,' and 'Gordon v. Gordon,' were cited.

In support of the writ of error, Mr Brougham and Dr Lushington were heard.

For the defendant, the Attorney-General and another Learned Gentleman appeared.

JUNE.

*Doe, on the Demise of Birtwhistle, v. Vardill.*

This case was again brought before the Judges today. It is a writ of error brought upon a judgment given in the Court of King's Bench, on a special verdict argued in Easter Term 1826, before the Judges of that Court; the question being, whether the subsequent marriage in Scotland, between the father and mother domiciled there, of a child born in Scotland before such marriage, had the retrospect effect of legitimating

that child, so as to qualify him to inherit lands in England, holden by tenure of fee-simple? The opinion of the Court was, that the child so born could not inherit lands in England.

In the preceding case we give briefly the facts of the case, with the substance of the argument of Counsel on behalf of the plaintiff in error.

For the defendant in error, for whom the original verdict of the Jury was found, which was afterwards confirmed by the judgment of the Court below, the Attorney-General, and Mr F. Courtenay appeared.

The substance of the argument now used by those Learned Counsel may be thus stated—First, it was contended that, by the law of England, a child born out of marriage could not inherit lands in England: secondly, that the *lex loci rei sitæ*, in all cases of reality, governed the right of inheritance; thirdly, that legitimacy and the right to inherit feudal lands were very distinguishable from each other, and, accordingly, the former might exist, and frequently did exist, without the latter, legitimacy being a personal *status*; but the right to inherit lands being no status at all, but a real right, attached indeed to the person, but exclusively governed by the *lex loci rei sitæ*; fourthly, that no principle of Roman civil law was applicable to the discussion of feudal inheritance. Even in countries where the Roman law prevailed it was insisted that the right to feudal property was regulated exclusively by the feudal law; and the feudal law did not admit of that legitimation *per subsequens matrimonium*, upon which the plaintiff relied; and lastly, admitting, for the sake of argument, that the law of Scotland, legitimating *ante nati*, legitimated them, so as to make them capable of all feudal inheritance in Scotland, yet that legitimation, by the law of Scotland, must be confined to the inheritance of lands situate in Scotland, for one country could not legislate for another independent country.

In support of these arguments many cases were cited, and numerous authorities quoted.

After Mr Brougham had replied to the observations and arguments of the Learned Gentlemen who appeared for the defendant in error, judgment was deferred.

The Judges then retired.

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KING'S BENCH.—APRIL.

*Gell v. Waterhouse and others.*

This was an action brought against the defendants, as common carriers, to recover damages for the loss of some watches sent by their coach from Coventry to Aberdeen. A verdict was had for the plaintiff, which Mr Denman applied to set aside, on the ground of misdirection on the part of the Lord Chief Baron, who tried the case at Warwick. It appeared that a notice was in the office of the defendants, stating that they were not to be held liable for any parcels in value over 5*l.* and the Learned Gentleman contended that this was sufficient notice, whereas the Learned Baron left it to the Jury generally whether the plaintiffs had sufficient notice.

The Court thought his Lordship had left the question properly to the Jury.—Rule refused.

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PREROGATIVE COURT—JUNE.

*Heddington v. Holloway.*

This was a suit instituted to try the validity of a bequest made by Mrs Heddington, deceased, to a son of her husband's under these circumstances:—

Mr Holloway was a son of the husband of the deceased, who was in possession of a policy of insurance for 5,000*l.* She was also possessed of property to the amount of 10,000*l.*, which she left by will among her own and her husband's relatives, but in that will she made no mention of the policy of insurance. By a private will, however, she gave that to Mr Holloway, and placing the will in his possession, desired him not to produce it until after her death, and not to mention the circumstance to any one until then. Mr Holloway obeyed her instructions, but, instead of producing the will immediately after her death, he deferred it for a considerable time, and first mentioned it in a conversation with Mr Parnell, his solicitor, who was also solicitor for the parties interested under the other will; Mr Parnell thought the delay so suspicious that he felt bound to oppose the will relating to the policy; and thus the question came before the Court.

The Court at once decided that Mr Parnell's conduct was, under the circumstances, quite justifiable, though there could be no question but the will was an authentic document, and, as such, must be pronounced valid by the Court. At the same time, if Mr Holloway had at once produced the will, it was more than probable that Mr Parnell would have admitted it, and the present suit would never have been brought; therefore the Court adjudged that Mr Holloway must pay his own costs.

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COURT OF EXCHEQUER.

Before the Chief Baron and a Common Jury.

*Wedlake v. Hurly and another.*

This was an action brought to recover from the defendants the sum of 103*l.* 5*s.* 6*d.* received by them for the use of the plaintiff, under the following circumstances. The plaintiff is a coal-merchant residing in Monmouth; the defendants are merchants, residing in Great Winchester-street, in the city of London; both parties had dealings with a merchant named Goold, who resides in Cork. Goold gave a promissory note to the plaintiff in November last, payable on the 4th of January, at the house of the defendants. On that day he sent a Bank of Ireland Bill for 104*l.* payable in 20 days after to the defendants, endorsed by himself in these words:—'Pay this to Messrs Charles Hurly and Co., under provision for a note of mine to Thos. Wedlake, payable at their office.' The defendants received cash for the bill at the Bank of Ireland when it became due, and the plaintiff subsequently applied to them for the payment of the promissory note. The defendants refused to pay, acknowledging, at the same time, that they had received the bill on the Bank of Ireland for the purpose mentioned. These facts having been established by evidence.

Mr Sergeant Jones, for the defendants, observed that Goold was insolvent, and indebted to both parties; and the question was whether the plaintiff or the defendant should have the amount of the bill. He contended that the plaintiff should be nonsuited. When a remittance was made to a party with directions to apply it to a particular purpose, he (Sergeant Jones) admitted that the remitter could sue the party, to whom the money was remitted for any damage he should receive in consequence of his directions not being complied with; but he contended that the party to whom the money was directed to be paid could not bring an action against the receiver, as there was no privity between them. In support of this position he cited the case of Williams v. Everett, 4 East, page 597, which was directly in point; and the case of Gates v. Bell, 3 Barnewall and Alderson, 643, which was an action by the holder of a dishonored bill against a person to whom money had been remitted to take it up; wherein Lord Ellenborough nonsuited the plaintiff, on the authority of the preceding case, observing that as the defendant had repudiated the trust reposed in him by the remitter, there was no privity between him and the plaintiff.

Mr Maule, for the plaintiff, observed that there were authorities both ways, but the better way would be to take a verdict for the plaintiff, with liberty for the defendant to set it aside, and have a nonsuit entered, as that course would prevent the necessity of a second trial.

The Chief Baron observed that he should rather act as Lord Ellenborough had done, which was to nonsuit the plaintiff, with liberty to move to have the nonsuit set aside, and a verdict entered for the amount of his claim.

The plaintiff was accordingly nonsuited, with liberty to move to have a verdict entered.

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## DIGEST OF RECENT ENGLISH CASES.

*Naylor* v. *Taylor.*

Where a ship, having insured goods on board, was captured for an alleged breach of blockade, and afterwards rescued by the British crew, who brought her back, with the goods, into an English port, and after receiving information of the capture, but before the return of the ship and before hearing of her rescue, the assured gave notice of abandonment: Held that they were not entitled to recover on the policy as for a total loss. 1 Danson & Lloyd, 240.

*Page* v. *Newman.*

The plaintiff and defendant being prisoners in France, the plaintiff lent the defendant 135*l.*, and received the following instrument, properly dated and signed, as his security. 'In one month after my arrival in England, I promise to pay W. E. P (the plaintiff) or order the sum of 135*l.* as sterling for value received: Held that the plaintiff was not entitled to interest although several years had elapsed since the defendant had arrived in England and been applied to for payment. 9 Barn. & Cress. 378.

*Laing* v. *Stone.*

A bill or note payable on a day certain, carries interest from that day, unless the non-payment has been occasioned by the negligence of the holder. 2 Man. & Ryl. 561.

*Hawkins* v. *Sherman.*

Where a person agrees to take an assignment of a lease of a house, which is out of repair, subject to the performance of all the covenants of the lease, from the day of the assignment, the assignor cannot recover against such assignee, sums which he is compelled to pay the original lessor for dilapidations that occurred before the assignment. 3 Carr. & Payne, 459.

[*Quære*, If B. assign the lease of a house to A. by deed, subject to certain covenants, and A. take possession, whether B.'s remedy for a breach of the covenants is by an action of covenant, though A. never executed the deed?]

*Doe dem, Wheelder* v. *Paul.*

In ejectment to recover demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twentyone days, it

appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day at one o'clock:—Held, that only one quarter's rent should have been demanded, and that at sunset. 3 Carr. & Payne 613.

*Pierse* v. *Shaw.*

B. holding land of A. for a term of years, underlets part to C. from year to year. At the expiration of the term B. agrees with A. to hold from month to month: in the absence of any new agreement between B. and C. the tenancy from year to year continues. 2 Man. & Ryl. 418.

*Doe dem. Elliott* v. *Hulme.*

Where joint lessors are partners in trade, a notice to quit in the name of all, signed by one only is valid. 2 Man. & Ryl. 433.

*Vessey* v. *Pike.*

In an action for libel, the defendant cannot, under the general issue, give evidence of any fact in mitigation of damages, which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part. 3 Carr. & Payne, 512.

*Saunders* v. *Mills.*

Assuming editors of newspapers to possess the right of publishing proceedings in courts of justice, the report must be fairly given; and a report of a trial containing the *ex parte* statement of the plaintiff's counsel and those parts of the judge's address to the jury which were unfavorable to the defendant, and omitting all but a few sentences of the defence, is not a privileged report. Park J. instancing the cases in which blasphemous or indecent statements may be made, said 'he could not accede to the position that a party is excused for publishing every proceeding in a court of justice, even though he publish it fairly.' Tindal C. J. who tried the cause, admitted evidence that the report was copied in substance from another paper, but, there being no justification on record, refused to admit evidence that any other paper had published the same statement. Held that he acted rightly in both respects. 6 Bing. 213.

## MAINE.

### SUPREME JUDICIAL COURT.

Vol. 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Stanley v. Perley.*

In a writ of entry it is competent for the tenant, under the general issue, to disprove the seisin of the demandant, as alleged in the writ, by showing that his grantor had, previous to the time stated in the writ, conveyed the title to a third person; even though the tenant does not claim under such grantee.

*Chandler v. Morton.*

The rule that a party to a negotiable note shall not be admitted as a witness to prove it usurious, extends to the maker of an accommodation note; and is applied even where the note had been delivered up to the real debtor, on his giving a recognisance to the creditor for the amount. And its application is not restricted to the case of an innocent indorsee; but is admitted where the usurer himself is a party.

*Gardiner Manuf. Co. v. Heald.*

If a written instrument, purporting to be a deed of partition, is signed by the parties, but not sealed, yet it is not therefore to be treated as a nullity, so far as to admit parol testimony to contradict it.

*Soule's case.*

In an indictment against a husband, for an assault and battery upon the wife, she is a competent witness against him.

*Lathrop vs. Muzzy.*

A judgment debtor, whose goods have been seized and sold on execution, does not stand in the relation of vendor to the purchaser. And therefore, not being liable on any implied warranty, he is a competent witness in any suit between other persons respecting the goods.

*Cutts v. King.*

Since the passage of *Stat.* 1826, *ch.* 344, a verdict and judgment in favor of the tenant, upon the general issue, in a writ of entry, will not always be evidence of title in him; for the statute having declared that such plea shall not be taken as an admission of the tenant's seisin and possession of the land, it may be that he prevailed because he was not proved to be in possession.

*Linscott v. Fernald and al.*

Where the course first given in a deed of conveyance was north 69 degrees west, fortysix rods, and thence to a certain range-line, and by that line, and other courses and monuments, to the beginning; and this description was intelligible, and unambiguous, agreeing with all the monuments given:—the grantor was not permitted to prove by parol that the first course actually run by the surveyor, at the time of the conveyance, was *south* 69 degrees west, which would equally well agree with all the other courses and monuments in the deed; and that the surveyor, who also wrote the deed, inserted *north* instead of *south*, by mistake.

*Steward v. Allen.*

If a creditor extend his execution on land mortgaged for more than its value, he not in fact knowing the existence of the mortgage, though it had been long on record; he may have an *alias* execution, and satisfaction out of other estate of the debtor; the case being within the meaning of *Stat.* 1823, *ch.* 210.

*Emerson v. Towle.*

The time of returning into the clerk's office an execution extended on land, is not material, if it has been recorded in the registry of deeds within three months after the extent.

*Gardiner Manuf. Co. v. Heald.*

If an execution be issued against an absent defendant, without the previous filing of a bond, pursuant to the statute, it cannot be avoided collaterally, but is good till superseded.

*Moore v. Smith.*

In an action against an executor, under *Stat.* 1821, *ch.* 51, *sec.* 11, to recover the penalty there provided for not filing a will in the probate office, it is not competent for the executor to prove that the will was revoked, this being a question exclusively of probate jurisdiction.

*Ring v. Burton.*

The provisions of *Stat.* 1821, *ch.* 51, *sec.* 28, apply to the cases where the creditor had already recovered his judgment against the administrator, before the estate was represented insolvent, as well as to those where the action was then pending, or is afterwards commenced.

*It seems* that the allowance of further time to settle an administration account, under the hand and seal of the Judge of Probate, ought to be made before the expiration of the six months mentioned in *Stat.* 1821, *ch.* 51, *sec.* 28; and that if a still further time be granted, the order should issue before the end of the term first allowed;—*sed quære.*

*Stearns v. Burnham.*

An executor, appointed under the laws of another State, cannot indorse a promissory note payable to his testator by a citizen of this State, so as to give the indorsee a right of action here in his own name.

And this objection, though in disability of the plaintiff, may be taken under the general issue, in an action by the indorsee against the maker of the note.

*Heald v. Heald.*

Whether an administrator, who is also an heir at law, is chargable as administrator for the rents of real estate in his own occupancy, without some contract express or implied,—*quære.*

*Stanley v. Perley.*

The title of an attaching creditor to the land afterwards taken by extent, is not affected by any knowledge which the officer may have had of the existence of a prior conveyance of the same land, made by the debtor to another person; even though such knowledge may have been communicated to the creditor himself, after the attachment, and before the extent.

*Foss v. Stickney.*

Where an execution has been extended on two or more parcels of land, the debtor is not entitled to redeem one of them alone, without the others, even though its value is separately stated in the certificate of the appraisers.

Where a judgment debtor, whose land has been taken by extent, having tendered the money within the year, brings his writ of entry for the land, pursuant to *Stat.* 1821, *ch.* 60, *sec.* 30, it is sufficient that the money be produced and lodged in court at any time before the rendition of judgment.

*Little v. Lathrop.*

Where there is no prescription, agreement, or assignment under the statute, whereby the owner of land is bound to maintain a fence, no occupant is obliged to fence against an adjoining close; but in such case, there being no fence, each owner is bound at his peril to keep his cattle on his own close.

Where a tenant is bound by prescription, agreement or assignment under the statute, to maintain a fence against an adjoining close, it is only against such cattle as are *rightfully* on that close;—and in such case, if the fence be not in fact made, the owner of either close, thus adjoining, may distrain the cattle escaping from the adjoining close, and not rightfully there.

The *Stat.* 1821, *ch.* 128, *sec.* 6, respecting fences and impounding, is merely in affirmance of the common law.

Whether to leave wild lands unfenced, be not an implied licence for all cattle to traverse and browse them,—*quære.*

*Fisk and al. v. Weston.*

If the trustee in a foreign attachment disclose an assignment of the debt to a third person, who thereupon is made a party to the suit, pursuant to the *Stat.* 1821, *ch.* 61;—the trustee is bound by the result of the ulterior litigation in that suit between the creditor and the assignee, in the same manner as they are, though he had no agency in making up the issue.

*Gorham vs. Canton.*

Upon a question of domicil, the declarations of the party whose home is in controversy, made at the time of his going or returning, may be received as evidence of his intention.

*Crockett and al. v. Ross and ux.*

A *feme sole* being summoned as trustee in a foreign attachment, took husband *pendente lite*, and afterwards disclosed, and was adjudged trustee. On *scire facias* brought against the husband and wife, to have execution *de bonis propriis*, they pleaded that at the time when &c, she had no goods, effects or credits of the principal in her hands; and on general demurrer the plea was held bad.

*Sherwood v. Marwick,*

The cases in which the court will determine the question of fraud, as an inference of law, the facts being clearly proved or admitted, are those of sale, in which the rights of creditors are concerned, under *Stat.* 13, and 27. *Eliz.* or of sales with intent to defraud creditors, at common law. In other cases of alleged fraud, the imputed intent and *scienter* are subjects for the consideration of the jury.

*Clement v. Durgin.*

The right to flow the lands of another, in order to raise water sufficient to carry a mill, subject to the claim of the owner for damages, is given, by necessary implication, in the statute regulating mills, and therefore needs not to be proved by writing, under the statute of frauds.

The damages occasioned by such flowing may be waived or relinquished by parol.

*Dearborn v. Parks.*

Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise; this is not such an undertaking to pay the debt of another as is within the statute of frauds, and therefore it is not necessary that it should be in writing.

Though the consideration of such promise was land, yet the party to whom the debt was to be paid may recover the amount in an action for money had and received.

*Bishop v. Little.*

Where one, upon giving a deed of release and quitclaim, stipulated by parol that if the deed did not pass and secure the land to the grantee, he would make it good;—this was taken as a promise to convey a legal and perfect title to the land, and therefore as void, by the statute of frauds.

A parol renewal of such promise, within six years, creates no legal obligation.

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NEW HAMPSHIRE.

SUPERIOR COURT OF JUDICATURE.

Vol. 4 contains the cases decided from January, 1827, to May, 1829

*Pritchard vs. Brown.*

An acknowledgment in a deed of conveyance, that the consideration money has been paid, cannot be contradicted for the purpose of defeating the conveyance, but for any other purpose, it may be contradicted like any other receipt.

Where a consideration of money is expressed in a deed of conveyance, the land will pass by way of bargain and sale, although there is only one subscribing witness to the instrument.

*Crane vs. Thurston.*

M. and his wife were seized in fee of land in her right, and having agreed to separate and live apart, M. conveyed all his interest in the land to L. the father of his wife, in trust, for the wife; and by indentures made at the same time between M. L. and the wife, M. covenanted that the wife might enjoy and absolutely dispose of the property she had to her separate use—it was held that the deed of L. and the wife, living the husband, was sufficient to pass a fee in the land.

*M'Afee vs. Gilmore.*

D. M. by his last will devised to his wife one third part of his real estate, and the use and improvement of the other two thirds till his daughters S. and M. should severally arrive at the age of eighteen years, in case his said wife should support, clothe, and educate the said two daughters. He then devised the said two thirds to his said daughters, in equal shares, when they should severally arrive at the age of eighteen years. The testator died April 3, 1809. The oldest of the two daughters died in August, 1809, aged about four years.

It was held—that the devise of 'two thirds of the real estate,' was sufficient to pass a fee without other words; that the daughters took a vested estate of inheritance at the death of their father, as tenants in common, by virtue of the will; and that the share of the deceased daughter belonged to her mother, as sole heir.

*Mills vs. Stark.*

A owned a close adjoining a highway and B owned another close adjoining the same highway, and opposite the close of A. A's cattle strayed from his said close, through defects in his fence, into the highway, and thence into the close of B, through defect of B's fence—it was held that B might lawfully take the cattle as a distress for the damage they had done.

*Clindenin vs. Allen.*

When a defendant dies, and it is decreed by the judge of probate, that his estate shall be administered in the insolvent course, the suit is to be discontinued.

*Hamilton vs. Elliot.*

Where the tenant in a writ of entry has disclaimed all the title to the demanded premises, both he and his subsequent assignees will be ever afterwards estopped to set up against the demandant and his subsequent assignees any claim to the land, which the tenant may have had at the time of the disclaimer.

And an agreement, made subsequently to the disclaimer by the demandant, to purchase all the right of the tenant in the land, will not set the estoppel at large.

*Nelson vs. Swett.*

When a defendant enrols the summons left with him in the service of a writ, and it appears by that, he was cited to appear at a different time and place from those where the writ was returnable, he is not estopped by the sheriff's return to allege what thus appears upon the record.

*Pritchard vs. Atkinson.*

Where a road was laid out over the land of A, in 1796, by the selectmen of the town where the land was; but the return of the road by the selectmen made no mention of any compensation allowed to A. for the road—it was held to be competent for the jury to infer from the circumstances, that the road was made in 1796, and constantly used for seventeen years from that time, as a highway, with the knowledge of A. and without any objection on his part, that he had agreed to dedicate the land to the public, and to permit the road to be made and used without receiving any compensation.

*Robinson vs. Bachelder.*

In assumpsit upon a written contract to deliver specific articles at a particular time and place, the defendant may show under a general issue that he had the articles ready at the time and place, and that no one came to receive them and this is a good answer to the action.

And a defendant in such a case may show under the general issue that the plaintiff accepted part of the articles before the day, and this will be a good defence *pro tanto.*

And farther the defendant may show in such a case that subsequently to the making of such contract a parol agreement was made between the parties that the articles should be delivered at a different place and a tender at such different place will discharge the contract.

But where in such a case the defendant left the articles at the place, in the custody of a person who was authorized to deliver them only in case the plaintiff produced and gave up the written contract, it was held that the articles were not ready at the time and place so as to discharge the contract.

*Ela vs. Rand.*

Where an attorney is party to a suit, depositions taken in a distant county by the opposite party while the court is sitting in the county where the attorney resides, will not be rejected unless it be shown that the party taking the depositions knew that the court would be sitting at the time.

When a party to a suit dies, no depositions can be taken by the opposite party, until the executor or administrator of the party deceased becomes a party to the suit upon the record.

*Shepherd vs. Thompson.*

The declarations of deceased persons, as to the boundaries of lands, are not admissible when it appears that they had, from their situation, an interest to make the declarations.

When depositions are taken abroad in another State, it must be shown to the court that the person by whom the depositions were taken, was a person duly qualified, before the same can be admitted as evidence.

Where the evidence of a party went to the jury in depositions intermixed with testimony, which was incompetent, and which the court had ordered to be erased, but which was not erased, this was held to be a legal cause for a new trial.

A notice to the adverse party of the taking of depositions under a dedimus ought to state not only the day, but the hour, when they will be taken.

*Ross v. Knight.*

A delivered to B in payment of a debt a promissory note made by C. Afterwards A paid to B the amount of the note and took and passed it to D. In an action on the note by D against C, it was held that the delarations of A that the note was an accommodation note, were not evidence for the defendant.

*Barnard v. Edwards.*

Where a right of dower accrued to a widow in 1797, but she neglected to make any claim of dower until the year 1826, such neglect was held to be competent evidence to be submitted to a jury as proof of a release of the right, although she married again in 1798, and remaining a *feme covert* during the residue of the time, and had resided out of the State during the whole time.

THE JURISPRUDENT.

BOSTON, SATURDAY, SEPTEMBER 11, 1830.

*Paine and Duer's Practice.*—The first volume of this work has been recently published, and in some of our Periodicals favorably noticed. It is a Book of more than 600 pages. The object of it is to explain the 'Practice in civil actions and proceedings at Law in the State of New York, in the Supreme Court, and other Courts of the State, and also in the Courts of the United States.'

Much of the matter is necessarily local and uninteresting to Gentlemen of the profession practising in other States. There are some portions of it, however, which are of general interest, particularly the Chapter on the United States Courts. The Chapter upon 'Actions' also will be found not altogether inapplicable to the Practice of most of the States. We have heretofore had no Books of Practice in this Country, and in New England especially, and those States whose institutions resemble hers; but little aid has been, or could be derived from the various treatises upon this subject which have appeared in England. The proceedings of the Courts are altogether dissimilar. Indeed any young Lawyer, who should attempt to get an action at Law through our Courts by the help of Tidd or Sellon, would find himself sadly disappointed and mortified. The Practice of our Courts is one of the most difficult and one of the last things the young Lawyer learns. And the reason is he can go nowhere to learn it. It is to be picked up by degrees in a daily attendance upon the Courts. It is besides ever varying as new systems of judicature are introduced, new legislative Acts passed, or new Judges take the places which age, death, or other causes have made vacant. It is so much so, indeed, that the venerable Practitioner who has been forty years at his post, watching his *return, motion* and *judgment* days, to whom the whole routine of the business of the Court is as familiar as the way to his office, if he happen to be a few months from his place, feels, on his return, not quite certain that he is *rectus in curia*, or that he moves their Honors in manner and form or at the right point of time. Nobody has ever undertaken to make Books of Practice for the different States, because, in the first place, of the difficulty of executing such a work satisfactorily—and in the second place, because every State must have its own work, and of course the sale must be extremely limited, and Book makers, we know, although they are often wofully disappointed, generally have an eye at the profits.

If indeed every Lawyer in the State should buy a copy, the avails would hardly pay the expenses of the Publication of a work which should be adapted, as it necessarily must be to the practice under a single local jurisdiction.

The volume of Messrs Paine and Duer, before us, seems to be well executed. When completed we should think this work could not fail to be valuable to the members of the New York Bar. If there exist any exception to our remark upon the want of encouragement to the compilers of such Treatises it is found in the State of New York, which already numbers about 1700 Lawyers.

Mr Paine is not altogether unknown to the Profession as an author. He was for many years the partner in business with Mr Wheaton, the late United States Reporter. And he has long enjoyed the reputation in the City of New York of an industrious, correct and sound Lawyer. He is a graduate of Harvard College, and the son of one of the most efficient, enterprising and intelligent men in Vermont, the Hon. Elijah Paine, District Judge of the United States for that District.

The table of contents of this volume is as follows:

PART I.

*Of Civil Actions, &c.*

Ch. I. *Of Actions.* Sec. 1. of personal actions. 2. of suits relating to real property. 3. of scire facias. 4. of remedies at law which are not called actions. 5. When actions are transitory or local, and when they die with the person or survive. 6. of the parties to actions. 7. of mistakes in the form of action, and the election and joinder of actions. 8. of the time limited for the commencment of actions.

Ch. II. *Of the Supreme Court, including the Circuit Court of the State and Attorneys and other officers; and of the prosecution and defence of actions in person or by attorney.* Sec. 1. of the supreme court. 2. of attorneys and counsellors. 3. of the prosecution and defence of actions by attorney or otherwise. 4. of sheriffs and coroners.

Ch. III. *Of the Court of Errors.*

Ch. IV. *Of Courts of Limited Jurisdiction.* Sec. 1. of the superior court of New York. 2. of the country courts of common pleas. 3. of mayors' courts in cities.

Ch. V. *Of the Courts of the United States.* Sec. 1. of the district courts of the United States. 2. of the circuit courts of the United States for the southern districts of New York. 3. of the superior court of the United States.

PART II.

*Of the practice of the Supreme Court in the principal and direct proceedings to judgment in personal actions brought for the recovery of any debt or for damages only.*

Ch. I. *Of the modes of commencing personal actions.* Sec. 1. of the original writ and process thereon. 2. of the commencment of actions by a capias and respondendum.

Ch. II. *Of the proceedings after issuing the capias until the defendant's appearance.* Sec. 1. of the arrest and service of the writ. 2. When the defendant may be held to bail. 3. of bail to the sheriff, or bail below. 4. of the return of the writ by the sheriff, and his duty thereon.

Ch. III. *Of the defendant's appearance.* Sec. 1. of common appearances and notices of retainer. 2. of special bail.

Ch. IV. *Of the declaration.* Sec. 1. of the parts and requisites of the declaration. 2. of the filing and service of the declaration.

Ch. V. *Of Pleas and the subsequent pleadings, and of Demurrers.*

Ch. VI. *Of the issue.*

Ch. VII. *Of the proceedings from issue in trial.* Sec. 1. of the circuit roll. 2. of notice of trial and inquest, of countermanding the same, and of preventing inquest and putting off trial. 3. of the venire for foreign jurors, and the mode in which they are drawn and summoned. 4. of the evidence and the witnesses, and the mode of compelling their appearance.

Ch. VIII. *Of the trial and its incidents.* Sec. 1. of pleas puis darrein continuance. 2. of drawing jurymen, of talesmen, and of challenges. 3. of proceedings before the jury; swearing and examining witnesses, demurrers to evidence, bills of exceptions, and non-suits. 4. of verdicts general and special, and of the conduct and duties of the jurors. 5. of the portion and rule for judgment. 6. of the damages.

Ch. IX. *Of final costs.* Sec. 1. of the general rules awarding, regulating, and limiting costs. 2. of the taxation of costs.

Ch. X. *Of amendments.*

Ch. XI. *Of judgment by confession.* Sec. 1. of warrants of attorney and entering judgment thereon. 2. of cognovit.

Ch. XII. *Of judgment by default and the assessment of damages thereon.* Sec. 1. of the default. 2. of the assessment of damages by the clerk. 3. of the assessment of damages in a court of inquiry.

Ch. XIII. *Of discontinuance, nolle prosequi, retraxit, and cassetur billa vel breve.*

Ch. XIV. *Of judgment by default of the plaintiff.* Sec. 1. of judgment of non pros. 2. of judgment as in case of non suit.

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Letters patent have passed the Great Seal of Ireland, constituting and appointing John Leslie Foster, Esq. LL. D., to be one of the Barons of his Majesty's Court of Exchequer, in the room of James M'Clelland, Esq. resigned.—*Dublin Evening Mail.*

Mr Horne, of the Chancery Bar has been appointed Attorney General, and Mr J. Williams, M. P., Solicitor General to her Majesty.

## New Publications.

Condensed Reports of Cases in the Supreme Court of the United States, containing the whole series of the Decisions of the Court, from its organization to the commencement of Peters's Reports, at January term, 1827, with copious notes of parallel cases in the Supreme and Circuit Courts of the United States. Edited by Richard Peters, Counsellor at Law, and Reporter of decision of the Supreme Court of the United States. Vol 2. From February term, 1807, to February term, 1813, inclusive.

The Patentee's Manual—containing a list of Patents granted by the United States, for the encouragement of Arts and Sciences, alphabetically arranged, from 1790 to 1830, (to be continued by supplements.) Also, the Laws of Congress for granting Patents, with a digest for all the decisions which have taken place in the courts of the U. States respecting Patents. By William Elliott.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as proprietor in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, { *Clerk of the District of Massachusetts.*

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep, $3,50—Calf, $4,00.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

The work will be published with despatch.

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The work will be printed on a beautiful small type, and good paper, and will be comprised in four or five volumes, (probably not exceeding four,) royal octavo size, each volume to contain about 1000 pages; and will be delivered to subscribers at $5 per volume, in good law sheep binding, which is a very low price for a law work embracing so great a quantity of matter.

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RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan suggests.

July 10. ISAAC PARKER.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

Aug. 20.

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NEW LAW BOOKS.—JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

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The work will also contain references to the decisions of the chancery courts of the United States, and of the several states.

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THIS DAY PUBLISHED,—By GRAY & BOWEN, a second, and cheap edition of '*British Opinions on the Protecting System*, being a Reply to Strictures on that System, which have appeared in several recent British Publications.' Reprinted with a few alterations from an article in the North American Review, for January, 1830.

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NORTH AMERICAN REVIEW. Complete sets of this work (thirty volumes in all) can now be had, on application to the Publishers, on liberal terms. The number and variety of the topics discussed in this work, and the high reputation it enjoys both in this country and Europe, render it a most valuable addition to the library of literary men. A General Index of the first twentyfive volumes has also been published, in a style to match with the current volumes of the work.

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THE JURISPRUDENT

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, SEPTEMBER 18, 1830. NO. VIII.

## MERCANTILE LAW.

### NO. III.

[Continued.]

Neither law nor common sense allow, that, where one of the essential ingredients is wanting, the binding consequences of a contract should attach; and mental incapacity at the time of contracting is admitted therefore as a good defence, not only in equity, but at law. Our law was indeed once disgraced by the recognition of a contrary doctrine, supported by a contemptible refinement of absurdity, which declared that a man could not be allowed to stultify himself.* But at this day no stipulation, however testified, whether by parol, by deed, or by record, entered into by one, who at the time was destitute of understanding, will prevail in a court of equity; and even at common law, nothing but the transcendant authority of a record, which admits of no question, is exempt from impeachment on that ground.† Whether the temporary prostration of the understanding, induced by a fit of drunkenness, is such an incapacity for contracting, as will on that account defeat an engagement entered into under such circumstances, was a question formerly much controverted:‡ but it seems to be now settled, as good sense and consistency demand, that such an engagement, wanting the requisite assent of the understanding, is invalid both at law and equity.§

Mere weakness of understanding in the party contracting is not *of itself* a recognized ground of incapacity to contract. Unless there be an absolute privation of the reasoning faculties, all men are considered as possessed of understanding sufficient for the conduct of their own affairs, and competent to bind themselves by agreement.‖ The reason undoubtedly is the difficulty of applying a different rule. It would be manifestly impossible for the law to ascertain in every case, by a nicely graduated scale, minute differences of intellectual capacity.

Accordingly, where this difficulty does not exist, it resumes its office of protecting the weak against the practices of the strong. Now those who have not yet attained to manhood, (a period which by our law is for this purpose fixed at 21 years) cannot in general have had experience sufficient to guide them in the management of their own affairs; and this incompetency being so far uniform, that it can be reduced to a tolerably accurate standard, the law interposes to shield them against the impositions to which the indiscretion of youth is liable, and does not bind them to the performance of their engagements.* But the reason which gives this indulgence to the *infant* (for so a person under the age of 21 is, with some inaccuracy of language, denominated by our law) manifestly does not apply to the other contracting party, if he be of full age. He at least is capable of providing for his own interests; and his engagement, therefore, if the infant choose to insist on performance, is obligatory on him.† Upon the same principle, of the infant himself, after his attainment to full age, recognize the engagement by an express and deliberate undertaking, he will henceforth be bound by it.‡ It is in fact a new engagement, rather than a confirmation of the former one, founded, it is true, on a benefit received before, but made at a time when he must be supposed capable of estimating what that benefit was worth, and when he had the choice of adopting it, or not.§ A reasonable distinction, however, has been drawn between such transactions as are apparently for the infant's benefit, and such as are clearly to his prejudice. The latter are held to be altogether *void;* the former merely *voidable* at his election.‖ Thus, the lease of a house, or the letting out to hire of a ship, may be confirmed by him when of age, without a renewal of the instrument. Indeed, if the contract be such, that after his maturity it is still in a course of performance, (as if a partnership, entered into by him when under age, be continued after his majority,) the engagement will thenceforth bind him, unless he at that time expressly repudiate it. But where the contract is *void*, as in the case of a bond with a penalty, no acknowledgment after full age can set up and give validity to the transaction.¶

The rule of law proceeds, as we have said, on the principle of protecting the young against the practices of such as might be inclined to take advantage of their inexperience: when therefore the circumstances of the transaction repel the presumption of unfairness, it is just, and for the benefit of the infant himself, that the rule should not apply. Accordingly a person under age may enter into a binding engagement to pay a reasonable price for such things as are necessary to his comfort, and proper to the station he holds in society. It is usual to include all such things under the general term of *necessaries*, and the expression, if understood as relative to the degree and condition of the infant, is sufficiently accurate for all pratical purposes.* The law will not countenance the claims of those who indulge, or take advantage of the extravagance of minors, but holds it to be the duty of the tradesman to make such previous inquiries as may satisfy him that the goods supplied are what may reasonably be required. If therefore the infant were already provided with all that was necessary, either by his father or from other tradesmen, he cannot support his claim.† An infant cannot be sued for money lent; in a court of common law, not even when advanced for the purpose of being expended in necessaries, because when trusted to the infant himself, it may be misapplied.‡ A court of equity, however, will grant relief, where the money has been lent to pay a debt for necessaries, and has been applied accordingly, by allowing the lender to stand in the situation of the creditor for necessaries, whom he has satisfied.§

As the law considers a minor wanting in the necessary discretion to contract, *à fortiori* it does not recognise him as a trader.‖ It does not, therefore, hold him liable on the custom of the realm, as a carrier or innkeeper,¶ or on the law of merchants, as on a bill of exchange, or promissory note, when given in the course of trade, and as a negotiable instrument;** nay, it is very doubtful whether either would be available against the infant, even though given for necessaries, and in the hands of the original payee.†† It will not bind him by the statement of an account,‡‡ nor regard him as a partner,§§ nor suffer him to be made a bankrupt.‖‖ But though not liable on a mercantile contract, he is not precluded from suing upon it,¶¶ and, had not the case been questioned, it would seem unnecessary to add that a negotiable security is not invalidated, because it has passed through the hands of an infant.***

By the civil law, persons who squandered away their money in extravagance and dissipation might, on the application of those who were immediately interested, be placed under what was called an

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* 39 H. 6. 42. Co. Litt. 247 a. 4 Co. 124. Cro. Eliz. 398. See also 2 Bl. Com. 291, 2. and the notes by Mr Fonblanque *d, e.* to the Treatise of Equity, b. 1. c. 2. s. 1. 'It is always,' says the learned translator of Pothier on Obligations, 'a question of fact, whether a given act is imputable to a given individual; and where the nature of the act requires a mind capable of rational assent, the want of such capacity is a negation of the act imputed.' Appendix, No. 3.

† Hobart, 224. Co Litt. 247.

‡ 3 Ch. Ca. 107. Co Litt. 247 a. Heineccius, c. 14. s. 392. As to the relief afforded by equity in such cases, see 1 Ch. Ca. 202. 3 P. Wms. 130. and the opinion of Lord Hardwicke in Cory v. Cory, 1 Ves. and B. 30.

§ 18 Ves. 1 16. Bull. N. P. 172 citing the opinion of Holt Ch. J. 3 Camp. 33. and 1 Stark. N. P. C. 126. per Lord Ellenborough. And see Pothier, Pt. 1. c. 1. s. 1. art. 4. div. 49. The law of Holland agrees with this.—See Institutes of Holland, p. 1. 90.

‖ Still weakness of capacity may be a material circumstance for inferring unfair practice, when the bargain is manifestly to the disadvantage of the weaker party; and fraud, as we shall hereafter see, vitiates everything into which it enters.

* Bac. Abr. Infancy, I. Com. Dig. Enfant, B.

† Bac. Abr. Infancy, I. 4. Strange, 937. 2 M. & S. 205.

‡ Co Litt. 3. a. 2 Ventr. 203. 1 Mod. 25. Strange, 690. 9 Vin. Abr. 393, 394. 1 T. R 648. 2 T. R. 766.

§ See the observations of Lord Ellenborough in Cohen v. Armstrong, I M. & S. 724.

‖ See the case of Zouch v. Parsons, 3 Burr. 1794. where this distinction was much discussed by Lord Mansfield.

¶ 8 Taunt. 35. 5 B. & A. 147,

* Co. Litt. 172. a. 2 T. R. 159. 4 T. R. 363. 8 T. R. 578. Peake's N. P. C. 229. 4 Campb. 164. Necessaries for the wife of an infant are considered as necessaries for himself. 1 Strange, 168. It may sometimes be a question, whether the credit was not given to the father: if it were, the infant is of course exempt. See Baker v. Keen, 2 Stark. N. P. C. 501. Alleyne, 94.

† 2 Stark. 501.

‡ 1 Salk. 297. 387. 1 Vern. 255.

§ 1 P. Wms. 559.

‖ Therefore an action against an infant for goods supplied to, or work done for him, for the purpose of a trade, by which he gains his livelihood, cannot be maintained. Cro. Jac. 494. Strange, 1083. 2 M. & S. 209. 6 Taunt. 120. 8 Taunt. 35. 5 B. & A. 147. 2 B. & C. 824.

‡ Carthew, 161.

¶ Carthew, 160, Holt's N. P. C. 359, Com. Dig. Enfant, C. 2.

** 1 Campb. 552. Bayley on Bills, 19. Chitty on Bills, 16. Holt's N. P. C. 78.

†† 1 T. R. 40. 2 Stark, N. P. C. 36.

‡‡ 1 Stark. N. P. C. 26. 5 B. & A. 147.

§§ Cullen, 26. A debt contracted during infancy is not sufficient to support a commission against a trader, on an act of bankruptcy committed after full age. Bull. N. P. 38. 1 Atk. 146. 197. 4 Ves. J. 163. 11 Ves. 402. 1 Ves. & B. 494. 6 Taunt. 119. 2 M. & S. 207.

¶¶ 2 M. & S. 205. 6 Taunt. 118.

*** 4 Esp. N. P. C. 13.

interdiction for prodigality. From this time they were incapable of entering into valid contracts. The law of England has nothing analogous to this; except that the courts of equity view with great jealousy contracts entered into with young persons, engaged in a course of dissipation. This, however, is not on the ground of an incapacity in them to contract, but of an undue advantage taken of their weakness and indiscretion.

But we have said that in order to constitute an agreement, there must not only be an assent of the understanding, but an exercise of the will. We need hardly say, therefore, that where there is no recognized will, there can be no contract. Now, the law of England, somewhat ungallantly perhaps, but in truth by a wise and commendable policy, considers the moral existence of the woman as incorporated, or rather merged, by marriage, in that of the man. It looks upon the will of the wife, not as identified with, but altogether lost and absorbed in that of the husband.* The consequence is manifest: the engagements of the wife, made during marriage, or as the law aptly enough expresses it, *coverture*, are altogether ineffectual; the general rule being, that neither she, nor her husband, can sue or be sued on any stipulation entered into by or with her, whilst this incapacity continues. All such engagements, whether evidenced by simple contracts or by deed, are absolutely void.† There are of course qualifications of this, as of every other rule. Laws which are for the benefit, are not to be strained to the disadvantage, of the community. Whenever the strict application of a rule would work general and manifest injustice, the same reason which first established it, equally sanctions the relaxation of it. Hence, the contracts entered into by the wife for necessaries (i. e. for goods corresponding to the rank and appearance which the husband permits her to assume in society) are, not only out of a due regard to the interests of the wife, and the rights of the fair-dealing tradesman, but even for the sake of the personal convenience of the husband, held to be binding on the latter.‡ Still the law does not depart from its principle. It does not consider these transactions as the acts of the wife, but of the husband represented by her. And in this reasonable fiction it does but conform to a still more general rule, that whatever is done for a man's benefit shall be presumed, unless expressly repudiated, to have been done by his authority. Of course this, as well as all other presumptions, may be rebutted by fact. Thus, an express notice to the individual tradesman not to trust the wife will discharge the husband.* Nor does the presumption attach, where circumstances shew that credit was given, not to the husband, but to the wife.† The tradesman has then chosen to rely upon her honor, and he must abide by the consequences. As in the case of infants, so in this, money lent to the wife for the purchase of necessaries cannot be recovered in law; in equity, if really so applied, it may.‡ And in both, an actual payment on account of necessaries for the wife may be claimed from the husband, as money expended for his use and benefit.‖

* Our law uniformly manifests the most anxious disposition to preserve entire the union of the married state, and to prevent whatever might be likely to introduce domestic discord. Undoubtedly, by this surrender of the wife's legal existence, it has taken a very effectual step towards the attainment of its object. It seems to have proceeded on that Homeric maxim, which we sincerely believe, so far as the executive of government, whether domestic or politicial, is concerned, will be found universally true—

ακ αγαθου πολυκοιρανια· εις κοιρανος εσω.'

† Com. Dig. Baron & Feme. Bacon's Abr. Baron & Feme. 1 Sid. 120. 1 Lev. 4. 2 Atk. 453. 6 T. R. 609. 11 East. 301. 4 Camp. 26. If, therefore, the wife sell or dispose of the goods of the husband without his assent, he may recover them back from the holder, and if she lose money at cards, he may bring an action for it against the winner. Com. Dig. Baron & Feme, 2.

‡ Com. Dig. ubi ante. 2 Lord Raymond, 1006. 1 Salk. 118. 1 Campb. 121. It is at the peril of the tradesman if the goods supplied are beyond what is suitable to the apparent circumstances of the husband. 3 Barnewell & Cresswell. 631.

* Strange, 1214. A general prohibition will not. 1 Sid. 121. Lord Raymond, 444. Strange 875.
† 3 Campb. 21. 4 B. & A. 255. ‡ 1 Moore, 126.
§ 1 P. Wms. 483. ‖ Salk. 837.

## MR BROUGHAM'S SPEECH

### ON THE LAW REFORMS.

April, 1830.

Mr Brougham, in bringing forward his motion on this subject, called to the recollection of the House that, in consequence of his former motion two Commissions had been appointed. One was upon the law of real property. That Commission had already made one report, and a second was, at an early period, expected. The other Commission was with relation to the proceedings in a suit of law. The Commissioners had made a report, and disclosed their intention of speedily following it up by a second, in which the most important questions would come under discussion. Let it not be supposed that in calling the attention of the House to this most important subject he had any complaint to make of the manner in which the Commissioners had discharged their duty. He did not know that he ought to complain of the length of these reports, because, as the field of inquiry was large, it behoved the Commissioners to investigate fully; neither did he know that he ought to complain that the powers granted to the Commissioners were too limited; and certainly he had every reason to say that the powers granted were well exercised. The Commissioners, he thought, prosecuted their inquiries, and promoted their investigation, keeping clear of the rashness of innovation on the one hand, and too much veneration for ancient institutions and existing abuses on the other—(hear.) The great learning and experience which the Commissioners, as practical men, have brought to the extensive subject of this inquiry, and the vast knowledge which they have obtained from others of equally extensive practice with themselves, in addition to their own suggestions which those Commissioners have laid before them. That, therefore, being his candid opinion, it could not be supposed for a moment that he now brought forward the motion, of which he had given notice, in any hostility to the Commissioners. He would take the ground which they left untouched. If he saw that the labors of the Commissioners could be concluded in any reasonable time, he would not move upon his own views, until he could learn whether they formed part of the investigations of the Commissioners—or if the subjects to which their inquiries were directed could be brought within a reasonable scope—or that they had any connexion with the subject which he was about proposing—he would be inclined to postpone his motion. But finding that the attention of the Commissioners was not directed to this subject, or their inquiries connected with it, he saw no reason for postponing his purpose of directing the attention of the House to it. If we were told that there was any country, in which, for the purpose of recovering 600*l.* or 700*l.*, which a person was entitled to receive, he should first have to spend 60*l.* or 70*l.*—throwing, as the common saying was, good money after bad—in what circumstances such a country was placed in respect to the administration of justice, in which such a loss was to be first incurred. But that was not all. If, after that, and after great anxiety of mind, great labor of body, no little uncertainty as to the final event, and withal to be bandied about, from province to province, and from Court to Court, it must be confessed that our admiration of the administration of justice in such a country could not be great. But when after all, after spending so much money, we still could find that the adversary in the suit could still keep the property in litigation out of the power of the true owner, and that this latter did not ultimately receive one fourth of the debt, when even the debtor was solvent, and was willing to pay what the law and the Judge declared, even in the most favorable case. When we find that the party could receive 60 or 70*l.*, but even less, after being, perhaps, 14 or 15*l.* out of pocket beyond the debt, then we should say, if such a country existed, it must be a barbarous country—(hear, hear.) Nevertheless, he need not remind them of what they all knew—many of them to their cost—that that country was England—that country in which they then sat. Then the question to be considered was—how shall this be remedied? And the first question which occurred was, 'How did all this arise?' He would thus go into the question and into the subject at once, in the way that was most convenient for discussion. He had formerly stated to the House the experiment which he had made at one Assizes at Lancaster. He begged of the Prothonotary to give him the number of verdicts which were given at one Assizes. He did accordingly get them—they were in number 50, and the average amount of each was 14*l.* He did not mean to say that there were not among them some cases in which the damages were merely nominal, such as ejectment, issues out of Courts of Equity, &c; but the most of them certainly were such as enabled the creditor to hold the debtor to bail for his debt. He would refer to the tables given by the Commissioners in the appendix to their report, to show the great evils of the system. In the year 1826, the number of actions brought in the King's Bench was about 69,000; of these, the number brought to trial was about 60,000. Many of the actions were not proceeded in for various reasons with which he would not trouble the House. If they could form an estimate of the sums for which these actions were brought generally, it could not be from the documents laid on the table. But they could form an approximation to them. They had a return in 1827 of the number of actions that were brought in the Courts of King's Bench and Common Pleas for two years. The number of affidavits of debt for 10*l.* and upwards, was 73,000. Out of these affidavits, an average of about 30,000 out of the 73,000, were made foundations for actions. These affidavits were for sums in the following proportions:—29,000 of them were for sums above 10*l.* and not exceeding 20*l.*; 36,000 of them were for sums exceeding 20*l.* and not exceeding 50*l.* Taking all of these, it would be found that 63,000 of these affidavits were for sums not exceeding 50*l.* each, and no less than 78,000 odd of them were for sums not exceeding 100*l.* each. Now, he called on the House to observe, that out of all the 93,000 affidavits of debt,

one third of them were for sums not exceeding 20*l.*; no less than two thirds of them were for sums not exceeding 50*l.*; and no less than five sixths of them were for sums not exceeding 100*l.* each. Of this statement there could not be a doubt, and he pledged himself to the House for its accuracy. From all this, the House would see the practical conclusion—which was this, that a great part of the Legislature of the country resolved itself into questions where the sums in dispute did not exceed 100*l.* He next would call the attention of the House to the description of the persons that were engaged in those actions. The Commissioners, from whose labors he was quoting, had added some valuable tables of costs of actions to their report, and they gave four bills of costs of actions in the Court of King's Bench, to which he would direct the attention of Members. The Commissioners distinctly stated that these bills were reduced by taxation to the lowest possible scale of expenditure. One of the bills to which he would allude was that of an action tried in London, the witnesses being from the county of Lancaster. The Bill included the costs of the plaintiff only. Not only was it on the lowest scale of expenditure, but was also free from the additional costs of special writ, or more than one defendant; and the suit was altogether the most favorable that could be selected, both in the points of cheapness and expedition. The plaintiff's taxed costs, as allowed between party and party, from the giving of the instructions to his attorney to proceed up to execution, were 86*l.* 4*s.* 4*d.* These costs, the Court having ordered further proceedings after the verdict amounted to 110*l.* 18*s.* 10*d.* Out of this sum was to be deducted about 10*l.* for delay. There being two delays arising out of the arrear of business before the Court, one of these delays being 6*l.* odd, and the other 10*l.* odd, as he said before. But taking that there was no delay, but that all the proceedings were as they were laid down by the Commissioners in these most valuable tables; taking that there was no delay, the sum of 6*l.* was to be deducted for the first bill, and 10*l.* odd from the second, in which case they have to name 80*l.* odd for the one bill of costs, and 100*l.* odd for the other. Now he would admit that much of this expense was owing to the large sums given to the witnesses. He would not only admit it, but he maintained it. True it was that the cause was not a town cause, but was brought from Lancaster; but true it also was, that if the cause were tried in Lancaster or in York, the expense would be the same. The witnesses in this cause were an architect, a master carpenter, and a laborer. In taxing the bill two guineas a day were allowed to the architect, 15*s.* and then so much for each also for travelling and for expenses on the road, which was 12*d.* per mile. He next begged to direct the attention of the House to the head of delay, which was generally very great at the Assizes, and which delay, or fear of delay, he had no doubt was the cause of bringing this action for trial to London from the county of Lancaster, as in London the party could almost fix on the day by making it a Special Jury cause, so that he might in London know the day on which his cause was to come on, whereas he would have to wait twelve or fourteen days, as was often the case at Lancaster, at great expense, and in great anxiety before the trial might come on. Then as to the attorneys, they were to have two guineas each day if they had but one cause; if two causes or more, then one guinea a day. All the witnesses were to be paid all the days they were waiting, at the rate he had said. This expense was essential as long as the present system continued, and was inseparable from it. He did not know but it was more essential than retaining of Counsel, or employing attorneys, and for these he knew not how much expense was to be added.

Upon a former motion he produced to the House four bills of costs from respectable houses, one of these bills was for 400*l.* 200*l.* of which were taxed off, so that the party was 200*l.* out of pocket if the debt was not more. In the second bill 70*l.* were taxed off, being one third. In the third bill 15*l.* out of 60*l.* were taxed off. This last was an undefended cause, and if it had been litigated and if the other party had been litigious and made opposition, he might put him to the expense of 80*l.* before he got his verdict, or 100*l.* before he got final judgment. Another party had to pay 120*l.* before he got his verdict, and 150*l.* before he obtained final judgment—so that he paid 150*l.* in costs and got 50*l.* of debt.—So that, after all this harassing proceeding—out of all this uncertainty—out of all this vexation, embarrassment, and anxiety—together with the risk of losing his suit and his debt too—the plaintiff paid 150*l.* instead of getting 200*l.* It was needless for him to say that this was not an average case. But what was the result? It was this—that any man skilled in the proceedings of Courts of Justice would not think of suing for such small sums. Such a man would rather lie out of his money than enter a Court of Justice, quite certain of losing some at best out of pocket. He had occasion to converse with an attorney on the subject. Being only 20 miles off, he (the attorney) said, if he were the party, he would not think of going to the assize town for any sum under ninety pounds. A man might be inclined to bring an action for a gross detention of his rights, or to resist a flagrant demand, but this which he described was the result of his exertions. Now these were the evils, and whoever proposed a remedy for them somewhat exposed himself to opposition, and perhaps to obloquy, inasmuch as he seemed to put himself above others in wisdom and in experience. He felt that something would be done by the investigation of the Commissioners, if the House should carry into effect these proposals. He felt that somewhat of the evils of our present system would be diminished at least by acting upon the recommendations of the Commissioners. He had stated that we felt the evils, and he had also stated the principal causes of them. He would now come to suggest what he thought would be a remedy. He thought that the distance to which parties were forced to come, in order to have their causes decided by the existing Courts, a great evil, and requiring remedy. It long has been the custom to have justice distributed and causes decided in the capital of the kingdom. That this should be the great mart from which all process was to be purchased and issued forth—that hither all processes should be returned—and that hither all parties should be obliged to resort—was long the custom. But that was not of itself the cause of expense, because the difference of sending to town for a writ was nothing almost in point of expense, and the difference of expense from York or Lancaster was almost nothing; but out of that still arose another part of the system to which the same reason did not apply. The Judge as well as the process came from London, and the cause had to wait till he came. The Judge came once in half a year. But that was not all. The cause was to be heard, and the parties had to go to a remote part of the country; they had to send their lawyers and their witnesses, and generally a race was run by some practitioners to see who entered his cause first. The witnesses had to be supported; and not only supported, but paid a reasonable compensation for loss of time; and they were the better witnesses the better they were paid. As he said before, the day laborer was to be paid 5*s.* a day, and that was allowed in the taxation of costs. It was well known that the attorney who paid his witnesses stintingly was sure to pay for his parsimony. All these evils were essential to, and inseparable from, the system of jurisprudence now existing. Then another ground of evil was, that if any ulterior or special proceeding was to be had in Court, that must be done in London, and not in the neighborhood of the parties. The whole result necessarily was considerable delay in deciding the cause, and great and overwhelming, and most unnecessary expense. What, then, was the obvious remedy? He would suggest an alteration in the mode of issuing out process, by which a few shillings would be saved out of every eight pounds. Another proposition, emanating from the report of the Commissioners, was to lessen the arrears of causes, by which a saving might be made both of time and expense. In the larger bills a saving of 10*l.* might be effected, and in the smaller the expense might be diminished by 6*l.*—that was all. Then came a set of valuable recommendations and excellent improvements, to which he could only generally advert. He must, however, specially notice the proposition with regard to the attendance of witnesses in the places where causes were to be tried. Here an excellent principle was recommended, which was not at present acted upon. In like manner the whole system of pleadings was brought under consideration both in principle and practice, and this branch evinced some of the happiest thoughts and most profound suggestions which it was possible to conceive. These were well worthy the earnest attention of every lawyer, but more particularly of those ingenious persons who were engaged in the peculiar department of the profession to which they referred. What he principally alluded to were the suggestions with regard to the plea of interpleader. It appeared to him, however, that the great evil arose from the distance of the suitors from the town in which the causes were to be heard. Thus far with respect to the causes of complaint as to actions for a certain amount. He was ready to admit that, in actions for a large amount, there was no reason why a cheaper mode of proceeding might not be adopted than that at present existed; but the great and crying evil arose from actions not exceeding from 50 to 100*l.* And here he might be permitted to call the attention of the House to the old system, which our ancestors had adopted for the purpose of avoiding litigation. At the same time he must observe in the outset that it was quite impossible to deny the advantage of that system, by which all the practice of the law was carried from the Courts of Westminster Hall twice a year through the most remote parts of the land. Yet, long antecedent to the present system of law or jurisprudence, the form was much more simple, and afforded to the suitors a much more convenient remedy by means of trial in the Country Court. Lawyers differed not a litle as to the origin and jurisdiction of that Court, but it was evident that both were coeval with the Saxon times. In those days the County Court was the great ordinary tribunal of the country. It was said, but in this he could not agree, that its juri-

diction extended to criminal as well as to civil causes. At all events, it was certain that it had jurisdiction in all cases ecclesiastical as well as civil. The persons who presided in it were the Aldermen and the Bishops, acting under the Earl of the county, this maxim being enjoined—'Let the Bishops and the Earl meet the county at stated times, and let the one teach the law of GOD, and the other the law of the land.' The principle of the law was, that in all ordinary cases every man should seek for justice at his own home, and that he should not appeal to the King till he had failed of obtaining it at his own home. The principle laid down by Sir Harry Spelman was to this effect—'Let no man seek a remedy from the King till he cannot find his burdens lightened in the County Court; when he cannot find them lightened in the County Court, then let him seek a remedy from the King.'

In support of this view of the subject he might refer to the practice which obtained in the 6th year of the Conqueror, when the Archbishop, the Bishop, and the Earl, presided in the County Court, and continued their sittings for three days, adjudging manors of great value. In the Court were Lanfranc, Archbishop of Canterbury, and Odo, the half-brother of the King. These, with the Earl, had jurisdiction in all civil cases. By degrees the jurisdiction of the Court became limited, much inconvenience being found to arise from the manner in which it was subsequently constituted, and the Sheriffs having fallen into disrepute. In the time of Henry I. the jurisdiction of the County Court was confined to matters of 40*s* in amount, for under that sum no one was allowed to sue in any of the King's Courts of Westminster. But in a century and a half afterwards 40*s* became the maximum as well as the minimum amount for which legal process might be instituted at a County Court. Now he thought it would be convenient if the House looked to the history of the County Court in Scotland, since, in endeavoring to discover a remedy for an evil it would be desirable, before they agreed to any change, to try whether a system which was objected to in this country had been adopted elsewhere, and with what success. The Hon. and Learned Gentleman then made some observations to show that the system of British judicature probably originated in the principles laid down by Glanville, and that it was analogous in most respects to that which now existed in Scotland. He contended, however, that the improvements which had been made in the one county had been lost in the other. It was much to be regretted that the people of Scotland had retained many excellent things which the people of England had thought proper to discard. In the original constitution of the County Court the regulations were the same for both countries. In the earlier times the Sheriff could try pleas of the Crown, and in all civil causes his power was unlimited. At a subsequent period, however, the genius of the Scottish County Court assumed a character differing in a material degree from its Saxon origin. Its judicial offices became hereditary in fee in private individuals. But many of these hereditary jurisdictions were forfeited in the rebellion of 1715, and still more in that of 1745. It was at this time found that monstrous abuses existed under the system which then obtained, for persons purchasing property were vested with local jurisdiction, not only in civil suits, but in all cases of life and death. Therefore, to remedy an evil so obvious, all local jurisdiction of this feudal description was abolished. Hence arose, as a substitute, what was called the Crown County Court, the Crown possessing the shrievalties and their appurtenance of jurisdictions all over Scotland, and appointing persons to act through all parts of the country. Under that system Scotland had continued ever since, and the best effects were found to result from the mode in which justice was administered. He still thought that the system might be further improved by such a reform as would oblige Sheriffs Depute to reside within the limits of their shrievalties, instead of devolving their jurisdiction to other individuals. Yet it could not be denied that, whatever defects might exist in it, the system was found to work well; and so far as it went, it was a very cheap and convenient mode of obtaining justice. The Sheriff was competent to entertain all ordinary actions that might be brought by individuals. All actions for debt might be brought in his Court; so likewise might all actions of damages for assault, for criminal conversation, for slander, for seduction, together with all criminal prosecutions; and the damages might be laid at any amount there being no limitation whatever.

[To be concluded.]

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## ARCHES COURT—JUNE.

Before Sir John Nicholl.

### *Harrison vs. Lane.*

The Court pronounced judgment in this case this morning. It was a suit promoted by Mrs Harrison, for the purpose of setting aside the will of the late Rev. Dr Pugh, of Hereford, her own brother, on the ground of mental incapacity. It was alleged, on the part of the promoter, that, for some years prior to his decease, the Rev. Dr Pugh had indulged in excesses which brought on a gradual decay, and that, in the month of March, 1829, when he made his will, making his housekeeper (Rebecca Charles) and her nephew (Thomas Rogers, a young boy) his residuary legatees, he was childish, and incapable of managing his affairs. It was alleged that, during the whole of the month of March, he was of unsound mind, memory, and understanding. Dr Ligh, however, who was called on the part of Mrs Harrison to prove this, did not go the length of stating that the deceased was of unsound mind, but that he was imbecile, and was daily getting worse. Into the other grounds of the suit—namely, the improbability of his thus disposing of his property while he had a sister for whom he always entertained a regard until he became dissipated, and the control alleged to have been exercised over him by Rebecca Charles, his housekeeper, it was not very requisite, to examine, the main question being whether, at the time of making the will, he was in such a state as to render Mr Lane's account of the transaction incredible. The previous history of his habits and of his profane swearing was of no importance, nor was even his continued intoxication, except so far as it tended to produce imbecility. It was clear from the evidence, that, even prior to his mother's death, he was in a state of alienation from his mother's family; and, after her death, the breach was still further widened by the legal proceedings which the sister thought proper to commence against him in the Court of Chancery. The extent of this alienation was proved by the fact that in the beginning of March, only three weeks before his death, their mutual friends endeavored to bring about a reconciliation between the deceased and Mrs Harrison. For this purpose, at the request of Mrs Harrison, the Rev. Mr Wynne and Mr Ware called upon the deceased, but he rejected the proposition. There was no occasion, therefore, for Rebecca Charles to incite the deceased against his sister; and even though she had joined with him in his feelings against Mrs Harrison and her family, however base that might be, yet it could not vitiate the act of a capable testator. The whole disposition of the will was supported by probability. The deceased had frequently declared that he would leave nothing to his family; and it was clear that he regarded Dr Jones, to whom he left 200*l.* and Mr James Lane, to whom he had left 500*l.* as his best friends. The boy Rogers also he was fond of playing with, and he had repeatedly declared his intention to provide for him; and, as he was the nephew of Rebecca Charles, it was by no means unlikely that he should have wished to unite the two in the enjoyment of his property. The probability was so very strong in favor of the will that only one presumption could be raised against it—namely, the length of time which elapsed before he made it. This, however, was a trivial objection, for it was a very common occurrence. The evidence in support of the will was very decisive, both as to the intention and capability of the testator. One of the witnesses, Green, deposed that he was sent for by the deceased on the 12th of March, upon which occasion the deceased told him that he intended to make his will; that the Harrisons had been annoying him, and he would 'disannul' them of everything. On the morning of the 13th he was again sent for, but was unable to go until evening, and then, when he inquired of Mr Pugh why he sent, the reply was, 'It does not matter now,' the will having been made in the interim. It was unnecessary to examine minutely the details of the evidence, because to presume it to be false would be to presume such a mass of perjury as it was impossible to concert. A few days prior to the death of the deceased, Mrs Harrison forced herself into the house, and it became necessary to send for Mr Gough, the Mayor, for protection. Mr G. was subsequently examined as a witness for Mrs Harrison, and he deposed that Dr Pugh was not insensible, but was very weak. On that occasion Dr Jones said to Mr Gough that Dr Pugh had sent for him on account of Mrs Harrison's conduct, which had very much excited him. That her conduct had done serious injury to Dr Pugh; and that he (Dr Jones) would not be answerable for the consequences. This was on the 18th of March. On the 19th Mrs Harrison sent Mr Pateshall, the keeper of a lunatic asylum, to the deceased, and on the 20th she took possession of his house and person. The effect of such measures upon the mind of the deceased might be easily imagined, but, even if reduced at that time to a state of absolute imbecility, it would be no proof that he was not on the 13th in such a state as to make his will. The course pursued by Mr and Mrs Harrison was most extraordinary. They took possession of and barricadoed his house, instead of leaving their rights to the due course of the law; and this conduct was the more extraordinary when it was remembered that they could have no reason for supposing that their exclusion was not the will of the deceased himself. The question then was, whether the deceased was not on the 13th of March in such a state as to enable him to make a will? With respect to this point Mr Theophilus Lane was a most important witness. He was, it was true, the brother of Mr James Lane, the executor, and large legatee un-

der the will; but then there was abundant evidence that he was a man of unimpeached professional and private character. He was also Registrar of the Consistorial Court of the diocese—a situation which of itself inferred respectability; and in addition to this it was to be observed, that the making of this alleged fraudulent will could confer no benefit upon himself which could induce him to commit his character by lending himself to the grossest perjury. His evidence went to establish the capability of the testator, as well as his intention, and the Court felt it could rely upon his testimony with the utmost confidence. It could not, indeed, pronounce this will invalid, without declaring that not only his evidence, but the evidence of all the numerous other witnesses for the will, was perjury. The Court, therefore, had no hesitation in pronouncing for the validity of the will; and with respect to the question of costs, when it took into its consideration the total alienation of the deceased from his family; his constant declaration that he would never leave them a shilling of his property; his refusal to be reconciled to his sister shortly before his death; her conduct in taking forcible possession of his house and person; the respectable character of the person who made the will; when it took into its consideration the application made to the witnesses in the case by Mrs Harrison, between their examination in chief and their examination upon interrogatories; when it considered the large mass of evidence introduced, much of it of little value, and the large consequent expenses compared with the smallness of the property involved in the issue, the Court felt that it would not be doing justice if it did not discourage such vexatious actions by pronouncing costs against the party who had promoted the suit.

## DIGEST OF RECENT ENGLISH CASES.

*Clarkson vs. Lawson.*

Declaration stated that the defendant had published of the plaintiff, that the plaintiff, a proctor, had been suspended *three times*. Plea (professing to answer the whole declaration,) that the plaintiff had been suspended *once*. Held bad, on demurrer, as omitting to answer two specific charges; and per Tindal C. J. 'the defendant's character is much more deeply affected than if he had only been charged with one offence.' 1 Bing. 266.

[The judgment of the Exchequer in *Adams* v. *Meredew*, 2 Y. & J. (*ante*, Vol. II. 401.) was reversed, 3 Y. & J. 219.

The Reporters state that a writ of error is now pending in the Lords.]

*Gould vs. Shirley.*

The defendant on being applied to for payment of a debt of 20*l.* barred by the statute of limitations, said he was going to H. in the course of the week, and he would help the plaintiff to *5l. if he could*. Held that, to make this promise available, the plaintiff must show that the defendant was of ability to pay. 2 Moore & Payne, 581.

*Williams vs. Tailor.*

The defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and they were ignored. He then went to the K. B., and having himself appeared, a bill was found. The plaintiff's bail was refused, and the indictment was kept suspended for three years, when the plaintiff himself took the record down to trial. The defendant was present, but did not appear, and the jury after a short pause, acquitted the plaintiff. The chief assignments of perjury were the plaintiff's having sworn (in action for money lost at play) that he had lost money seventeen times, and that he had played at Taylors's on Good Friday; which the defendant, at the trial of the present action, called witnesses to negative. This evidence the C. J. (Best) who tried the cause, held insufficient to shew a want of probable cause, and nonsuited the plaintiff. A new trial was granted on the ground, that, although the onus of proof in such actions lies on the plaintiff, sufficient *prima facie* evidence was given to impose upon the plaintiff the necessity of shewing, that he had probable cause. Particular stress was laid upon the circumstance of his being the chief witness himself, and not having appeared at the trial of the indictment.

At the trial of the cause, the learned Chief Justice allowed a shorthand writer to be examined as to the testimony of witnesses given at the trial of the indictment: Held, not to be evidence, and that the witnesses themselves should have been called. 6 Bing. 183.

*Crocker vs. Molyneux.*

A servant being engaged for a year at thirty guineas, and a suit of clothes, was provided with a suit of clothes, on entering the service; he was wrongfully turned away within the year: Held, that he could not maintain trover for the clothes. 3 Carr. & Payne, 470.

*Galliers vs. Moss.*

Mortgaged estates do not pass by the general words of a devise, sufficiently large to include them, but conveying the property to trustees with a variety of limitations not properly applicable to mortgaged property, but more applicable to property of which the party making the disposition was the sole and exclusive owner. Neither does the mortgaged property pass by a bequest (to certain persons named executors, their executors, administrators and assigns upon trust to sell) of all the testator's stock in trade, *securities for money*, debts, personal estate and effects of what nature or kind soever. 9 Barn. & Cress. 267.

[The precise words of this last bequest were, upon trust that the executors or the survivor, or *the heirs*, executors, administrators or assigns of such survivor, should sell—but the word *heirs* was held to apply to other trusts of the will.]

*Jones vs. Yates.*

A. being a partner in the two firms of A. and D., and A. and B. C. indorsed bills and paid over money (the property of the firm of D. and A.) to the firm of A. B. and C., in discharge of a debt due from himself individually to that firm. Immediately after the indorsement of the bills to A. B. and C., A. indorsed the bills to a creditor of that firm. It appeared that B. was privy to the fraud: but the Court intimated an opinion that privity was immaterial, and held that the firm of A. and D. could not recover either the bills or the money; because a party, whether suing jointly or individually, could not rescind his own act, on the ground that such act was a fraud on some other person. 9 Barn & Cress. 532.

[Lord Tenterden, C. J. remarked that the defrauded partner might perhaps have a remedy in equity by a suit against his partner and the party joining in the fraud.]

*Carolina Bank vs. Case.*

A. B. and C. carried on business in partnership as factors, A. and B. in England under the firm of A. C., and Co., and C. in America, in the name of C. only; C. had written instructions from his partners, stating, 'It is understood, that our names are not to appear on either bills or notes for the accomodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here.' C. having obtained a consignment from D. in America, indorsed bills in his own name for him, to provide for which, B. drew other bills on A. C. and Co. in England, which were to be paid out of the proceeds of the consignment. Before the latter bills were presented for acceptance, A. and B. became bankrupts: Held, that the indorsement of the first bills by C. was the indorsement of the firm, and all the partners were liable as indorsers of those bills. 2 Man. & Ryl. 459.

*Jones vs. Hunter.*

*Semble*, that in an action against three partners, the non-liability of one, who had pleaded his bankruptcy and certificate, and as to whom a *nolle prosequi* had been entered, could not be set up as a defence by the others who were liable. 1 Danson & Lloyd, 214.

*Hammond vs. Teague.*

In assumpsit for money had and received, money paid, &c, the Court refused to allow in addition to the general issue a plea stating, that the plaintiff and defendant and others were partners in a mining company, and the money was employed by them for the purposes of the company;—Gaselee, J. saying that 'the practice was to allow secondary pleas of matters which might be given in evidence under the general issue only where such matters are simple and single.' 6 Bing. 198.

*Fowler vs. Coster.*

Plea in abatement, in assumpsit, that promises were made jointly with A. Replication that they were not made jointly with A., on the trial of this issue, the defendant begins. 3 Carr. & Payne, 463.

*Cooper vs. Wakley.*

If, in an action of libel, the defendant plead justifications, without pleading the general issue, and the affirmative of the issue be on the defendant, he is entitled to begin, and the plaintiff has not a right to begin, with a view of proving the amount of his damages. 3 Carr. & Payne. 474.

*Cotter vs. James.*

In trespass for taking goods, the defendant, pleaded (without the general issue,) a justification under the warrant of commissioners of bankrupt, and averred, that the plaintiff had become bankrupt within the true intent and meaning of the stat. 6 Geo. 4. c. 16. Replication, denying that the plaintiff became bankrupt: Held, that the defendant had the right to begin. 3 Carr. & Payne, 505.

*Fish vs. Travers.*

In trespass, where there are several pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage. 3 Carr. & Payne 578.

*Sculby vs. Pickford.*

In assumpsit for work done, the counsel for the plaintiff proved the work done, and relied entirely on the *quantum meruit* count. The defendant set up a contract, by which the work was to be done for little more than a third of the value proved by the plaintiff. The plaintiff then proposed to call witnesses to prove that by this contract she was

to be paid more than the contract (in the first instance) specified, in case the work exceeded a certain quantity. Held, that it was not competent to the plaintiff to do this; that she should have relied on the contract in the first instance. 2 Moore & Payne, 545.

## MAINE.

### SUPREME JUDICIAL COURT.

Vol. 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Griffin vs. Derby.*

Where R the son of D, bargained with the plaintiff for a yoke of oxen, giving his promissory note payable in six months for the price, under an agreement that the oxen should be his own if the note was paid at its maturity, otherwise the plaintiff should take them back, and the son afterwards exchanged them with a stranger, for other oxen, and then absconded, leaving on the farm of D his father, with whom he had dwelt, the oxen thus obtained; and the note being due and unpaid, the plaintiff called on D for the oxen, who replied —'if you will be easy for a fortnight, I will become accountable for the oxen which R had, and bring you the money;' this was held to be an original undertaking of D, and so not within the statute of frauds.

*Usher vs. Hazeltine.*

Where a farmer made a conveyance of his farm to his son in consideration of the son's bond to support him during his life, retaining in his own hands personal property to a greater amount than the debts he owed at the time; this conveyance was held good, there being no proof of actual fraud; although some of the personal property was exempt from attachment; and although after his decease, in consequence of the charges of administration, and of the sum allowed by the Judge of Probate to the widow, the estate proved insolvent.

If a creditor will blend in one suit debts accrued partly before and partly after a conveyance which he would impeach as fraudulent, and has one judgment for them all; he can come in only in the character of a subsequent creditor.

*Fryeburg canal vs. Frye.*

The statutes relating to the *Fryeburg* canal, are private statutes.

The remedy by complaint, given in the statutes relating to the *Fryeburg* canal is cumulative, not precluding a resort to the process of the common law, nor to the statute-remedy by arbitration.

*Estes vs Troy.*

Ten years' user of a way by the inhabitants of a town, is not sufficient to oblige them to keep it in repair.

*The State vs. Kittery.*

Towns are punishable by information for not opening public highways newly laid out, as well as for not keeping them afterwards in repair.

*Templeton vs. Cram & al.*

An action for breach of a promise of marriage, by a *feme sole*, was compromised by her attorney, after her marriage to another person, by taking the defendant's promissory note, payable to her by her maiden name; both the attorney and the defendant being ignorant of the marriage. In an action by the husband in his own name upon this note, it was held good.

*Webster's case.*

An indictment not certified to be *'a true bill,'* though signed by the foreman of the grand jury, is bad.

*Strout & al. vs. Bradbury & al.*

Where a defendant, having judgment and execution for his costs, caused certain property to be taken in execution, which was replevied, but the replevin was not pursued;—it was held that his remedy against the indorser of the original writ was not impaired by his omitting to obtain judgment for a return, it appearing that this would have been fruitless, as the property was under a prior attachment.

If the indorsement of a writ does not contain the whole christian name, and is not objected to by the defendant on that account, the indorser cannot afterwards take advantage of this omission to avoid his own liability.

*Dodge vs. Bartol & als.*

The owner of a vessel is not liable to contribution for the jettison of goods laden on deck.

*White vs. Philbrick.*

A judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff, against another person, for taking the same goods.

## NEW HAMPSHIRE.

### SUPERIOR COURT OF JUDICATURE.

Vol. 4 contains the cases decided from January, 1827, to May, 1829.

*Walker v. Wilson.*

In a writ of entry the tenant pleaded non-tenure, to which the demandant replied an entry claiming a freehold upon which issue was joined. The demandant showed that he went to the land and requested the tenant who resided on the land in the family of J. R., to surrender the possession, to which she replied that she had no possession to surrender, but she remained upon the land; it was held that this evidence was sufficient to maintain the issue on the part of the demandant.

*Waldron v. Tuttle.*

A deed thirty years old, is an ancient deed, and may be read in evidence without proof of its execution, provided possession of the land has constantly attended it.

Hearsay evidence is admissible to prove a pedigree—but this exception to a general rule is confined to what deceased relations, who had no interest to misrepresent, have been heard to say.

*Barker v. Clark.*

A claimed a right of way, founded on an uninterrupted use of the same for more than twenty years, through the close of B—it was held to be competent evidence to rebut the presumption of a grant from the use, that B had within the twenty years ploughed up the way declaring that A had no right, although A was not present when the declaration was made.

*Pritchard v. Brown.*

A resulting trust may be shown by parol evidence.

When the consideration money is expressed in a deed of conveyance to be paid by the grantee, evidence that the money belonged to a third person does not go to contradict the deed.

Any person who buys land, while there is a *cestui que trust* in possession, will be presumed to have had notice of the trust.

*Lyman v. Lull.*

In debt by a town upon a bond with condition to save the town harmless from the support of an illegitimate child, the breach of the condition was, that the town had expended $20 for the support of the child, upon which issue was joined—evidence that the child had been supported several weeks at the expense of the town, was held sufficient to maintain this issue on the part of the town although no money had been actually paid by the town for the support.

A plea, in such a case, that adequate provision had been made for the support of the child, of which the town had notice, without an averment that the child was in the custody of the town, and that the town refused to let the defendant support it, is no answer to the action.

*Brown v. Webster.*

In replevin for a horse by D. B. against W., the defendant pleaded in bar that the horse was the property of one T. and not of the plaintiff, and issue was joined on the plaintiff's property—it was held, that evidence offered by the defendant upon this issue that the horse was the property of one D. B., jun. was improperly rejected, because, although the defendant made no claim to the horse under D. B., jun. still, the evidence might have a tendency to disprove the plaintiff's property in the horse.

*Sanborn v. Neilson.*

An offer of a sum of money by a party, by way of compromise of an existing controversy, is not to be used as evidence against him.

But an admission of a particular fact, made during a treaty for a compromise, may be given in evidence as a confession.

In an action for criminal conversation with the plaintiff's wife, evidence that the character of the wife for chastity was bad before she was married to him, that the plaintiff had lived with her after he had notice of her improper intercourse with the defendant, that he had connived at her intimacy with other men, or that the plaintiff had been improperly intimate with other women, is no answer to the action, but goes only in mitigation of the damages.

But if a husband suffer his wife to live openly and publicly as a prostitute, and a man is thereby drawn into criminal conversation with her, no action lies.

And in such a case, the jury may be properly instructed to look not only to the character and conduct of the husband and wife to determine what such a husband ought to recover for criminal conversation with such a wife, but to the conduct of the defendant to determine what he ought to pay.

*Cooper v. Bisbee.*

Where an officer in his return of an extent of an execution upon land, stated that he commenced the extent within thirty days after judgment, but did not state the day when he commenced, it was held that the return was not sufficient to show an extent within thirty days after judgment.

Where an officer in his return of an extent stated that he chose two of the appraisers, the debtor not being within the state, nor within his knowledge, the return was held to be sufficient.

In such a case it is not necessary, that the return should state that one of the appraisers was chosen for the debtor.

*Pritchard v. Brown.*

The interest of a *cestui que trust* in land, will pass by the extent of an execution upon the land as his etsate.

THE JURISPRUDENT.

BOSTON, SATURDAY, SEPTEMBER 17, 1830.

We give to our readers this week a part of the last speech of Mr Brougham on the *English Law Reforms*, and shall publish the remainder next week. It will be read with interest by every Lawyer who is desirous of knowing the nature and extent of the great changes and innovations which are taking place in the system of English Jurisprudence. We believe those changes are not to be confined to that Country. They will be, and they should be, felt here. What has been taken upon trust should be examined, and what is not founded in principle should be discarded. The work of reformation with us is easy. It yet remains to be seen with how much safety to her political, England may break in upon and reorganize her legal institutions. It may prove dangerous to the whole to attempt to reform a single department of that Government. 'The English (says Chancellor Kent) put more to hazard in meddling with their jurisprudence than any other European nation; and they ought to be more jealous than any other, of the spirit of innovation and codification which are abroad in the land. When a free people have their constitution and system of laws pretty well established, construed and understood; when their usages and habits of business have accommodated themselves to their institutions, and especially when they are secure in their persons and property, under an able and impartial administration of justice, they ought, above all things, to beware of theory, for 'in that way madness lies.'

Our institutions are, however, held together by no such dependences. We are in no danger of sacrificing what is essential by an attempt to reject what is useless or pernicious. We can cast off the form without endangering the substance. And we hope the time is not far distant when our Courts will not feel themselves shackled by technicalities which are no longer to be tolerated anywhere, much less in a Country like ours;—and when the course of justice shall no longer be clogged up by the entanglements of useless forms and legal subtleties which originated in ignorance and have been perpetuated by prejudice. As a general rule the administration of justice in our Country is liberal and safe. The labor of a few more such Judges as Marshall, Kent, and Parker would give to our jurisprudence a symmetry and consistence, a perspicuity of arrangement and a completeness of effect, which could not fail to meet the wants and complicated demands of this free, great and busy community.

It would have been thought quite unpardonable twenty years since for a Lawyer to have expressed a doubt of the indispensableness of the System of Special Pleading to the safe administration of Justice in our Courts. It was regarded no less essential, than elaborate and abounding in astute learning and profound logic. But who now thinks of thrusting his student into the midst of its mysteries the moment he enters his office? Any Lawyer would as soon doom him to plod from Michaelmas to Michaelmas upon Coke's first Institute,—where many a desponding tyro has been kept till he has been ready to renounce his books and vocation. The truth is, that much of the latter has become 'dead matter'—and is only interesting as a subject of antiquarian research; while the former has been found quite too cumbersome and refined for our condition, and 'has fallen into very considerable disuse and neglect in almost every part of the country without the prospect, or perhaps the hopes of revival.'* Let us strip our practice of the pedantic follies and metaphysical abstruseness and puzzles which were engrafted upon the English Law at the same time and by the same men, who, by their vast and vigorous intellects, laid the foundation and embodied the elements of an imperishable system of Jurisprudence. But while we reject these, let us retain and abide by, as our sure guides, the great and unchanging elementary principles of law and equity, which we trace back to their age, and which give such ample proof of that 'robustness and vigor of intellect and plenitude of ideas, which throw their successors far behind them in individual attainment and exertion.'

* 4 Kent Com., p. 528.

*Kent's Commentaries, Vol. 4th.*—When after twentyfive years of distinguished usefulness as a Judge at Law and in Equity in the State of New York, it became necessary, by the Act of Limitation, that Chancellor Kent should retire from the Bench, it was everywhere regarded as a calamity. He was then in the enjoyment of health and of all his faculties in their fullest and most vigorous exercise. That event, however, has proved most propitious to that Gentleman himself and most fortunate to the country.

His Commentaries on American Law, which are now complete, can but prove a most valuable acquisition to the science and profession of Law. They are replete with the wisdom of experience, and rich in the exuberance of learning and variety of acquirement which they everywhere exhibit. The last volume has been recently published, and as many of our readers may not have seen it, we give the *Contents* below.

LEC. 53.—OF ESTATES IN FEE.

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2, of Qualified Fees,
3, of conditional fees,
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IEC. 56.—OF ESTATES UPON CONDITION.

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LEC. 57.—OF THE LAW OF MORTGAGE.

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LEC. 58.—OF ESTATES IN REMAINDERS.

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LEC. 59.—OF EXECUTORY DEVISES.

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LEC. 60.—OF USES AND TRUSTS.

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LEC. 61.—OF POWERS.

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LEC. 67.—OF TITLE BY WILL, OR DEVISE.

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3, of things devisable,
4, the execution and revocation of wills,
5, of the construction of wills.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

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RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan suggests.

July 10. ISAAC PARKER.

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Aug. 20.

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In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, SEPTEMBER 25, 1830. NO. IX.

## MERCANTILE LAW.

### NO. III.

[Continued.]

But a *separation* may take place, and that under various circumstances. What effect then will this produce on the rights and obligations of both? If the marriage be annulled by a court of competent jurisdiction for some original vice of the contract or solemnization, the parties, never having been married in contemplation of law, have the same rights and liabilities as to all engagements made with third persons during the period of cohabitation, which they would have had, if they had remained single in fact. Still, it cannot be doubted that for necessaries supplied, during the period of cohabitation, to the supposed wife, the nominal husband would, on the ground of a presumed authority, be liable even after the dissolution.* A divorce on account of adultery puts an end to the marriage, and therefore to its consequences, from the period of the sentence: but a separation *à mensa et thoro* does not affect the legal relations of the parties, and the wife therefore, though living apart from her husband, and upon her own resources, is not liable upon her contracts.† Hitherto the rule is simple; but the question as to the liability of the husband, for necessaries supplied to the wife in case of separation without divorce, has something about it of more intricacy. The following distinctions seem, however, to be now settled. 1. When the separation is by *mutual consent*, if competent provision be made by the husband for the maintenance of his wife, either by deed or verbal agreement, he is not liable;‡ provided that in the latter case payment has been made,§ or in the former, that the trustees have taken possession under the deed.‖ 2. Where the separation is in consequence of the *adultery of the wife*,¶ or, if during separation caused by other circumstances, even the fault of the husband, she *has been guilty of adultery*,** in either of these cases, he is thenceforth released from all obligation to provide her even with the bare necessaries of life.†† The separation, however, whether by consent, or by the fault of his wife, must be notorious, else the presumption of authority from the husband remains.* 3. Where the wife has *voluntarily* quitted her husband's roof, and has not committed adultery, he may discharge his liability by a particular notice, but not by a general advertisement.† But, lastly, where the separation is occasioned by the *misconduct of the husband*, his responsibility for necessaries furnished for his wife's support, so long as she preserves her own fidelity, remains under all circumstances. He cannot divest himself of it either by a general advertisement or a particular notice, for the law will permit no man to take advantage of his own wrong.‡ It may be collected from what has been already said, that in none of these cases can the wife herself be sued either at law or in equity, and the tradesman, therefore, who gives credit to a married woman, has need to satisfy himself previously, by careful inquiry, of the circumstances of the party, or he does so at his peril.

There are, however, some few cases in which a woman, though married, is treated as a single woman (or, as the law terms it, a *feme sole*), whose contracts are binding on herself. These are, first, where the husband is, in contemplation of law, no longer in existence, as when undergoing a judicial sentence of transportation.§ 2. Where the husband is a foreigner, or alien, who has never been in this country at all;‖ for if he has once resided here, it seems the legal inference is, that he intends to return,¶ and in that case the personal responsibility of the wife does not attach.** 3, Where he has been absent and not heard of for a period of seven years, the law in such case presuming that he is dead. It need scarcely be added, that a married woman is not recognized as a *trader*. Yet, in the city of London, she may, by peculiar custom, carry on a trade separately and on her own account; and, if the husband do not interfere in it, she may, as to all the transactions connected with that business, be treated as a single woman,* except that in the suits, which are brought against her,† in her capacity of *feme sole trader* (for so she is designated) the husband must be made a party for conformity.‡

But the wife may have entered into contracts before her marriage, the effects of which remain after the marriage. And on this subject it may be sufficient briefly to remark, that the husband by the marriage, gains the right to sue, in conjunction with his wife, on such contracts—that the fruits of them become absolutely his by possession‖—but that if he omit, during the life-time of the wife, to reduce the right into possession, he cannot afterwards claim in his own right, but merely as the representative and administrator of the wife. In like manner he is liable, upon the contracts of the wife made before coverture, only while the marriage continues, and jointly with her. After her death, his personal responsibility upon them ceases altogether. It follows, that if the wife survive the husband, she may in the former case sue, and in the latter be sued, alone. There is, moreover, one instance, and but one, in which the wife may sue after the death of the husband, in her own right, upon a contract entered into during her marriage; and that is, when she is herself what is termed the *meritorious cause* of the contract; as when a service has been rendered by her personal exertion, for which a stipulated remuneration has been promised. It is of rare occurrence, and might scarcely have been deemed worthy of mention, had it not been an anomaly in the law, for which there seems no sound or intelligible reason.

In concluding this subject it may not be useless to remark, that, although property may be settled in various ways, so as to be subject to the disposition of married women, yet that this is not inconsistent with a general incapacity to content. It must be regarded rather as a modification of the particular property, drawing after it none of those consequences of personal liability, which are inseparable from the nature of a contract.

But in order to constitute an agreement, there must not only be a power of willing, but a free and bonâ fide exercise of the will. Reason declares that where undue constraint is put upon the inclination, the party suffering it, though he may, in order to avoid a present evil, have *assented*, cannot be considered as having *agreed*, to the terms so forced upon him. Violence offered to the will is termed in our law *duress*; and it is a gratifying instance of the advance of civilization, that in the modern reports scarcely a case can be found upon a subject which, in the ancient books,

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*It has been decided that if a man cohabit with a woman, holding her out to the world as his wife, he is liable for goods furnished to her, even by a tradesman who knew that the parties were not married. 2 Esp. N. P. C. 637. 1 Campb. 246. 4 Campb. 215. This must have proceeded on a presumed agency of the nominal wife, and is therefore a stronger case than the one supposed.

† 6 M. & S. 73. 3 B. & C. 291. The courts of common law at one time assumed to themselves the extraordinary discretion of determining, that, where a married woman by agreement lived apart from her husband, and had a separate maintenance settled upon her by deed, her general disability was removed, and her contracts became equally obligatory with those of other persons. See the case cited 1 T. R. 5. But this doctrine, which was long doubted, was at last exploded, and the law restored to its former consistency, by the case of Marshall v. Rutton, 8 T. R. 545.

‡ Lord Raymond, 444. Salk. 116. 2 New Rep. 148. 4 Campb. 70. 4 B. & A. 252.

§ 3 Campb. 370. 2 Stark. N. P. C. 86.

‖ 8 Taunt. 343.

¶ Ham v. Towey, cited in Selwyn's N. P. Assumpsit.

**Strange, 647. 706.

†† There is a case reported, in which, although the husband had been guilty of adultery with a woman whom he brought to his home, and had turned his wife out of doors without any imputation on her conduct, yet because the wife subsequently, during the separation, committed an act of adultery, the husband was held not liable for necessaries furnished to her. Govier v. Hancock, 6 T. R. 603. This is most harsh and unjust.

* 1 Bos. & Pul. 226.

† 1 Sid. 109. Freeman, 248. Strange, 1214.

‡ This is a beautiful illustration of a rule of law, overcome by a more general rule of reason and equity. The presumption of authority, which is the only legal foundation of the husband's liability, might here be rebutted by the fact: but the law will not listen to the husband, when he would turn his own misconduct to his gain, and estops him, therefore, from setting up such a defence. There has been some difference of opinion whether the introduction of a mistress into the house where the wife is residing, is such misconduct on the part of the husband, as justifies the wife in quitting his roof: and, consequently, whether he is liable for necessaries supplied to her while so living apart. In Hopwood v. Heffer, 3 Taunt. 421, the Court of Common Pleas decided in favor of the husband; but Lord Ellenborough is stated to have held in a subsequent case, that of Aldis v. Chapman, cited in Selwyn's N. P. 281, that he was bound under such circumstances to supply her reasonable wants; and there can, we think, be little doubt on which side justice, humanity, and good sense incline.

§ Co. Lit. 133 a.

‖ 2 Bos. & Pul. 231. 11 East, 303.

¶ 3 Campb. 124.

** 1 Bos. & Pul. 359. 3 Esp. N. P, C. 18.

*She may, therefore, be made a bankrupt. 1 Atk. 206. 3 Bur. 1783.

†Which are confined to the courts of London. 4 T. R. 361.

‡ Cro. Car. 67. 10 Mod. 6. 2 Bos. & Pul, 93. 106.

‖Negotiable instruments are in this respect treated as chattels, and not as choses in action. Thus, where a bill of exchange is given to a *feme sole* who afterwards marries, the right of indorsing vests in the husband, 7 T. R. 348.; and he may sue alone upon a bill payable to the wife *dum sola*. 1 Brod. & Bingh. 50.

occupies so conspicuous a place. It will, therefore, be sufficient cursorily to remark, that personal violence, or unlawful imprisonment, or threats inducing a reasonable fear of the loss of life or member, or of imprisonment, whereby an engagement is extorted against the will of the party making it, constitute such duress as invalidates it altogether, and leaves it in his choice to fulfil it or not.* It is superfluous to add that the engagement of the party imposing the violence remains obligatory on him. The plea of duress is available only to the person himself who has suffered it; if, therefore, a third person enter into an engagement for the purpose of releasing another from unlawful constraint, he cannot discharge himself on the ground of duress from the obligation which he has contracted.†

*2 Inst. 472. Rol. Abr. 687 43 Ed. 3. 11 Hen. 4. 66, Bac. Abr. (Duress). Threats of violence, or other injury, for which an action in damages might afford a sufficient compensation, are not considered as duress. 2 Inst. 483. 2 Strange, 917.

†1 Rol. Abr. 687. The civil law is copious on the subject of duress. It provided that the person, on whom the violence had been exercised, might, if he pleased, procure the engagament to be annulled by letters of rescission within ten years; after that time he was estopped. Our law has nothing analogous to this mode of proceeding; the violence being a good defence to any suit instituted for enforcing the engagement,

## Obituary.

In that apportionment of the means of nature which is in fact infinite calculation, the exact appropriation of talents to the demands of society, by the operation of cases founded upon the individual and social constitution of man, is the most curious and unerring part. As in the supply of our physical wants so in the provision for the intellectual necessities of society, allowance is made for those vicissitudes by which the original appropriation is diminished before it can be applied to use. All the analogies of nature teach us that fine faculties and noble characters must be almost every day blighted in some of the stages between their first germination and the perfection of their fruit. However painful it may be therefore to those who watch the process of development and decay or death, it would seem to be useless to inform society of the particulars of those secret losses and internal waste of resources, which, on general principles, it must be conscious, are constantly taking place in their elaboration. But there are some characters of a class which seem hardly necessary, in the common operations of society, or which belong to a more enlarged and comprehensive part of the system of its progress, which when fully developed and ready to take their place in the world, deserve notice as examples in the natural history of mankind. And if I may judge from the eager curiosity with which we dwell upon the character and untimely fate of the few characters of the sort, whose connexion in youth with those who have lived to become distinguished has introduced them to our notice, there is a sentiment in human nature, which makes them an object of public interest.

Such a person was Edward Jackson Lowell, a member of the Suffolk Bar, lately lost to them and the community, at the early age of twentyfive, and almost at the very hour when he was to have performed his first act of professional duty; and after having lived a life, which, though undistinguished by public exertions, made it privately known exactly how he would have performed it. His place at the head of those of the same standing in a profession of the highest importance in the conduct of society, is a public station, from which it seems due, to those who are acting a similar part, under the influence of similar hopes and objects, that he should not retire unnoticed. A community too of moderate extent, in which the comparative smallness of the final reward which it promises to successful industry and talent is compensated for by its interest and sympathy with it, in all the stages of its progress seems to demand some account of the many valuable qualities and accomplishments which it plainly expected from so many advantages of nature and fortune, a happy constitution of mind and temper, the facilities of a competent fortune, the influences of the best connexions.

A childhood spent partly in Boston, partly in Scotland, and partly at the Andover Academy;—five years and a half in the College and Law School of Harvard University, a winter attendance upon the lectures and private instruction of Chancellor Kent; a year in a counsellor's office in this city; two years profitably spent in study and travel in Europe, and two years of professional seclusion and study, excepting the interruptions of sickness, fill out the short and simple outlines of his life.—The very day on which he was to have opened in an interesting case in one of our highest courts, he became incapable of appearing, from the progress of that decline by which he passed without pain or struggle to his grave.

A habit of patient, systematic and comprehensive study, which was assiduously conformed at all periods, times and places, and in every variety of manner according to the subject and occasion; which books could neither mislead or embarrass, and which pursued, analyzed and digested its materials whenever and in whatever condition found; had rendered him the man of the most information upon his own profession and all the branches relating to it, I have ever met with of his age. Before he went to Europe the progress he made in the common law, and the thirst and industry with which he studied it, raised the highest hopes in his several instructers. While abroad he was perhaps equally industrious in the study of the civil law and of the modern codes and scientific treatises, upon which subjects he had an excellent collection of books in his library.—While in France he took an instructer in the civil and French law; and both in France and in England he attended their courts and legislative assemblies, and paid great attention to the history, theory and operation of their political and legal institutions.

He moreover had a fondness for, and during his whole studious life greatly attended to the study of history, geography, and the belles lettres, and the political, metaphysical and moral sciences. On all those subjects he had a surprisingly judicious collection of books, considering its size. He spoke the French language with elegance, ease and spirit, and the Italian fluently. The Greek he had neglected at College, and postponed the recovery of it to a day which, alas, will never come for him.—He kept up his familiarity with the best Latin authors, to whom he evinced his attachment by his having the best editions of many of them. But though fond of and accomplished in all these studies, the science of law was his favorite study, the practice of it the intended occupation of his life. His mind was not one of those which to be efficient must be directed to a single point, and whose intensity seems to be scattered and wasted by being directed to a multiplicity of objects; but it seemed to derive and concentrate light from every subject which was submitted to it.

The predominant quality of his mind and character was its sense of justice. But it was a sense of justice which not only appreciated and decided rightly upon the materials presented to it, but which could only be satisfied with the most deep and comprehensive method of considering the subject. His instinctive perception of sophistry in argument, or faults in morals were sometimes so surprisingly rapid and intuitive that one could hardly attribute them to anything but a conscientious instinct. In the comprehension of general principles he was liberal and philosophic, in the use of them scientific and clear. He was equally accurate and faithful in the observation and generally in the recollection of details.

He had genius, but it was not of that sort which consists in the possession of any single faculty in that high degree at which it amounts to genius. But it was that kind of genius which results from the happy proportion of several faculties, and which often produces results equally surprising and admirable, and is always more permanently serviceable to society.

He had brilliancy; but not that dazzling brilliancy which seems to be poured out upon and distinct from our thoughts themselves, but that sober and subdued light, which seems to emanate from, and be inbred in the thoughts themselves and which may be called the splendid solidity of the judgment. He possessed no distinct and separate organ of light by whose aid the other faculties surveyed and displayed their subject, but the combination, and order of his thoughts was light itself. In addition to those active and judicial powers of mind, his taste was equally delicate and just; he had a fine sense of the sublime and the beautiful, the noble and the refined both in sentiment and expression, and both in poetry and in the fine arts.

To these qualifications he added enough of that excitability and sensibility of temperament which partly physical and partly moral seems a necessary ingredient in the composition of an orator; a person and face happily suited to his character and adapted to the expression of his feelings; and a voice naturally deep, flexible and melodious. His ambition was not the desire of excelling, but the love of excellence. To show how far he carried his attention to all the requisites to his professional success, he took pains to procure all the best treatises not only upon the arts of oratory and the management of the voice, but upon what may be called the ethics of his profession. He belonged to several Debating Societies—but he always spoke extemporaneously and rather talked than declaimed in their discussions, in which he never was called upon, or exerted himself to display anything more than his good sense.

His character was remarkable for the same justness which distinguished his mind. He was a man of whose secret thoughts one felt as confident as in the correctness of his most considered actions. His very instinct hardly seemed to need the chastisement of his judgment. There was no subdued grossness or impurity in his conceptions, no satirical severity in his temper, no secret mixture of selfishness in his motives. But he was as just and firm a judge of what was due to himself as of what was due to others. His opinions on matters which require a nice sense of delicacy and propriety, were as valuable in their place as those which required the application of his stronger powers of mind. In temper he was generally calm and dignified, but susceptible of warm emotions

and that strong indignation which in his mind was the only form of passion. He was in his affairs generous and free; and to the extent of his means elegant in his tastes and habits of life. In manners he was uncommonly well bred and elegant, always remarkable for the manliness and dignity, and often for the playfulness of his manners. In his conversation, which was always easy and spirited, his intimates found all the characteristics of his mind and character. Strong in his own personal attachments, he had in the highest degree all those qualities which attach others. He was easily susceptible of the kindest and noblest emotions, and happy in his conceptions of all those relationships which make life most beautiful and interesting.

In short, he possessed so remarkable a combination of useful and amiable qualities, that all those who have known him well, must agree, that however great the misfortune of losing a person so valuable and so much beloved in all his relations, it seems hardly too high a price to pay for an intimate acquaintance with so admirable a character.

## MR BROUGHAM'S SPEECH

### ON THE LAW REFORMS.

April, 1830.

Concluded.

From returns which had been laid before the House, it appeared that in the year 1821, 1822, and 1823, not less than 22,000 some odd causes had been brought in the Sheriff's Court in Scotland, the amount being for 5*l.* and upwards, for the smaller jurisdictions took all the smaller actions out of the Sheriff's Court. This was a great amount; but, considering the difference between the extent of litigation in Scotland, as compared with England, the number of actions would be found six times greater in the latter country; so that, if in England the same system were adopted that prevailed in Scotland, the number of causes tried in England in the same period would be 120,000 and some odd hundreds. The number of actions brought before the Sheriff's Court, and in which judgment was pronounced in the absence of the defendant, within the time he had mentioned, was 12,000 some odd hundreds; and the number of causes disposed of in what was called *foro contentioso* amounted to 9,000. Of all these, the proportion of appeals was as one in 117 in actions brought, and as one in 53 in the number tried. There was an appeal from the Substitute to the Sheriff himself, but the causes were chiefly tried by the Substitute. An estimate might be formed of the extent of property they involved by the fact that, in Lanarkshire—which, including the city of Glasgow, was the most important and populous district in Scotland—no less a sum than 500,000*l.* was disposed of yearly, by legal adjudication. Now, if, with the proportion which he had stated, the adjudication had taken place in England, the amount would be 3,000,000*l.* sterling yearly. He would ask, then, was nothing to be learned from this system, which was found to work so well in Scotland? He would ask, could we not improve our system of judicature—he would not say by adopting the precise form which existed in Scotland, but by recurring to that which had been the ancient law of England?—(hear, hear.) He meant that law which had obtained in the Saxon times, and for a considerable period after the Norman invasion. They ought to see whether this ancient law was not applicable to the mischief which he sought to remedy. He now wished to make a few observations as to the expense of legal proceedings. When the sum pending in a trial before the Sheriff in Scotland was 12*l.* and not upwards, the expense of recovery was 10*s.* where it was 25*l.* and not upwards, the expense was 15*s.* or a little more. When the sum was 100*l.* and not upwards, the expense did not exceed 20*s.* This was the estimate in all cases in which there was no litigation; but even where the parties did come to issue with each other, the expense was quite a trifle. Of the 12*l.* a portion, amounting to 5*l.* might be received, which would reduce the charge of recovery upon the remainder, to 5*s.* that being the whole amount, that the party suing would be out of pocket. When the sum rose to 10*l.* the party would never be more than 10*s.* or 1*s.* in the pound out of pocket; and upon 100*l.* the expense would not go beyond 20*s.* We might well envy our Scotch neighbors, who had all the benefit of a system like this—a system which gave cheap justice to all classes. Cheap it certainly was, when a man might recover 100*l.* for 20*s.* instead, as was the case with us, of being obliged to throw half a hundred pounds away in seeking to secure the remainder. He might ask them whether it would not be expedient to adapt the County Courts of England to the Scotch system? It was altogether an error to suppose that there ought to be an inferior description of justice for inferior suits. It was, however, held by some persons, that when the sum amounted to 100*l.* there ought to be a superior jurisdiction; but when it was only 2*l.*, 3*l.* or 5*l.* it mattered not in what sort of Court the suit was instituted, for the individual who presided there might be called a Judge, an Assessor, or a Commissioner of the Court of Requests. It was equally held to be a matter of indifference, whether that individual afforded a remedy or not, provided the sum was small. No principle could be more erroneous than this. He could never agree to such a proposition, for nothing could be more crude, or more at variance with the first principles of justice, than a distinction between large and small sums, where the question was as to the mode of recovering them. The forty shillings for which a man sued, was of infinitely more consequence to him, so far as the question of justice was concerned, than the importance of which this sum was the measure. He felt it less hurtful to him to lose the amount, than to consider that his case had not been fairly heard; he was therefore resolved to be righted, and would not submit to wrong. A man with such feelings felt as satisfied with a decision given either for or against him in a competent tribunal, however small might be the amount, as the individual did when sued for 100*l.* and upwards. The great object was to satisfy the mind of the party that justice was done to him by the Judge. He (Mr Brougham) would not be understood as wishing to cast any reflections upon the person who administered the law under the present system. It was better to have some place in which suitors might recover than no place at all. So precious a thing was justice, that he preferred having any tribunal, however slovenly—any Judge, however incompetent—to having no tribunal, or no judge at all. It was better that two tradesmen, even uneducated as they might be, should preside in some place, than that parties should be driven to Westminster Hall, where they had not the slightest chance of recovering debts, of so small an amount as 2*l.* without considerable expense. The next observations he had to make regarded the subject of appeals. It appeared to him that no causes, except those of the most trifling nature, ought to be decided by local judicatures, and any man ought to have the power of appeal to a higher tribunal. He therefore much desired to see the appellant jurisdiction extended. He had formerly referred to what he considered very great defects in the appellant jurisdiction, so far as regarded our colonial possessions; and he hoped that in future certain Judges would attend the Privy Council who were acquainted with colonial affairs. With regard to the appellant jurisdiction of the House of Lords, he could not help saying that our fellow-subjects in Scotland had great reason to complain of the manner in which the jurisdiction of that tribunal was constituted with regard to them. It was a great, and, to him, unaccountable anomaly, that a person should be selected—as had been the case since 1705 or 1706—since the union of Scotland with England—that a person should be selected to decide all questions of appeal upon Scotch law who was not of necessity a Scotch lawyer, and who might possibly know nothing at all of the law of Scotland. How this anomaly had been borne so long was to him a mystery. That our brethren in Scotland, who were acute observers of things—who were well acquainted with their own rights, attached to their own interests, and who were said to be not averse to litigation—of course he did not mean to dispute the right of every man to demand justice where he felt occasion—but how they could have submitted to this strange anomaly so long he was at a loss to conceive; and it seemed to him that it could be only ascribed to the accidental circumstances which had attended the exercise of that jurisdiction. There were not many appeals soon after the Union, and then came a succession of Chancellors in England of the highest fame and the most comprehensive knowledge in all branches of the law, whose opinion was paramount in the profession, and who, by universal consent, were at the head of their profession. But, in addition to all these essentials for the character of Judges in generalt, hey had one peculiar qualification which admirably fitted them for the exercise of these functions. They had practised much in Scotch Appeals, and some of them had been intimately connected with Scotland. There was Lord Hardwicke, who was a good Scotch lawyer. There was Lord Mansfield, who was himself a Scotchman, and was amply conversant with the law of that country. There were also Lord Loughborough and Lord Thurlow—Lord Loughborough having practised for many years as a Scotch Advocate. After these came Lord Eldon, who had attained a standing of greater eminence than any Judge since Lord Coke, who was profoundly skilled in jurisprudence, marvellously learned in the English law, and who, to these high qualifications, added an extensive and thorough knowledge of Scotch law, having been employed for 12 or 15 years in almost every appeal which came before the House of Lords from Scotland. To their peculiar fitness for the duty he looked to account for this grievance, and, as it appeared to him, unaccountable anomaly, having been so long borne by the people of Scotland. But if there should ever come a time when a person should be appointed to administer those functions, who possessed but a moderate authority among English lawyers (hear, hear,) and who, the first time he ever saw a Scotch case, was called upon to decide it in the last resort, then the anomaly would remain, but the means of accounting for its being endured would become wholly inex-

plicable. Let it give offence where it might, he could not but take the first opportunity, as a lawyer, of saying that a revision of the arrangement of appeals on Scotch law in the House of Lords would be a task infinitely worthy of the attention of Parliament. He had drawn the attention of the House from the subject more immediately under consideration, and he would now beg leave to return to it. He should proceed shortly to explain what, as it appeared to him, on the principles which he had stated, ought to be attempted, on some scale at least, if they could not at first and altogether carry into effect the purpose of rendering the system universal, by creating tribunals where cheap justice might be speedily administered in cases which were under a certain extent in point of amount or value. What he would suggest was this—appoint in each county a proper person (a lawyer of so many years' standing) as Judge in the last instance of cases under a certain amount, and in the first instance of those causes which should exceed that amount. Enable a man who sought to recover a debt of 10*l.* or under, to call his adversary before this local Judge, who should examine both parties, dispose of the claim, give his judgment between the parties, award execution, and specify in what time, and by what instalments, that execution should be levied. Above the sum of 10*l.* give the party the power of going before the same local Judge, and of calling his adversary into Court, with the assistance of professional men if they thought fit, without the examination of the parties if they thought fit, and limiting his jurisdiction to the sum of 100*l.* in point of value, but not limiting it in respect of the nature of the causes which should be brought before the Court, with the exception, however, of questions in which the right of freehold, copyhold, or leasehold was involved, giving this Judge jurisdiction in matters of cost as well as of debt, and confining the appeal to those cases which amounted to more than 10*l.* making his decision final up to 10*l.* but rendering his judgment subject to revision in cases above 10*l.* and not exceeding 100*l.* Now in what way was the appeal to be directed? He considered that it would be a great relief to the suitor that the appeal should be, not to the Courts at Westminster Hall, but to the Judges annually, or rather twice a year, going the Circuits for that purpose. There would be one reason, however, against that being the only Court of Appeal. Accidents might often render it undesirable for a party to bring his appeal before the Court of Assize at a particular time; and it would be always desirable to have an option—a competition—so as not to be the suitor either in the original stage of the cause, or in the appeal upon it. He would allow a party (subject to certain restrictions as to costs, which he should mention) to appeal either to the Court at Westminster Hall or to the tribunal in the country.

If a party called his adversary to the more distant tribunal, he should be made to pay double, or in some cases treble costs, if he did not recover the sum which he claimed. He begged leave to say, by way of explanation to his legal Friends, to whom he principally addressed these observations, that when he talked of appeal he meant motions for new trials, and other proceedings of that nature. The local Judge, for instance, or the County Judge or arbitrator—however he should be designated—says he had decided upon a point of law Well, a motion might be made against the decision to the next Judge who went the Assize; or, a verdict had been given against evidence, a motion for a new trial might be made before the same Judge at the Assizes, notice being given by the party making such motion, in order that the other might be able to meet him on the spot, and to instruct Counsel, if necessary; not, however, as in Westminister Hall, by a rule to show cause being first obtained, but rather as in the Courts of Equity, notice being previously given, and then both parties being heard—first, the one and then the other. He had mentioned in his outline trial by Jury; and far be it from him to say that there were not some cases in which that mode of trial might, with great convenience, with manifest and unquestionable benefit, be dispensed with. When he mentioned the name of his venerable and most highly-esteemed friend, Mr Bentham—one whose transcendent merits as a lawyer and a philosopher, but, above all, as the founder of all legal reform in this country—(hear, hear)—would hand down his name to future ages as the first great and efficient purifier of our legal system, when he paid him this humble, but sincere, tribute for the important services which he had rendered to this country during a long, disinterested, and most useful life, he retracted no portion of that acknowledgment; he did in no wise qualify his heartfelt admiration of that high character when he said that he was very far from agreeing with that venerable and learned authority in the whole of his speculations on the subject of the system of jurisprudence. He differed in degree from his friend in many points—he going much further than he (Mr Brougham) was prepared to go; but he also differed from him in kind on some parts of the subject, and on none more than that which regarded trial by Jury. It was not that Mr Bentham was, as was vulgarly and most inaccurately supposed, an enemy to trial by Jury—far from it; but he undervalued its importance in many cases to which he (Mr Brougham) thought it peculiarly fitted, while he was for retaining it in others where it appeared to him (Mr Brougham) that it might be dispensed with. They differed in kind as to the cases to which it was applicable, although they differed in degree upon some other points. Whenever conflicting evidence was to be sifted—whenever you had to find your way through the intricacies of a case by contrasting the evidence on the one side with that upon the other, where it was given inconsistently—whenever documentary evidence was to be compared with parol—whenever circumstances were to be weighed against each other, there being no direct testimony in the case to point conclusively on which side the truth lay, then it appeared to him that trial by Jury was of infinite and incalculable benefit. There was no means in any of these cases of eliciting the truth so effectual as assembling twelve men. He was not devoted to the number twelve; any moderate number of individuals, of various habits of thinking, whose experience had been derived from various quarters—men of different kinds of feeling, and different forms of understanding, to weigh the same circumstances, and then to secure, by a discussion among themselves—paradoxical as it might seem, and irreconcilable on the first blush—a compulsory unanimity in their decision. This unanimity must be produced, because, if the matter were to be decided by the opinion of a majority, would not 'question, question,' be called there, when they became impatient of restraint, as it was in a larger and less judicial assembly—(a laugh). So that there was no more of reaching the truth except this anomalous and apparently paradoxical one. Also in assessing the amount of rational compensation, where the damages could not be stated in the declaration—in cases of defamation, libel, seduction, or other cases where the precise damage could not be specified—this was the only mode of awarding a just compensation. For these reasons he was desirous of retaining trial by Jury in the system which he hoped to see universally established in this country. He trusted that the experiment would be made in some parts of the country before any long time should have passed over. Be had already said that though he thought Jury trial ought not to be abandoned, yet there were many questions in which he admitted it would be more convenient to leave the decision to the Judge; but how to specify these cases by any general definition, he confessed he was at a loss. It was not for want or time or attention, for he had long meditated upon it with all the earnestness of which he was capable, but it did not appear to him that those cases could be so classed as to enable him to say with safety to the general system what cases should be decided by the Judge, and what should be tried by a Jury. He would, however, in all cases under 10*l.* allow the Judge, if upon viewing the case upon the pleadings, which, by the plan suggested by the Law Commissioners, would be materially reduced in extent, and would then speak as they did in former times, and as it was their proper use and object to do so—namely, to tell the very story of the plaintiff and the very story of the defendant, so as to let a person, on reading them, understand fully their import, and to enable the Judge to know what he had to try, and each party to know what he had to allege. When the important improvements suggested by the Commissioners, in their second Report, should be made, and when other improvements should be added to adapt them to the local jurisdiction, and to the moderate amount of the causes, he apprehended there would be no difficulty in the local Judge saying, 'This cause is not fit for a Jury.' But he would impose a restraint upon the Judge in this instance. He would not allow him to say, without any control or responsibility, 'I will have no Jury here,' but if both parties agreed—if the Judge said that a Jury might be dispensed with, and if neither of the parties insisted upon a Jury being impannelled, it might be entrusted to him, and then there could be no evil in vesting in the Judge and the parties jointly the discretion of calling or not calling for a Jury. With respect to the kind of actions to which this regulation should apply, he had already said that whenever a person brought an action, be it for tort or debt, and let the case be of what kind it might, provided the damages were under the sum he had mentioned as the limit of this officer's jurisdiction, he would extend this regulation to such cases. In the present state of our law, the essential and necessary expenses of driving one of the parties from one part of the country to another, and from one country to another, made it a duty imperative upon Parliament to provide some cheap, effectual, and speedy tribunal for rendering justice to the public. That the officer whom he had described ought to be a man of weight from his learning and character, required no argument. That he ought to receive such a salary as would be suitable to his station; and that he ought to work constantly for that salary, appeared to him to be essential to upholding the proper character of that office. He should hold his sitting once a month for 10 months in the year at least. He should sit six times in the principal town in the county, and two of the

other four times in each of the two principal villages in the county; so as to carry justice to the door of the individuals, and to enable the most distant to have justice twice a year nearer home. This was an essential part of his plan. He had already stated the case of Scotland. He understood that great benefit had been felt in Ireland since the introduction of Assistant Barristers there in 1795 or 1796. He was informed that the having or not having a Jury was in the discretion of the Assistant Barrister; and that that officer was entitled, in cases under 20*l.* to say that they should be tried by a Jury or not. It appeared essential that notice should be given of a motion for a new trial, before the Judge of Assize. For this purpose the local Judge should always be in attendance at the Assize. He should be in commission with the Judge of Assize, in order that he might possess the due weight in public estimation. He should sit with the Judge when a motion was made against his direction or against a verdict in his Court; and should report to the Judge who would dispose of the question, whether in point of law or fact, he would decide it, if it had been reserved for him, whether upon his decision, upon a particular point, a verdict stand or not. But that he should have no voice in the decision, was the result not only of reasoning upon the subject, but of experience in other cases. He could intend nothing disrespectful to any of the Learned Judges, when he said that, although he conceived it convenient when a motion was made against the direction of the local Judge on a point of law, or against the inclination of his opinion on a point of fact, although he conceived it highly convenient that the local Judge should be then present, yet his having a voice or influence in the award of the Court; his setting himself up to support his own opinion, and, perhaps, his own error—for even Judges might sometimes err—his setting himself up to back in Court the prejudices which he had derived at the trial, was what he (Mr Brougham) altogether objected to; for it was a practice which he had seen operate injuriously, and lead to misdecision in our highest Courts; causing cases to be decided one way, which he was morally certain would have been decided in another, if the cause had come out of a Court which the Judge did not belong to who had ruled the point of law, or directed the verdict. Of this he had had, he would not say constant, but certainly abundant experience; and it led him to the opinion that the local Judge should be present to report his own decision, and to state the grounds of it; but that he should have no authority in disposing of the case. This appeal in cases of error, not to the Court at Westminster, but to the Judge of Assize, would have the effect of superintending and controlling the local Judge, and of preserving the same law in different places, so that there should not be one law in one place, and another in another; or one law for one class, and another for another.

Then came the question of the expense. He did not think it necessary that very large salaries should be given to the officers of those Courts. There ought to be an officer in the nature of a Registrar, an assistant clerk, and one or two ushers. Some establishment of this description was necessary, because, if the system were established at all, it should be constructed so as to be able to do the business. He could not imagine that 1500*l.* a year would be too much as the salary of the local Judge. He saw the Hon. and Learned Gentleman opposite (the Solicitor-General) smile at the amount; but undoubtedly, if we were to have a good lawyer—a man fit for business—whose time was to be purchased out and out—the sum he stated was not too much. He had, indeed, some doubt whether it was not too little; but taking the whole expenses, including the salaries of the Judge, the Registrar, and other officers, the whole amount would be between 120,000 and 130,000*l.* a year. And this sum was not much, when compared with the amount expended in other countries. In France there were from 3,500 to 4,000 local Magistrates, who were to decide all causes in the first instance, where the amount did not exceed 200 francs, or about 8*l.* of our money—and these were maintained at an expense of 121,000*l.* a year. Then came the Tribunals of First Instance in each of the arrondissements, which were 300 or 400 in all, and the Judges of which amounted to about 1,600, and who, besides the Judges de Paix, or local Magistrates, cost 125,000*l.* a year. Then the Courts of Appeal cost from 70,000 to 80,000*l.* a year; and last came the Court of Cassation, at Paris, which was the ultimate tribunal of appeal, or rather a Court of Error, the expense of which was 25,000*l.* a year. So that for the administration of civil justice alone, France paid between 300,000 or 400,000*l.* a year. The whole expense of the administration of civil and criminal justice, amounted to about 525,000*l.* a year, which, in that cheap country, would nearly equal a million of our money—at least it was equivalent to about 800,000*l.* This proved that the French wisely thought that no expense was too great for the inestimable benefit of an effectual administration of justice; and that we should grudge 125,000*l.* a year for that purpose, was a supposition to which he would never yield until he saw it proved by a vote of that House. It was not equal to three weeks' extra expenses in the last year of the last war. He did not mean that the war was conducted for 50,000*l.* a week, unfortunately nothing like it. But he meant, that independent of the National Debt, the civil list, the whole expense of the army, and the ordinary charges of war, the extra expenses amounted to a sum in three weeks which would have been sufficient in the capital expended, to purchase an annuity of 150,000*l.* a year. By far the greatest benefit which Parliament had ever bestowed upon this country would be the providing cheap, speedy, and certain justice. The functions of these Courts ought not, in his opinion, to be confined to litigious judicature. If the law were brought to its highest possible perfection, there would always remain a sufficient quantity of business which might be beneficially administered by arbitrators. If the person selected for the function of this office were respected in his character of Judge, who could be so fit to arbitrate in cases in which, from the nature of their details, the parties might not be disposed to go into Court. What could be more judicious, or more proper, than that such a person as the Judge described should be appointed to take references between parties on subjects which he might have had to decide as a Judge? What mode of terminating litigations or disputed claims would give greater satisfaction to the public and the parties? There was another improvement of which he thought the administration of justice in this country was susceptible—namely, that of the constitution of Courts of Conciliation, similar to those which were in use in foreign countries, where the parties appeared to talk over calmly and quietly the subject in difference between them, in the presence of a Judge, who, instead of urging them to litigation, represented to the claimants the necessity of moderating a demand, or to the party on whom the demand was made, the reasonableness of compliance. The system had been introduced extensively in France, as appeared by the accounts published by Levasseur, in his Manuel, who states that, though the object of the law is fulfilled, yet where recourse is had to a compulsory enforcement of conciliatory adjustment, satisfaction is but rarely given to the parties concerned. The system had been tried in Holland, but it was not intended to revive it in the new Constitution, which they were now remoulding. In Sweden it had succeeded partially; but in Denmark, where going before such a Judge was entirely optional, it had been peculiarly successful. In one part of Switzerland the system had been adopted on the plan of the Code Napoleon, with the compulsory provision; and as it might be evaded by paying a fine of 10 francs, the practice of evasion was general. In Geneva, where the proceedings was not compulsory, by the returns of 1825, 1826, and 1827, nearly one third of the causes commenced were finished by withdrawing the cause, and nearly one seventh, and certainly an eighth, were absolutely settled by this conciliatory process alone. In respect of cases instituted in Courts of Law, it had been said, and tolerably correctly, that the man bringing the action was generally the person most ignorant of his case and of its merits. Not that he wished to insinuate, with the high respect he felt for his own profession, that Counsel were in the habit of promoting litigation by giving that sort of advice which would lead a plaintiff astray. The reverse was the fact, for none were found more disposed often to discountenance, or throw cold water on litigation. There were cases, however, where ill advice had led men to ruinous and fruitless litigation; and where that had been given by persons in the profession consciously, such persons could not be respectable. Yet he had heard of those in the profession of solicitors and attorneys—however generally respectable that branch of the legal profession—who, if such a person were to be found in the other branch alluded to, would prefer to have recourse to him, or even go so far as to assert to a client that such an opinion had been given, when they had substituted one which was favorable to their own views, and the promotion of litigation. He had been on occasions at consultations where the hands and eyes of Counsel had been turned up, as if to ask how in honor's name could such actions have been advised, and which never would have been brought had not a fallacious coloring been given to the case by false statements of facts. Ignorance on the part of his advisers he would, however, assert was far more frequently the ingredients in such dangerous and injurious advice to clients than premeditated mis-advise. All these were reasons why an opportunity should be afforded to litigants to bring their claims, and the nature of their defence, before some competent judge of the merits of their case in the first instance, so as to promote an amicable adjustment of their differences. All who were acquainted with the ordinary incidents of life and society must feel that such an improvement in our law would be highly conducive to the best interests of society, by insuring the prevention of useless litigation or cheap justice. Those who felt an indisposition to adopt this proposition were, in justice to their own motives and the interests of society, bound to give to society

another remedy. He was not a man disposed to contend about words or forms. If they reformed effectually the County Courts, it would, to a great extent, produce many of the advantages which he was desirous to obtain, and should have his support.

The existence of the enormous grievance of the law, as it now was administered, was a matter of fact—was undoubted. The people had a right, and they felt it, to justice ; they clamored and called aloud for it ; they distrusted the profession in their slow approaches to legal reform—they distrusted the Government in their meditated reforms, whether politicial or otherwise, as long as expeditious and cheap justice was denied them. An absurd cry had been attempted to be raised that this reform was the result of a clamor raised against everything that was venerable in our Constitution—a clamor against the laws of the land. It was not so. But, if clamor it were, it was a clamor against that which it was but just and right should be raised—it was a clamor against the abuse of the law—(loud cheers.) It had been said by one who was no strong advocate for popular privileges, and no eager aspirant to popularity himself, no zealous promoter of innovation, nor among the foremost to raise his hand against what was venerable in our Constitution, or to raise his voice in opposition to the wisdom of our ancestors—by that eloquent statesman and senator Burke—that where abuse existed, there was a right to be clamor, inasmuch as it was better to have our slumbers disturbed by the clangor of the fire-bell, than be awoke by the flames of our bed —(hear, hear.) He had been told by some that this was but a timid and weak attempt, a mere mock reform ; by others he had been accused of rashly taking up as a subject of dangerous experiment that which had been, and must continue to be, the object of all men's veneration. He disregarded the opinion of both the one and the other party. His object was simple—and that the accomplishment of a great public benefit. The part of a reformer had rarely been an enviable one. He had peculiarly felt the truth of that remark. In his attempts to be useful, he had been obstructed by objections on points of form, or thwarted by some who affected to be his coadjutors : but, above all, he deplored the impediments which had been attempted to be raised, through the medium of the basest slanders—raised against his motives by men who, whilst they raised these calumnies, were, from a variety of reasons, the very men, of all men on earth, who best knew how base and unfounded such charges were. 'I have lived (said he, in a very impressive manner) to be reproached with being leagued with abuse. I have lived to be accused with being in a corrupt league with those who fatten by abuse, and the motive for that league is the more infamous as it is the more unfounded—namely, that I have formed that base and corrupt league for the purpose of obtaining high professional advancement and station. What! I, who have been offered and have refused the highest judicial situation in the gifts of the Sovereign! I, who at that very period engaged myself in doing that act, which, above all other acts, was calculated to prevent the possibility of such a proposition being made to me again : and this on grounds both personal and political! Was I affected by this slander ? Did I hesitate or falter in the objects I was—in the exercise of a conscientous feeling of duty—at that moment engaged in ? Did those calumnies quicken or accelerate my efforts for the public welfare ? No. I pursued that course I had marked out to myself, regardless of imputation or calumny.

False honor charms, and lying slander frights
Whom ? but the wretch, in baseness that delights.

It has been the lot, in all times, of men like me to be subjected to the attacks of calumniators—to be thwarted by the perverseness of friends—to be designedly misunderstood—to be misrepresented —to be borne down, till the attempt to bear one down longer was found to be fruitless ; but what does it all amount to but to prove that truth will survive—will finally triumph—and that calumny will have its day ?—(loud cheering.) But if this be the reward of the reformer, if he is to be the object of suspicion and misrepresentation, in the present instance an inference must be drawn favorably for myself. Having been taunted, by the enemies of reform, with being too rash ; its friends by being too slow, or too cold ; it may, with some degree of consistency, be inferred that the presumption is that the course adopted is right. Coldness may be taken as a proof of prudence, and rashness may be modified into proper courage. It is said, ' Wo to you when all men speak well of you.' So encouraged, I shall go on undismayed, uninfluenced in that course my own judgment sanctions, following with confidence in the steps of those illustrious individuals who have gone before me in the same career, and have bequeathed to us their example to guide, and their success to cheer us.—I move, Sir, that leave be given to bring in a Bill for the establishment of local judicatures in certain districts in England—(loud cheers.)

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## DIGEST OF RECENT ENGLISH REPORTS.

*Robinson vs. Reed.*

The plaintiff having a claim upon the defendant, took the acceptance of the defendant's agent for the amount allowing discount, which bill was twice renewed for periods of two months, interest being added at each renewal. At the time of taking the bill, the agent had money of the defendant in his hands, more than sufficient to cover the demand, and the agent then debited the defendant's account with the amount of the acceptance : but it did not appear that the defendant had seen the books, nor that the plaintiff might have had cash had he chosen. Held, that the agent having become bankrupt, and the acceptances being unpaid, the defendant was still liable. 9 Barn. & Cress. 449.

*Holderness vs. Shackles.*

A part-owner of a ship is not entitled to his share of the ship's earnings until he has paid his proportion of the ship's outfit and expenditure for the voyage ; and a part delivery of his share does not necessarily defeat the lien, which the other part-owners have upon the remainder. 1 Danson & Lloyd, 203.

*Jones vs. Bright.*

Where an article is sold by the manufacturer expressly for a particular purpose, there is an implied warrantry to the purchaser that the article shall be reasonably fit for that purpose, or at all events against latent defects, arising from the want of skill or care in the process of manufacturing. 1 Danson & Lloyd, 304.

*Poulton vs. Lattimore.*

In answer to an action for the price of goods sold under an express warranty, it is competent for the defendant to shew that the warranty was not complied with, without returning the goods, or giving notice of their defect in quality. No evidence having been offered that the goods in question (seeds warranted to be good growing seed) were worth anything, and the point as to the plaintiff's right to recover something not having been raised at the trial, the Court refused to interfere in favor of the plaintiff on that ground. 9 Barn. & Cress. 256.

*White vs. Trustees of British Museum.*

Two of the witnesses to a will of lands subscribed their names at the devisor's request, but did not see his signature, nor were informed, at that or any other time, of the nature of the instrument. The third witness did not see S the devisor's signature, but was informed by the devisor that the paper in question was his will. Immediately above the names of the witnesses was written, in the hand-writing of the devisor,—'In the presence of us as witnesses thereto :' Held to be a sufficiently attested devise, within the Statute of Frauds. And per Tindal C. J. 'When we find that the testator knew this to be his will ; that he produced it to the three witnesses, and asked them to sign it as witnesses ; that they subscribed their names in his presence, and returned the identical instrument to him ; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. 6 Bing. 310.

*Kay vs. Brookman.*

To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to shew that he expressed an intention of leaving the county, that he had reason for so doing to avoid a criminal charge, and that his relations have not seen him since he expressed his intention of going. 3 Carr. & Payne, 55.

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THE JURISPRUDENT.

BOSTON, SATURDAY, SEPTEMBER 25, 1830.

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*Bigelow's Supplement or Digest of Pickering's Reports.*—Nothing is more easy than to make a Digest, if by that term is meant a collection of cases from the Index or Table of Contents of a reporter, alphabetically arranged and faithfully copied. And no sort of book making can be of less value to the Profession. Such Books are not merely useless, but they are pernicious. At best they give the authorities imperfectly, and, in many instances, incorrectly. The statements by reporters are always the last thing made, often hastily, and with the less care, because the cases reported generally go in the same volume with the statements, and are consulted as the better source of information. Sometimes, points raised are not clearly explained, principles are stated as general, which are applicable only to the case decided, and which, by the Court, are restricted or qualified.

Loose and uncalled for opinions, or suggestions of Judges, are regarded as considered and decided points.

The truth is, Reporters make their Tables or Indices for their Reports and to go with them, adopting the legal presumption, which, however, is often rebutted by the matter of fact, that those, who buy their Books, read them. It is enough for their purpose that their notice of the points decided, in any case, may direct to the case itself.

But something more is wanted in a Digest,

which is, in many respects, to supersede the necessity of a recurrence to the cases reported, and something more is accomplished by those who come to this labor with the necessary industry, discrimination and learning. The same judgment, the same power of comparison, of apprehending analogies and discriminating differences, which necessarily belong to those who settle the law right, is wanted in those, who undertake to arrange its principles and state the cases which sustain them. A properly executed Digest is itself authority. It takes the character and consequence of a Book of Principles. The law as stated by Comyn can hardly be said to be strengthened or rendered more satisfactory by consulting his authorities. He is the best of authorities himself. And yet his work is but a Digest. The labors of such a man tend to diminish the quantity of necessary Books, while they abridge or take nothing from the amount of knowledge. Ten to one, the man, who, now a days, gets a Digest to find the law, will find, if nothing else, that he must buy the Reports to explain his Digest. In fact, the Digests, which have hitherto appeared in this country, have been designed as accompaniments to the Reports, whose contents they attempt to give. They are made chiefly to facilitate references to the cases. Perspicuity of arrangement, accuracy of reference and clearness combined with brevity of statement have been, therefore, their highest merit. That merit has always been conceded to Mr Bigelow. The last Volume recently published, is designed as a Supplement to, or continuation of the Volume which the Author published in 1825. Those who have already supplied themselves with the first Volume of Mr Bigelow, published in 1818, may complete the Digest of the Massachusetts Reports, by adding to it, that of Mr Metcalf and the present Supplement.

The two Volumes of Mr Bigelow, last published, as they are now arranged, are, however, somewhat more convenient for reference. Mr Metcalf's Digest is well executed, as is everything that Gentleman has attempted. His name and reputation, are a sufficient pledge to the Profession, that whatever he gives to the public, comes from his hands fraught with learning, extensive research and critical accuracy. The reception which his efforts to illustrate, simplify and explain the law, have met from the public, should encourage him to some high and worthy undertaking in which he may embody his learning, secure his reputation, and enrich the Profession. Of his Edition of Yelverton, Judge Howe says, 'his notes and discussions are most excellent, and do honor to him and the country. The whole is worthy of the attentive perusal of every one who would be a student in Law.'

Mr Bigelow seems to have examined the cases reported for himself, and to have been guided by his own good judgment in the explanation and statements of the decisions of the Court. In some instances he has referred to corresponding cases in the earlier Volumes of the Reports, and he would have performed a very acceptable service to the Profession, and profitable, as we believe, to himself, if he had carried his labor in this respect siill farther, and, in important cases, even beyond the Reports themselves.

There is a degree of confusion in his '*additional references to former vol.*'

As Tyng's and Pickering's Volumes pass alike under the name of the Massachusetts Reports, we were at a loss, at first, to know when he refers to '*vol. iii. p.* 261,' whether vol. iii. of Tyng or Pickering was meant. We get no light on this point from the Introduction. We should have much preferred a repetition of the principle, stated in the first Volume, with references to former cases. The course pursued by the Author, leaves a great many cases in Pickering undigested. Many of them contain important matters beyond the mere confirmation of former decisions. Indeed it seldom happens that the same question is submitted a second time to the Judges for determination. The cases vary in some important particulars.

We beg leave also to suggest that the title of the Book is objectionable. We hope the Author will live to favor the public with still other Volumes. What will he call the next? A Supplement to the Supplement? Why not call this the Second Volume of Bigelow's Digest? As much uniformity as possible should be preserved in the Titles of such Books for conveniency of reference.

We have never discovered the necessity or utility of changing the Title of our Reports with the change of the Reporter. The Reporter gains nothing but a little notoriety to his name, which is worth nothing, if his works discredit it; and he needs no such aids if they are worthily executed. Such, however, seems to be the fashion, and although there is some inconvenience, there is no great injury arising from it. They have in New York, already, Johnson, Caine, Paige and Cowen, and are likely, for ought that now appears, to go on through the Alphabet.

In the United States Courts too, where it would seem, that there were many reasons for preserving the same style of Reports, there are several different Titles, and as many different modes of reporting.

There is no very good reason why the Reports to the several States should not be designated by the name of the State to which they belong.

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*English Judges and Law officers at the demise of the late King.*

Lord Lyndhurst, *Chancellor.*

Sir Launcelot Shadwell, *Vice Chancellor.*

Hon. Henry Goulbourn, *Chancellor of the Exchequer.*

Sir John Leach, *Master of the Rolls,*

Lord Tenterden, *Chief Justice of K. B.*

*Justices*—Sir James Parke, Sir Joseph Littledale, Sir John Bayley.

Sir Nicholas Conyngham Tindal, *Chief Justice of C. P.*

*Justices*—Sir John B. Bosanquet, Sir Stephen Gaselee, Sir J. A. Parke.

Sir Wm Bolland, Sir John Vaughan, ——— Garrow, *Barons of the Exchequer.*

Sir James Scarlet, *Attorney General.*

Sir Edward Burtenshaw Sugden, *Solicitor General.*

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*List of Crimes which subject the offenders to the punishment of death in England.*

Administering drugs, or using other means to procure the abortion of a woman quick with child.

Setting fire to buildings, stacks of corn, coal mines, malt houses, ships or vessels, or otherwise destroying them, at sea or in port.

Burglary, murder, rape, robbery, sacrilege, by breaking and entering any church, and stealing therein, or stealing in a church and breaking out therefrom.

Carnal knowledge of a female child under ten years of age.

Sodomy with mankind or with any animal.

Plundering or stealing any part of a ship or vessel in distress, or the goods on board.

Stealing horses, sheep, or cattle, or killing with intent to steal the carcass or skins.

Breaking into, and entering a dwelling house and stealing therein.

Stealing in a dwelling house any property, any person therein being put in fear.

Stealing in any dwelling house to the value of 5*l.* or more.

Forgery to defraud the customs, to defraud the excise, to receive wages of seaman, officer, or marine, and altering any instrument for these purposes; also obtaining by a false oath a probate of a false will, or letters of administration of a seaman or mariner, and demanding and receiving the wages of any seaman or mariner, by means of any document obtained by a false oath and with intent to defraud.

Poisoning, stabbing, strangling, or wounding with intent to murder. Also, cutting, shooting or wounding, which would amount to murder if death ensue. Attempting to drown with intent to murder.

Piracy on the high seas, smuggling by three or more armed persons, shooting at vessels in the British or Irish Channel, or shooting at or wounding any officer.

Persons returning from transportation before the time has expired, who have been transported for having goods liable to forfeiture.

Persons who assemble riotously and demolish or destroy any church, building, machinery, or any engine used in any mine, &c.

Accessaries before the fact are subject to the same punishment as the principal.

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Peters' Supreme Court Reports is just published in Boston, by Hilliard, Gray & Co.

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## RECENT PUBLICATIONS.

Part II., of Crown Cases reserved for Consideration, and Decided by the Twelve Judges of England, from July, 1825, to Easter Term, 1830, inclusive. By Edward Ryan and Wm. Moody, Esqrs., Barristers at Law.

An Analytical Digest of the Reports of Cases decided in the year 1828, in the Courts of King's Bench, Common Pleas, and Exchequer; in Chancery, at the Rolls, and in the Vice Chancellor's Court; in Parliament, in the Consistory Court, Arches Court, Prerogative and Peculiars, and Bankruptcy and Nisi Prius. By Henry Jeremy, Esq., Barrister at Law. This work on perusal will be found of great value, as it embraces and presents at one view all the Decisions of the different Courts that arise in the course of the preceding year; and from the circumstance of being published annually affords a ready reference to all the points decided during that period.

Reports of Cases argued and determined between the months of May and November, 1829, before the Committees of his Majesty's Most Honorable Privy Council, appointed to hear Appeals and Petitions. Vol. 1. Part 1. (to be continued.) By Jerome William Knapp, D. C. L. Barrister at Law.

A Practical Treatise on the General Principles and Elementary Rules of the Law of Evidence. By Richard Grade, Esq. Barrister at Law.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

The work will be published with despatch.

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The work will be printed on a beautiful small type, and good paper, and will be comprised in four or five volumes, (probably not exceeding four,) royal octavo size, each volume to contain about 1000 pages; and will be delivered to subscribers at $5 per volume, in good law sheep binding, which is a very low price for a law work embracing so great a quantity of matter.

After publication the price of the work will be raised to $6 per volume.

RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan suggests.

July 10. ISAAC PARKER.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

Aug. 20.

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NEW LAW BOOKS.—JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

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This work is intended to contain the opinions of the Supreme Court, *in the language of the Judges*, in every case decided in that court from the establishment of the Government of the United States, to the commencement of Mr Peters's Reports at January term 1828. The reported decisions in the Circuit and District Courts of the United States, upon similar points, are also collected and digested in the work, as notes; and abstracts of those Cases, and also of the collateral decisions of the Supreme Court are given, so that the Professional Gentleman and the Student will be in possession of all the adjudicated Law of all the Courts of the United States, in an authoritative, condensed, and arranged form.

The work will be contained in not more than six volumes; the first volume is now published; the second volume will be published about the 1st of August, and the balance of the work during the present year and 1831.

Those who wish to possess this work will do well to make an early application as the greatest portion of the edition is taken up by subscription. They are for sale by the principal Booksellers in the United States, with J. Griggs's other law publications.

Price six dollars to those who subscribe, and seven dollars to non-subscribers, payable on delivery of each volume.

PETERS' REPORTS.—Reports of Cases argued and determined in the Supreme Court of the United States, by Richard Peters, Esquire, Reporter of the Supreme Court of the United States, 4 vols. royal 8vo.

FONBLANQUE'S Celebrated TREATISE ON EQUITY. A new edition, with considerable additions, from the last London edition, by a distinguished Member of the Philadelphia Bar, in 1 vol. royal 8vo.

CHITTY ON CONTRACTS. A new and Practical Treatise on the Law of Contracts not under Seal, and upon the usual Defences to Actions thereon, with Corrections and Additional References. By a member of the Massachusetts Bar, in 1 vol. 8vo.

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The work will also contain references to the decisions of the chancery courts of the United States, and of the several states.

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GRAY & BOWEN have received by late arrivals the following valuable Foreign Books, which they will sell at low prices.

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Teatro Italiano Antico, 8 vols. July 10.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep, $3,50—Calf, $4,00.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as proprietor in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, { *Clerk of the District of Massachusetts.*

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CARTER AND HENDEE have in Press, SELF EDUCATION; or, THE MEANS OF MORAL PROGRESS, *Translated from the French of M. Le Baron Degerando.* To this work was awarded the honor of being 'crowned' by the French Academy; a distinction annually confered on one or two works, deemed the most useful that have been published during the year. And a late Review remarks; 'We have no ethical work of any living English writer to be compared with that of Degerando.'

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, OCTOBER 2, 1830. NO. X.

## MERCANTILE LAW.

### NO. III.

[Continued.]

There must likewise be a fair exercise of the understanding. Fraud, therefore, which deludes, or surprise which entraps the judgment, are forbidden alike by natural justice and by law. Misrepresentation or concealment, *suggestio falsi*, or *suppressio veri*, are equally acts of fraud which take away the binding force of an engagement.* But the rule must by no means be taken in a large and unqualified sense. If the subject of the agreement, and the manner in which it is entered into, be such, that the person imposed upon has had a fair opportunity of exercising his judgment, the law will not supply the want of skill or caution in him, but leaves him to the consequences of his own improvidence.† The sound distinction seems to be this: if the falsehood or concealment be such that a person of ordinary experience might have detected it, then the contract stands. But if the fact alleged or concealed be peculiarly within the knowledge of the person practising the deceit, then the person deceived may withdraw from his engagement altogether.‡ The fraud, however, must proceed from, or at least be participated in, or adopted by, the other contracting party; else the contract stands good with respect to him, and the remedy of the injured party is by action against the person who practised the fraud. Fraud, though in many cases a good defence at law, comes more frequently, and perhaps more properly, under the cognizance of the courts of equity.§ Indeed, the jurisdiction of the latter in this respect is somewhat more general, extending to every instance of a gross violation of good faith, and sometimes presuming fraud from circumstances, where the law requires it to be proved.‖ Thus equity, as was hinted before, will not allow undue advantage to be taken of the weakness or necessity of another, which, as Lord Hardwicke rightly observes,¶ is equally against conscience as to take advantage of his ignorance.

Neither in law or in equity, however, is mere inequality, however great, in the terms of the contract, when unaccompanied with deceit, a ground for impeaching its validity.* By the civil law indeed, where the excess amounted to the half of the just price, the contract, if it regarded *immoveable* property, might be annulled. But even there also inequality in contracts as to *personal* property, was never admitted as a reason for vacating it; perhaps on account of the difficulty of establishing a standard of price.†

Lastly, it seems but reasonable that a *mistake* of either party, or both, as to the subject of the contract, should be a ground for annulling it. The civil law so determines, on the maxim that, where there is error, there is no consent.‡ Undoubtedly, however, a mistake as to the mere *qualities* of the subject, not induced by deception, will not invalidate the transaction.§ And even in equity, where the matter was doubtful, or both parties were equally in ignorance, or the contract has been so long acquiesced in, that it might be inconvenient to re-open it, the transaction cannot be questioned on the plea of mistake.‖

It will probably not have been forgotten, that the engagements, which the law was said to enforce, were limited to such as were neither at variance with the general interests of the community, nor unfairly detrimental to those of individuals. In annalyzing this limitation, we find included in the first term, all compacts which offend against public policy, or public morality, or positive law; and in the second, all which may be deemed fraudulent, as respects the rights and interests of third parties. To such compacts the law will not lend its countenance. Now it is evident that this vice of contracts may lie either in the act of agreeing or in the thing agreed. But for practical purposes this distinction, which savors perhaps somewhat too much of metaphysical refinement, may be disregarded; and we shall therefore consider the taint as inherent in the subject matter of the contract, and proceed to treat of it according to the division adopted above.

But as this brings us to the second main branch of our subject, it may be as well to give our readers a three months' respite from an investigation, not very captivating in its details, and unlikely, we fear, to interest any but those who can appreciate the high philosophical gratification of tracing the derivation of law through a thousand channels and ducts to every part of the social system, and of remarking that, though occasionally contaminated by the mixture of earthy substances, its waters still indicate their source from the one pure fountain of natural justice.

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*1 Stark. 434. 2 Bro. Ch. Ca. 420.

†Vigilantibus non dormientibus lex inservit. This subject will be treated more at large under the head of Contracts of Sale.

‡2 Bl. Com. 451. 3 Id. 166. Sugd. Vend. & Purch. 1—10. 3 B. & C. 623. See also Gilb. Rep. 155. and 2 Salk. 251.

§ Fraud is a good defence to an action at law for non performance of an engagement; and this, whether the engagement were testified by parol or by deed, or if the party who has practised it, and damages recovered proportioned to the injury. In equity the fraud may be assigned as a reason for not completing such contracts as are executory, or for rescinding such as are executed. See the Treatise of Equity, B. 1. c. 2. s. 8. n. *y*, and the cases there collected. In the civil law the remedy was, as in the case of duress.

‖ See the remarks of Lord Hardwicke, 2 Ves. 155.

¶Ubi supra.

*See cases cited in notes *d*, *e*, and *h*, to the Treatise of Equity, ubi sup.

†Pothier, P. 1. c. 1. s. 1. art. 3. s. 4. Domat's Civil Law, B. 1. tit. 2. s. 9.

‡Non videntur, qui errant, consentire. The translator of Pothier mentions a case which occurred some years ago, respecting an error of this kind. A painting was sold as an original of Poussin, but it appearing afterwards, from the opinion of several artists, to be the work of some person, it was held that the sale was void, and the purchaser entitled to reclaim his money.

§ This subject will be more fully discussed under the head of *Warranty*, in contracts of Sale.

‖ See the cases cited in the Treatise of Equity, n. v. ubi sup.

## NO. IV.

Our readers, we hope, will not have forgotten that at the close of our last article we were entering upon the subject of agreements which were void either as violating some rule of morality, policy or positive law, or as unfairly prejudicing the rights and interests of parties not immediately connected with the contract, and, therefore, in legal phrase, fraudulent.

Where an agreement contravenes the provisions of a positive law, to common sense it would seem immaterial whether it were the written or the unwritten, the common or the statute law, against which it offended; but not so reasoned the legal sages of antiquity. 'A statute,' said they, in the pedantic phraseology of their times, 'is like a tyrant; where he comes, he makes all void: but the common law is like a nursing father; it makes only void that part where the fault is, and preserves the rest.'* The distinction, it need hardly be observed, has more of quaintness than solidity. Undoubtedly where a statute in express terms declares that all contracts containing stipulations contrary to its provisions shall be utterly void, it follows that one offending member must vitiate the whole. The rule so understood is a mere truism. But it is equally true at this day, whatever may have been the case formerly, that neither is the entire agreement necessarily invalidated, because some one independent clause transgresses the regulations of a statute, nor, on the other hand, can a contract be sustained of which any material and inseparable stipulation violates a principle of common law.† And if the transaction be founded in illegality; in other words, if the unlawful stipulation form any part of the *consideration*, it will be alike fatal to the claim of the party seeking to enforce the contract, whether the obnoxious clause have sinned against the paternal precepts of the common law, or the imperious mandates of a statute.

To enter into a detail of cases in which contracts have been vitiated by statutory illegality, would be compatible neither with our limits or our design. The mere enumeration of the statutes themselves would occupy more space than we can afford. Such of them as relate to mercantile transactions will come under consideration in the progress of our inquiry. For the present it may be sufficient, in order to point out the arbitrary and unmeaning distinctions which are made in them, giving rise to an endless variety of perplexing questions, to allude to the statute against usury,‡ which expressly declares void both the contract and the assurance which evidences it;§ the gaming acts,

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*Hobart, 14. 1Mod. 35, 36. It is amusing to observe the devotion of the old lawyers to the common law, in disparagement of the statutes. In modern times, or at least in the age just past, they would have been well justified in their preference.

†6 Taunt. 359. 4 M. & S. 66. See also 4 Taunt. 57. 105. 113. 553. 8 T. R. 411. 8 East, 231. 15 East, 440. 11 Ves. 635. 1 B. & C. 330. per Holroyd, J., 335. per Best, J. 4 B. & C. 130. arg. 1 Wms. Saund. 66 a. (*d.*)

‡12 Ann. c. 16.

§By 58 Geo. 3. c. 93. an exception in the case of usury has been made in favor of an innocent indorsee for value of a bill of exchange or promissory note. And with

one of which * vacates both contracts and securities for money lost, the other † the security for money lent at play, but not the loan itself; the act against stock-jobbing,‡ which invalidates the contract, but not the assurance; the restriction of partnerships for the effecting of insurances§ (now indeed repealed,‖) the terms of which statute are merely prohibitory, and the various revenue acts the regulations of which are for the most part enforced by a penalty.

The subject cannot, however, be dismissed without noticing a position, which has been sanctioned by too great authorities to be treated with contempt. It was maintained by Blackstone,¶ that where a statute enjoins or prohibits an act, in itself indifferent, and enforces the regulation by annexing a pecuniary penalty to the transgression, there is nothing intrinsically immoral or even unlawful in infringing the regulation, so that the appropriated penalty, which he conceived to be merely an alternative and not a punishment, be duly paid. It was on reasoning, probably, such as this, that a distinction long prevailed in the courts between what were termed *mala in se* and *mala prohibita:* the latter, as contradistinguished from the former, being offences against statutory provisions in themselves arbitrary (such as the revenue laws generally,) which induce no moral turpitude, and in fact are offences only because forbidden. It followed as a corollary from this doctrine, that unless the statute expressly vacated, or at least prohibited, contracts involving a transgression of its regulations, they would not, in such cases, be void at common law. Accordingly, a factor who had sold a parcel of prize-manufactured tobacco, consigned to him as a dealer in tobacco, without having entered himself as required by the excise law under a penalty, as such dealer, was nevertheless permitted to sue the purchaser for the price.** The distinction was also taken by Lord Eldon in a case of bankruptcy.†† 'The first point of objection,' his lordship said, 'resolves itself into this: Whether the proposition, that a broker of the city of London cannot act as a principal, be founded on a prohibition of general law, or a *mere municipal regulation.* If on the former, it is quite clear that a court of justice can give no enforcement to contracts which the law of the land has interdicted.' The statute 3 Hen. 8. c. 11. provides that no one shall practise as a surgeon in London or seven miles round without being licensed by the College of Surgeons, and imposes a penalty of *5l.* a month for so practising. Yet Lord Ellenborough seems to have considered that an unlicensed practitioner might maintain an action for business done as a surgeon within these limits. The practising, he observed, was only prohibited *under a penalty;* the statute did not provide that no fees or charges should be recovered.‡‡ Nay, it has even been suggested by the court, that although the holding of a fair on a Sunday (which is an offence against the 29 Car. 2. c. 7.) would be illegal, yet an agreement made under such circumstances would not be therefore void.*

But this distinction, which, whether metaphysically just or not, is at all events too subtle for a legal principle, has been at length swept away. The courts have discovered that an act is not the less forbidden, because a penalty is annexed to the doing of it; and that their business is rather to give effect to what is written, than to refine upon the degrees of criminality which attach to the violation of it. Lord Holt, indeed, saw this long ago;† for he says, 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, *because a penalty implies a prohibition: thence, no prohibitory words in the statute.*' In all the late decisions this reasoning has been uniformly acted upon; and the rule may now be laid down broadly that no agreement which contemplates the refraction of a statutory regulation (whatever the nature of that regulation may be) can be enforced either at law or in equity.‡

Contracts which offend against morality may be dismissed with a very cursory notice. The maxim of our law, as of every other system of rational jurisprudence, is *ex turpi causâ non oritur actio.* A single instance will serve to shew the extent to which the application of the rule is carried. A printer sought to recover from a publisher a remuneration for his labor and expense in printing a libellous and disgusting book, entitled 'The Memoirs of Harriette Wilson,' but the court would not contaminate itself by interposing in such a transaction, and refused to enforce the claim.§

Arguments of policy, it has been said by some one, are dangerous things for courts of law to meddle with. And the reason is plain: notions of policy are arbitrary, uncertain, liable to change; whereas rules of law ought to be, as far as human imperfection will allow, positive, definite, and stedfast. It might, therefore, seem a matter to be regretted, that there should exist a rule, declaring void agreements which are contrary to public policy: because either the determining of what is politic or not, must depend on the accidental opinions of successive judges, or uniformity of decision must be purchased at the hazard of occasionally upholding exploded error. In practice, however, little inconvenience attends the application of the rule. There are not many points of admitted expediency, on which the legislature has been altogether silent; and even where there is no express declaration on the particular subject, the general spirit of the law is for the most part sufficiently apparent. It must be recollected, moreover, that, however desirable it may seem to narrow the limits of this discretionary province, yet so long as the ingenuity of self-interest shall continue to mock the foresight of legislation, it is impossible altogether to abolish it.

The rule under consideration embraces agreements, which are either injurious to the public interest generally, or contrary to the policy, though not the letter, of a specific legislative provision. The following are examples of the first class:—An engagement, though founded on adequate consideration to the individual, not to carry on a particular trade, is void, as tending to a restriction of that competition which is unquestionably advantageous to the community. Nevertheless, with a subtlety of distinction not very intelligible, a like stipulation, in which the restraint is limited to a given distance, has more than once received the sanction of the court.* With a like regard to the general interest, bargains secretly concluded between unauthorized individuals, for the procuring a transfer of public and responsible appointments, have always been discountenanced by the courts. Accordingly an agreement, made by the owner of a ship in the service of the East India Company, for the sale of the command, without the sanction and in violation of the by-laws of the company, and even a deed of which such a stipulation formed a material ingredient, have been severally pronounced void.† It is on the ground of a supposed political inexpediency also, that trading contracts made with the subjects of hostile states, during the continuance of hostilities, are at common law absolutely and incurably void.‡ Of the latter class the following instances may be selected out of many:—It is the obvious policy of the bankrupt and insolvent acts, that there shall be a full disclosure of the affairs of the insolvent for the equal benefit of his creditors. Hence an agreement, which contained, and indeed was founded on, a stipulation that the commissioners should forbear to examine a bankrupt as to certain sums which he was charged with having improperly disposed of, was held void, as tending to stifle investigation:§ nay further, in a case recently determined, an engagement by the opposing creditor of an insolvent to withdraw his opposition, after an inquiry had been instituted by the court, was considered as vitiating the entire contract of which it formed the consideration.‖ The decision, however, in these latter cases, proceeded partly on the ground that the agreements were detrimental to the rights of the other creditors; and indeed they might, with equal propriety, be adduced as examples of that class of contracts, which, adopting the expression generally used, we have designated as fraudulent.

Of these there are many instances to be found in the reported decisions both at law and in equity. We shall mention two, as most appropriate to our subject. An insolvent tradesman compounds with his creditors for the payment of a dividend upon his debts. A secret stipulation by one of the creditors for a further sum, or even an additional security, as the condition of his outward acceptance

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respect to securities in general given upon illegal contracts, it is important to bear in mind the following rule laid down by Mr Justice Holroyd: 'I take it to be clear,' says that most learned Judge, 'that where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, there, if the violation of the law do not appear upon the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such a person.' 3 B. & A. 1.

* 16 Ch. 2. c. 7.
† 9 Ann. c. 14. ‡ 7 Geo. 2. c. 8. 19 Geo. 2. c. 37.
§ 6 Geo. 1. c. 18. ‖ 5 Geo. 4. c. 114.
¶ 1 Com. 58. ** 11 East, 180.
†† 2 Rose's Bankr. Cases, 349.
‡‡ 2 Campb. 144.

* See Drury v. Defontaine, 5 B. & A. 335. The stat. imposes a *penalty* on all who exercise their worldly calling on a Sunday.

† Carthew, 252.

‡ 2 Bos. & Pul. 371. 3 Ves. Jun. 373. 14 Ves. J. 192. 3 B. & A. 179. 5 B. & A. 335 It is laid down by a respectable writer (Deacon on the law and practice of of bankruptcy, v. i. p. 305.,) that 'if the consideration for which a security is given be good in part, and bad in part, though the security is void in law, yet in equity and in proceedings in bankruptcy, it shall stand as to what is good.' This position is not true. It is supported only by decisions proceeding on the exploded principle mentioned in the text, and now, therefore, overruled. See Exparte *Daniel*, 14 Ves. 192.

§ Poplett v. Stockdale, cor. Best, C. J.

* 1 P. W. 181. 2 Saund. 156. n. 1. 2 Marsh. 273. 5 T. R. 118. 4 East, 190.

† 8 T. R. 89, 2 B. & C. 661. But see 2 Bing. 242. There is much good sense (though the reporter seems to have taken some pains to disguise it) in the remarks of C. J. Best on this subject.

‡ 8 T. R. 548. 1 Rob. Rep. 196. 3 Bos. & Pul. 200. and see 1 M. & S. 726. 1 Taunt. 28. 6 Taunt. 237. 7 Taunt. 447. The alleged impolicy is, that trade improves the resources of the enemy, which it is the interest of the opposite party to impair. Did it never strike our sage forefathers that the prohibition cut both ways?

§ 3 T. R. 17.

‖ 8 B. & C. 421.

of the composition, is fraudulent and void.* The creditors bargain for an equal benefit; and it is therefore unjust towards the body that one should be more favored than the rest. A. guarantees payment for certain goods to be furnished by B. to C. A private arrangement between B. and C. that a sum shall be charged beyond the market price, to be applied in payment of an antecedent debt, is such a fraud upon the surety, as releases him from all liability.† Collusive transfers of his property by a debtor for the sake of defeating the claim of a *bonâ fide* creditor, were at common law, and by the statute 13 Eliz. c. 5. are expressly declared to be, fraudulent and void as respects such creditor; the principle of which has, for the benefit of commerce, been extended much farther in the case of traders by the various bankrupt acts, which we shall have occasion hereafter to notice.

*2 Vern. 71. 602. 1 Atk. 105. 2 T. R. 763. 4 T. R. 166. 6 Ves. 300. 15 Ves. 52. 1 Cox's Rep. 287. 4 East, 372. 4 B. & A. 695. 4 Moore, 78. 4 B. & C. 511. 515. n.

† 3 B. & C. 605.

## ENGLISH CASES.

### COURT OF KING'S BENCH—APRIL.

(Sittings before Lord Tenterden and Common Juries.)

*Coxe vs. Anwyl.*

The Attorney General (with whom was Mr Richards) stated that this was an action brought by Miss Susanna Coxe, a young lady now 22 years of age, against the defendant, who is about 40, to recover compensation in damages for a breach of promise of marriage. The plaintiff was the youngest of three daughters of Mr Coxe, who resided at Leicester. He had been in business as a cotton-manufacturer, on an extensive scale, but had retired from business for a considerable number of years, and had lived retired with his daughters, to whom he had given an excellent education. The eldest had married a Major Smith, of the East India service, and had gone out to India with him; and the plaintiff and Miss Sarah Coxe, her sister, who was two years older, now resided with their father. The defendant was the son of a Clergyman of the Church of England, residing in North Wales, and was engaged in the silk trade, in partnership with a brother of his; and also in another trade with a person of the name of Evans; and, from his own representations, it would appear that he had been successful in both, and that he had considerable expectations besides. On a certain day in December 1827, it happened that Mr Coxe was in the public room at Leicester, and was inquiring whether any body there was at that time about to proceed to Newcastle-upon-Tyne, as he had to send a power of attorney to a person at that place to sell a vessel called the Albion, at that port, of which he was owner. The defendant was in the room at the time, and, addressing Mr Coxe, of whose name he appeared to have heard, although Mr Coxe did not know him, said that he was in a short time going on business to Newcastle, and would be glad to undertake to carry the document to that place and deliver it to the person mentioned, and that he would call at Mr Coxe's house when he should be ready to set out, and in this manner the acquaintance began. The defendant did not call so soon as was expected, but at length he did call, and stated that his journey had been unavoidably delayed longer than he had anticipated. Upon being introduced into Mr Coxe's house, he discovered that his daughters were very elegant and accomplished women; and, on further acquaintance, he became warmly attached to the plaintiff, and did everything in his power to gain her affections, and obtained her consent to make proposals to her father for their marriage. Having obtained it, he mentioned the matter to Mr Coxe, who, having been before satisfied that the defendant, who was known in Leicester, was in a good way of business, answered that he had no objections, as he was a man of good manners and unobjectionable moral principles; but the father at the same time distinctly apprised the defendant that he could give no fortune to his daughters on their marriage, having spent so much money on their education, and on that of a son. He added, that at his death his daughter, the plaintiff, would be entitled to something, as he meant to make no difference between his daughters, but at the same time that it would be so little that it was not worth his consideration, and that if he was to marry his daughter he must consider himself as marrying her without fortune. This was from the beginning perfectly open, candid, and fair, on the part of the father; and prudent also, as it would remove any ground of subsequent reflections with respect to fortune, and the defendant was of an age to be perfectly capable of judging for himself, and taking care that when he married he should have a sufficient provision to maintain a wife and family in comfort. In reply to the statement of the father, he said that he had already gained half as much as his utmost ambition aspired at, and that he wished to marry the plaintiff on her own account, and not on account of her fortune; that, besides his own accumulations, he had expectations from his family, and that he had no doubt but he would soon be able to keep for the plaintiff a close carriage and horses; and he then requested that he and the plaintiff might be allowed to correspond together. The correspondence accordingly commenced by a letter from the defendant to the plaintiff, dated 1st September, 1828, in which he expressed himself highly gratified at the prospect of his union with the plaintiff, and observed that it was unnecessary to resort to extravagant terms to express his happiness, and particularly requested that the plaintiff would place the fullest reliance on his honor and sincerity. It happened that the plaintiff had occasion to be bled at different times, and this had caused a stiffness and soreness in the arm, so that the plaintiff, although she could write a finer hand than her sister, could not write without pain; and it also happened that about this time there was superadded a sprain, as the defendant knew. In the answer sent to the defendant, therefore, the sister (Miss Sarah Coxe,) who, as the defendant well knew, was on the most intimate terms with the plaintiff, and on the most confidential footing both with plaintiff and defendant, was employed by the plaintiff as an amanuensis, and wrote from her dictation. The plaintiff never doubted but that the defendant knew this, and it might be thought a circumstance of little importance, but he mentioned it now because they would find that the defendant afterwards relied on it as some excuse for himself. So matters went on till the close of the year 1828, the defendant expressing his fixed purpose to marry the plaintiff. When on his visits at Leicester, he usually attended the family to church, and on these occasions publicly paid the most marked attention to the plaintiff, stayed behind with her in the church till the rest went out, and then walked with her alone; and in this manner held it out to the observation of all that they were destined to be married. The defendant also strongly urged the plaintiff immediately to fix a day for their marriage; but, as young ladies did not like to show themselves over precipitate in appointing, she declined making any appointment till the following day, that she might have an opportunity of consulting her father. On the following day the 17th March, 1829, was appointed for the marriage. The defendant, after remaining some time at Leicester, proceeded to different parts of the country on his business, and on the 19th Febuary he wrote a letter to the plaintiff, stating that he was under the necessity of proceeding to Wales, on account of the illness of his father, and that he would probably remain there for some time. In this letter he made no mention of his engagement for the 17th of March, but neither the plaintiff nor any of her family had any doubt of his honor and integrity, and she proceeded to get her bridal dress ready, and they all made preparations for the marriage. On the 27th of February the defendant again wrote to the plaintiff, in which he said that he had to go to Wales, on account of the illness of his brother, where he might have to remain for some weeks.—The plaintiff had written to the defendant on the 22d of February, in answer to his letter of the 19th, and expressed her hopes that the defendant would not fail to attend at Leicester on the 17th of March, as he had promised. But in his letter of the 27th he made no allusion to this, and yet there was some reason to suspect that the time during which he might remain in Wales would over-ride the day appointed for the marriage. On the morning of the 17th, the defendant did not attend according to his engagement, and the Jury might conceive the consternation of the plaintiff and her family. Miss Sarah Coxe, however, received a letter from the defendant on that morning, in which he requested her to reconcile her sister to the delay, and asked whether she had not written the plaintiff's letters for her. From this time the correspondence ceased till the 18th May, when the defendant, sent a letter to the plaintiff, in which he reproached her for want of candor and plain dealing, in imposing upon him her sister's letters as her own. The plaintiff, however, had practised no deception, but had merely employed her sister to write at her dictation, for the reason which he had already mentioned. The defendant, however, by this time had evidently become less ardent than he was before, but still he did not put an end to his engagement, and desired the plaintiff to write to him again. On the receipt of this letter it was determined that the father and daughters should proceed to London, where the defendant then was. On their arrival, Mr Coxe left his daughters at an inn or hotel, and proceeded to the counting-house of the defendant, and brought him along with him to the hotel. The defendant stretched out his hand to the plaintiff, but she very naturally drew back, and asked him what he meant by that? He said that he meant to forgive her, alluding, as it might be supposed, to the letters. The plaintiff said that she had merely desired her sister to write for her on account of the pain in her arm, and that he was aware that her sister was on terms of the utmost confidence, both with her and the defendant; and she said that before she gave him her hand he must explain his conduct, and declare what his intentions were. And what did the Jury think was the explanation? He said, 'I am a villain, and have acted like a villain!' The plaintiff said that

she would not allow him to call himself a villain' and, considering this as an apology for his conduct, she said that if he would perform his engagement, which she considered necessary, as matters had proceeded so far, she would forgive him, and they would be on the same terms of affection as before. The defendant renewed his protestations of affection and promise of marriage, and said he had never been happy since he wrote the letter of the 18th of May, relative to the sister's writing the plaintiff's letters. The father then said that he hoped matters were arranged to the satisfaction of all parties, and asked the defendant whether he would come down to Leicester in a month. The defendant said that he would come in a month, or two months, at most, and marry his daughter. The family then returned to Leicester. The defendant afterwards wrote three letters to the plaintiff, in which he renewed the old subject about the letters, and the correspondence again began to relax. At length, on the 1st of September, Miss Coxe, at the desire of her father and sister, wrote a letter to the defendant, calling on him peremptorily to perform his engagement, and stating that otherwise she (plaintiff) would resort to the legal measures which, in case of his refusal, would become necessary to clear her reputation. A copy of this letter was sent to town, and another to Hastings, where it was thought the defendant might be. The copy sent to town was returned, marked 'Not at home,' and 'refused.' The copy sent to Hastings was not returned, but no answer was sent. The family then came to town, and in the month of October this action was commenced. As to the question of damages, he had only a few words to say. The plaintiff was compelled to bring the action to vindicate her character and honor, and any amount of damages that they would give would be but an imperfect compensation. As to the means of the defendant, they had it from himself that they were ample, and he hoped the Jury would give ample damages.

Miss Sarah Coxe, sister to the plaintiff, examined by the Attorney General—Her father resided in Leicester. He had three daughters—herself, the plaintiff, and another sister, married to Major Smith, and now in India. Saw defendant first in December 1827, and knew that he subsequently visited the family, and became very intimate in it. He stated that his father was a clergyman in Wales, and that he himself was engaged in the silk trade with a brother, and with the brother and a Mr Evans in the caulking and distillery trade. He paid the plaintiff the most particular attention from the beginning; and, in August, 1828, he declared his attachment to her in the witness's presence, for she was on terms of strict confidence with both parties. Her sister referred him to her father, to whom he applied. He then went away, and returned on the 1st of September, and then mentioned what her father said to him with respect to fortune; and he said that his reply was, that it was not fortune, but Susan only that he wished for. He said that he himself had already gained half what he desired, and what in the country they would call a good fortune, but what he (in London) would not consider so; but that, in a short time after the marriage, he would keep a close carriage for her. Her sister had sustained some injury in the arm in consequence of frequent bleeding, and the witness wrote her letters, at her sister's dictation. The witness was present in February 1829, when the defendant urged her sister to fix the day of the marriage, and she said she would consult her father, and the 17th of March was fixed upon. Her sister provided her wedding-dress, and prepared for the marriage. Her sister asked him whether his father could come to Leicester to marry them? and the defendant said that his father was too far advanced in age to undertake the journey, and that his sister could not leave him. The defendant frequently went to church with the family, and, on those occasions, publicly paid particular attention to the plaintiff.

The first letter of the defendant to the plaintiff was here read. This was dated from Hull, and gave an account of a loquacious little woman of the name of Mrs B., whom he had met on one of his journeys, who spoke of the Misses Coxe as well-educated women, who had been under the tuition of Miss Linwood; and said that she bronght up her own daughters in much better practices than going to see Madame Vestris; it was remarkable, he said, that she had five sons and eight daughters; he then gave her directions as to her manner of addressing him—such as to call him Robert in private, and Mr Anwyl in public; and the letter concluded with the following lines:—

At night and morn,
When, on bended knee
Praying, dearest Susan,
Think on me.

The letter of the 19th February, from the defendant to the plaintiff, in which he stated that he was under the necessity of being absent for some time on business, was then read, and also one of the 22d February, from the plaintiff, in which she stated her expectation that the defendant would attend at Leicester at the time he promised. She mentioned that her dress-maker had said that her bridal dress was very elegant, and asked what his tailor thought of his. The letter of the 27th of February was then read, in which he mentioned that he had another journey to perform. The witness, on the 17th of March, in the morning, received a letter from the defendant (which was destroyed), in which he requested her to reconcile her sister to the delay of the marriage, and asked her whether she had not written the letters for her sister. She sent him an answer. After this he discontinued the correspondence till the 18th of May. On that day the plaintiff received a letter from the defendant, in which he accused her of deception and want of candor in imposing on him her sister's letters as original and requested her to write to him again.

The witness stated, in continuation, that on the receipt of this letter the family went to London, and her father left them at an inn, and soon after returned with the defendant, who held out his hand to her sister, but she drew it back and said she would not take it till she knew what were his intentions. He answered as usual, 'To be sure.' She then talked to him on the subject of his last letter, he said that he never had known peace since he wrote it. He then said, 'Susan, I am unworthy of you—I am a villain.' The plaintiff replied, 'I will not hear you say so, if you are prepared still to act honorably.' He said he was; and, in allusion to the letters, he asked witness why she had not written in her own name? and at last said, 'hang the writing—say no more about it.' He then further said to her father, 'everything shall be properly settled according to your desire. I shall be at Leicester in a month—certainly at the end of two months—and marry your daughter.' They parted as good friends, and the family returned to Leicester. The defendant afterwards sent her sister three letters, but then relaxed in the correspondence; and at length, on the 1st of September, she wrote him by desire of her father and sister, and sent two copies or duplicates—one to London and one to Hastings. The former was returned 'refused'—the other was not.

Cross-examined by Mr Denman—Her father resided in a private house in Friar-lane, Leicester; he had been in business, but had left it off for 20 years. She was older than her sister. Her father at one time (not within her recollection) kept a grocer's shop, but latterly was a cotton-manufacturer on a large scale.

The last letter written by the plaintiff's sister to the defendant was then read, in which she reproached him with again mentioning the letters, as she had only done for her sister what thousands had done for others—and stated that, after matters had gone so far, it was necessary for the plaintiff's credit and character that he should perform his engagement. The witness, in continuation, said that her sister was now in town, and in a very bad state of health. She was, a few days ago at the house of Mr Jones, an attorney in the Temple. A brother of the defendant was there, and she conversèd with him in a dreadful state of agitation. The action was brought in October. Her sister wrote to the defendant since that time.

The Attorney-General objected to anything being said as to the contents of the letter without its being produced. The truth was that the defendant had been making protestations which the plaintiff and her friends had reason to believe to be sincere.

The witness, in answer to a further question by Mr Denman, said, that her sister was not attended by any medical man. The Doctor could not

'Administer to a mind diseased.'

Mr Denman, for the defendant, said that he stood in a very difficult situation, as the minds of the Jury must be strongly prepossessed by the statement of the Attorney-General, and the evidence of that ingenious and intelligent young lady who had just quitted the witness-box. But in the administration of justice all prejudices ought to be studiously discarded. In this case the plaintiff had really sustained no such serious injury as called for large damages. They would observe that no evidence had been given that the defendant had a fortune to enable him to pay large damages, for they could trust but little to the exaggerated representations of the defendant, wishing to place his circumstances in the best point of view in the eyes of the plaintiff and her friends. Upon a calm view of those circumstances, the defendant felt that he could not prudently marry. He totally disclaimed all imputation on the character of the plaintiff; but the Jury would observe that Mr Coxe, the father was not called, although he would have been the best witness to explain all the circumstances. But the case was left to the plaintiff's sister, who was a better advocate in the cause than the Attorney-General. The Jury would also observe that it did appear that the Coxes of Leicester had even communicated the circumstances of the projected union to the defendant's family: and there was no evidence that they knew anything about the matter even at this day. He then commented on some passages in the first letter, particularly that in which the defendant, as he said, went to the very heavens for

metaphors to describe his celestial affection, and turned poetical on the occasion:—

When, night and morning, on your bended knee
Praying, my dearest Susan, think on me.

Letters of this kind, accompanied with the bad spelling, on account of which he so much dreaded the clever sister, were not such as very much to attract the affection and admiration of such a well-educated young lady as the plaintiff, and she could hardly feel so much distress for her loss. Mr Denman then adverted to the deception as to the letters, and said that this was very natural in a matter of this kind, and was even noticed as material in this Court in a trial yesterday (in Atkinson v. Acton) the case of a person hiring himself as a clerk and traveller. The defendant thought he had Susanna in his arms, and lo! it was Sarah. The defendant, to be sure, forgave the plaintiff; but then that affair was very cleverly managed, and in the result, the defendant was convinced that he could not prudently contract this marriage so soon as the plaintiff's family wished. There was no particular day fixed for the marriage at the time of the renewed promise, and yet they insisted that there should be no longer delay; and on the refusal of the defendant to comply immediately they brought this action. The sister said that the plaintiff was very ill; but it did not appear that she had any medical attendance, and the witness was ready with a reason for it, for she knew that the Doctor

'Could not minister to a mind diseased.'

On the whole, this was not a case for heavy damages.

Lord Tenterden observed that, if the Jury believed the evidence of Sarah Coxe, there could be no doubt but the plaintiff was entitled to their verdict; for she had proved two distinct promises of marriage; and besides the matter did not rest merely on the evidence of Sarah Coxe; for the promises appeared from the defendant's own letters; and he, when he wrote them, was in business, and of the age of 40—an age at which he must have been able to judge for himself. His Lordship then recapitulated the evidence, and said that there was sufficient proof of the breach of promise, and the plaintiff was entitled to their verdict. The next question was the amount of damages. The plaintiff himself had represented his circumstances as being good; whether he might not have represented these as something better than they really were, in order to secure an accomplished young lady so much younger than himself, it was for the Jury to consider. Something had been said about the eloquent manner in which Miss Sarah Coxe had given her testimony. She certainly appeared to be a well-educated and accomplished young lady, but he thought that she had given her evidence with the utmost propriety. The Jury would give such reasonable damages as they thought the case warranted.

The Jury, after consulting together for a few minutes, found for the plaintiff—Damages 500*l*.

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COURT OF COMMON PLEAS.—JUNE.

Sittings at Guildhall, before Chief Justice TINDAL and a Common Jury.

*Strange vs. Wigney and others.*

Mr Sergeant Wilde (with whom was Mr Kelly) stated that this was an action in trover, and was brought to recover 100*l*. being the value of a Bank post bill received by the defendants, without due caution, and applied to their own use. Mrs Strange was the proprietor of the Kentish Hotel, at Tonbridge Wells. On the 15th of September last she came to town by one of the stage-coaches, having with her a silk reticule, in which she placed her purse, containing a 100*l*. Bank post bill, and some other money. On arriving in town she proceeded in a hackney coach to a friend's house in the neighborhood of Smithfield; when she was getting out she desired a gentleman who accompanied her to hold the reticule for a moment; he, however, placed it on the seat of the hackney-coach, and forgot to take it with him when he left the coach. In a few minutes Mrs Strange became aware of her loss, but the hackney-coach was gone; and, not knowing the number, no trace of it could be obtained. Notice was given at the Hackney-coach Office, and the loss was published in handbills, and in one or two of the newspapers; and the Bank post bill was ordered to be stopped at the Bank. In a few days afterwards it was presented at the Bank by Messrs Masterman and Co. They, it appeared, had received it from the defendants, who are bankers at Brighton, and who changed the Bank post bill on the 24th of September for a stranger of respectable appearance, who stated that he was going to Southampton and the Isle of Wight. The defendants asked him no other questions; although his manner of indorsing the note was enough to excite some suspicion, he having written his address '*Lincoln*-inn-fields' instead of 'Lincoln's-inn-fields,' after signing his name 'John Wilson,' the defendants thought proper to give him Bank of England notes for the bill, deducting a quarter per cent discount, but omitting to take the numbers of the notes which they gave in exchange. The question for the Jury would be whether the defendants had used due and reasonable diligence in this transaction; and as it was clear from the above statement that they had not, he felt confident the Jury would give a verdict in favor of tho client for the amount claimed.

After evidence had been heard in support of the plaintiff's case,

Mr Sergeant Taddy addressed the Jury on behalf of the defendants. The questions for them were, first, if the plaintiff had conducted herself with due and proper caution to secure the bill; secondly, whether she had used due diligence in trying to recover it: and, thirdly, if the defendants had been guilty of negligence in giving cash for it to a person who had the appearance of a gentleman. There could be no doubt, from the evidence before them, that the plaintiff had showed a want of caution in not putting the bill in a secure place, and leaving it in a hackney-coach. She also neglected to give due notice to the commercial world of the loss she had sustained, and contented herself with merely distributing handbills among the hackney-coachmen, and advertising in only one of the London papers, so that the defendants had not the slightest information on the subject until they heard the bill had been stopped at the Bank of England. It therefore appeared evident that the defendants had acted with as much caution as could be expected from bankers under such circumstances, and he felt convinced that the Jury would view the matter in the same light, and would give a verdict for the defendants.

The Chief Justice having summed up,

The Jury found a verdict for the plaintiff—Damages 100*l*.

DIGEST OF RECENT ENGLISH REPORTS.

*Hendebourck vs. Langton.*

If several parishioners in vestry sign a resolution in the vestry minute-book, stating that they approve of an action brought by the surveyor of the highways against A. and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit; this binds them personally, and will render each person signing it incompetent to be a witness at the trial of the action. 3 Carr. & Payne, 566.

*Hall vs. Rex.*

One admitting himself to be a co-contractor is not admissible as a witness for the defendant; on the ground of his liability to contribute to the costs and damages occasioned by the action. 6 Bing. 181.

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EQUITY.

(Tamlyn, Part 1; 2 Bligh, Part 2; 3 Younge & Jervis, Part 2; 12 Price, Part 3.)

*Cockle vs. Whiting.*

The master of a vessel in the South Sea whale fishery, agrees on behalf of the owners, that each of the crew shall have a specified share of the profits of the voyage. Before the return of the vessel, the owners sell a quarter of the cargo. The custom of the trade is for the cooper to estimate the quantity of oil; this was done, and the plaintiff settled accordingly; Held, that the owners had no right to sell part of the cargo; but the plaintiff having settled could not then come for relief to equity. 1 Tam. 55.

*Lewes vs. Morgan.*

In taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter is not sufficient evidence of a debt to that amount, and actual payment must be proved. 3 Younge & Jervis, 230.

*Barnham vs. Munn.*

A. agreed to lend B. 600*l*. navy stock: he sold the stock for 522*l*., which he paid to B. A bond was drawn, to repay 'the sum of 522*l*. (being the produce of 600*l*. navy 5 per cents, or such other sum as would replace the stock) with lawful interest.' B. on discharging the bond refused to replace the stock. A. received the money and gave up the bond: Held, that after having received the money, he could not come to equity for relief. 1 Tam. 86.

*Hicks vs. Morant*

The testamentary guardian of an infant sold part of his estates for the redemption of the land tax: the vendee paid the purchase money to the agent of the vendor, who was also agent for the vendee, and the conveyance was executed; but the agent did not pay the money into the bank as required by the act 38 Geo. 3. c. 60. The purchaser entered and continued in possession for many years, paying the land-tax. Nearly twenty years after, attaining his age, the heir at law brought an ejectment against the purchaser, to restrain which, and obtain a confirmation of the contract, the purchaser filed his bill. The Court dismissed the bill without costs. 3 Younge & Jervis, 286.

*Willis vs. Farrer.*

The Court ordered a new trial of an issue directed in a tithe suit, where it appeared that the verdict had been obtained by surprise, and against

the opinion of the judge. 3 Younge & Jervis, 264.

*Jones vs. Green.*

By an indenture a farm was demised at a yearly rent, with a covenant by the tenant, that if, during the last three years of the term, he should rsow more than seventy acres of clover in one year, he should pay an additional rent of 10*l.* a year for every acre above seventy for the remainder of the term: Held, that the additional rent was in the nature of stipulated damages, entitling the plaintiff to a discovery in aid of an action at law; and a plea that the discovery would subject the defendant to penalties, was overruled. 3, Younge & Jervis, 298.

*Oxenham vs. Esdaile.*

The lien of a vendor upon the land and title deeds until payment of the purchase money, does not apply to a conveyance to the purchases executed by some, but not all of the parties, where the contract has gone off by the vendor's default; and if there be any lien on such a conveyance, it is vested in the purchaser as security for his deposit. 3 Younge & Jervis, 263.

*Capper vs. Spottiswoode.*

A vendor who has taken, as security for part of the purchase money, the bond of the vendee and the mortgagee of part of the property sold, has not, on the bankruptcy of the vendee, a lien on the whole estate. 1 Tam. 21.

## MAINE.

SUPREME JUDICIAL COURT,

Vol. 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Fellow's case.*

Where a *venire facias* directed the constable to cause a juror to be drawn, not more than twenty, nor less than six days before the sitting of the court; and he made return that the juror was drawn 'as above directed,' but without date; the return was held sufficient.

So, where the language of the return was—'We have appointed J. C. a juror,' &c; for it shall be intended the language of the town, of which the constable was an inhabitant.

So, where the person drawn as a juror was the constable himself, who served the *venire facias*, and made the return.

So, where the constable styled himself 'constable of the town,' without saying of what town; the *venire facias* being directed to the constable of the town of *M.*

It is no good cause of challenge, that a juror has been called as a witness for the State, on a former trial of the same indictment, to testify against the general character of the prisoner.

A defendant has no right, in any case, upon the coming in of the traverse jury to have them polled, and each one separately interrogated as to his assent to the verdict.

*Irish vs. Webster & al.*

The Land agent cannot maintain an action in his own name, upon a promissory note not negotiable, given to him in his official capacity, for timber belonging to the State.

*Cousins, ex parte.*

A license to sell the land of a minor, under *Stat.* 1826. *ch.* 342, may be granted in the alternative, for public or private sale.

*Manson vs. Gardiner.*

The receipt of money for an outstanding debt, by an administrator, after the lapse of four years from the grant of administration, does not revive any creditor's right of action which had been previously barred.

Where a vessel on a voyage to *Trinidad*, and back to her port of discharge in the United States, was captured in the year 1797, by the cruisers of the king of Spain, and condemned; and a sum of money was allowed and paid to the owners in 1824, under the Spanish treaty, for the loss of the vessel and freight:—It was held that the receipt of the money by the owners, did not revive the claim of a seaman for his wages for the homeward voyage, even up to the time of capture.

*Gardiner vs. Nutting & al.*

An acknowledgment of debt, or a new promise, by the maker of a promissory note, takes it out of the statute of limitations only so far as he is concerned; but does not affect the rights or obligations of collateral parties.

Where the maker of a promissory note, of more than six years' standing, died insolvent, and a collateral guarantor of the note was appointed a commissioner on his estate; the allowance of the note by the commissioner, as a valid claim against the estate, being an official act, was held not to amount to a new promise on his part to pay the debt.

*Heald vs. Heald.*

The statute of limitations applies to civil actions at common law; and not to a claim made before the Judge of Probate against an administrator, for the rents of real estate occupied by him.

*Moore vs. Smith*

The *Stat.* 1821, *ch.* 62, *sec.* 14, limiting penal actions to one year from the time of forfeiture, may be given in evidence under the general issue.

*Gardiner C. & W. Factory vs. Gardiner.*

The capital employed in manufactures, within the meaning of *Stat.* 1825, *ch.* 288, includes whatever is essential to the prosecution of the business, whether it be fixed or circulating capital. And it is immaterial whether it is derived from assessments, or loans, or otherwise.

*Cram vs. Burnham.*

Cohabitation, known to be adulterous in its origin, a former wife being still alive, conveys no right to the guilty parties, against third persons; nor does the continuance of such cohabitation, after the death of the lawful wife, afford legal presumption of a subsequent marriage.

*Stevens vs. Morse & als.*

Where the proprietors of a township, in order to encourage its settlement, voted to give lands and a sum of money to any person who would build mills on one of the lots designated, and maintain them for ten years, which was done;—this was held to give no right to flow the lands of any individual proprietor, holden in severalty at the time of the vote, though more than forty years had elapsed since the mills were built, without any claim of damage.

## INTERESTING TO RETAILERS.

We learn from the Portland Courier of Tuesday that the long agitated question as to the constitutionality of the law requiring retailers of spirituous liquors to pay a duty for their license, was finally decided at the late term of the Supreme Court in that town: the action was brought by agreement between the defendant and others, for the express purpose of testing the validity of the law. The following report has been furnished for publication.

*The State vs. Lunt.*

The defendant in this cause was indicted for undertaking and presuming to be a common retailer of spirituous liquors contrary to the statute; and was defended by Messrs *Fessenden* and *Deblois* on the ground that the statute regulating retailers of spirits, and requiring a license, and the payment of a duty, was unconstitutional. As there are understood to be other cases, in other counties waiting the decision of this, the publication of the following opinion of the Court, delivered last week in this county, will be useful to a large portion of the people.

MELLEN, C. J. The object of the defendant in submitting the motion in arrest of judgment in this case is, to obtain the opinion of the Court on the question whether the section of the revised statutes *ch.* 133, for the violation of which he has been convicted, is a constitutional one, or a violation of the constitution. All acts of the Legislature are presumed to be constitutional, and the Court will never presume to pronounce a statute to be otherwise, unless in a case where the point is free from all doubt. So far as a long continued practice of successive Legislatures in Massachusetts, pursued also in this State has a tendency to sanction the act in question, and others similar in principle, such practice is unquestionably in favor of their constitutionality. We have never before heard the question agitated, or a doubt expressed in a court of law concerning the subject. In the constitution of Massachusetts, at least as originally formed, there was, and we presume there is now, an enumeration of specific powers granted to the Legislature, and among them is the power of laying duties and excises; which were the subjects of particular examination in the cases of *Portland Bank* vs. *Apthorp*, cited in the argument. It does not appear to the court that the decision of that case has any direct bearing upon the case at the bar; because in the 4th article, 3d part, 1st section of the constitution of this State, the power given to the Legislature is general, 'to make *all reasonable laws and regulations* for the defence of this State, not repugnant to *this* constitution, nor to that of the United States.'—In all cases where the Legislature have a constitutional authority to pass a law, the *reasonableness* of it seems to be a subject for their decision. We do not say that there *may not possibly* be exceptions to the generality of the above proposition; but we are not disposed to consider them as among the *probabilities* of Legislation. In the case before us, the Legislature, in the exercise of their constitutional power, have judged it reasonable and proper to impose duties on certain classes of persons in the community, such as Justices of the Peace, Sheriffs, Coroners, Clerks, Attorneys, Innholders, Retailers, &c. On payment of these duties, they may exercise certain powers. No doubt, such a law must be *general* in its operation—including all persons of the classes specified. Of this character is the statute on which the conviction of the defendant is founded. The Legislature have deemed it reasonable and proper, in the mode above mentioned, to add to the revenues of the State. It would appear strange that a law should be deemed unreasonable, because it prohibits the retailing of *ardent spirits* without special license; that it should be an un-

reasonable restraint upon the liberty of the citizens, to check those measures which are known to have a direct tendency to promote intemperance, and multiply evils and crimes in society. The idea is not admissible for a moment. But though this law imposes the *duty*, it provides no mode by which the collection of it can be enforced without the *consent* of the person on whom it is imposed; for no person appointed to any of the before mentioned offices, or licensed for either of the purposes before mentioned, can be compelled to accept the appointment or the license; and till such acceptance the duty does not become payable. So that in all these cases, the person appointed or licensed, does in effect, *tax himself* with the duty, and *voluntarily* pays it. In such cases, a man surely has no reason to complain of the law; it only authorises him, on payment of a certain sum, to enjoy what he deems a privilege and a source of profit; and prohibits the exercise of such privilege, for public reasons, unless such payment be previously made. We are all of opinion that there is no legal ground that can sustain the motion. The proper legal sentence must be awarded against the defendant.

THE JURISPRUDENT.

BOSTON, SATURDAY, OCTOBER 2, 1830.

*Jeremy's Equity Jurisdiction of the Court of Chancery.*—To England the honor justly belongs of first establishing a national judiciary upon a permanent and independent basis. And yet it is not a little remarkable that the highest Judicial Officer of that kingdom holds his office at the pleasure of the King, and is liable to be displaced on every change of Ministers. With a Jurisdiction, which is general, and which pervades every part of the kingdom and embraces almost every topic of litigation, he holds his office by a tenure more feeble and uncertain than that of the lowest of the Common Law Judges. We should suppose *that* the place of all others which should be kept free from political influences. Yet none is so much exposed to them. Hence, it is said, that the Chancellor is sometimes more anxious for the preservation of his office, than for the honest discharge of its duties, and not unfrequently passes those hours which should be devoted to the judgment seat, in posting between London and Windsor. With a power, in many cases, which almost amounts to an unchecked and unrestricted discretion, he is liable to the full operation of those personal and temporary considerations which would be regarded as disqualifying the humblest Judge for the discharge of his official duties. And, besides, his office is not merely Judicial, but, in some sort, political. 'He acts occasionally as speaker of the House of Lords—attends upon meetings of the Privy Council—and examines treaties, conventions, charters, &c. He presides also generally at the hearing of Appeals in the House of Lords. While inferior Judges hold their places *quamdiu benè se gesserint*, the highest Officer in the realm owes his existence to the stability of a political faction: and a squabble in the cabinet—a misunderstanding between two right honorable secretaries—in short, any "untoward event" may suddenly sink him into comparative insignificance and penury.'

And yet some of the purest, wisest, and most learned Lawyers in England have presided in that Court, and dispensed, with an equal hand, its Equities to the nation. The court has always been the subject of complaint and attack, and yet it has always been crowded with business. Lord Eldon has suffered more abuse, perhaps, than any other Judge in England, while scarcely an opinion, which he has ever given, has been overruled, and competent judges have declared that he has 'attained a standing of greater eminence than any Judge since Lord Coke; that he was profoundly skilled in jurisprudence, and marvellously learned in the English Law.' The High Court of Chancery is a complicated machine, and could be made tolerable in no other country. No one can understand its operations but those who preside or practise in it. There are three Heads, at least, and no one can tell how many subordinate members. There is the Lord Chancellor's tribunal—the Master of the Rolls', and the Vice Chancellor's. Any case may be brought before either of them except such as relate to lunatics, and those belong exclusively to the Chancellor. The Vice Chancellor not only attends to his own cases, but when his Lordship is otherwise engaged, he hears such as the Chancellor directs. After all, if the latter is dissatisfied with the decrees &c, of the former, he alters, discharges, or reverses them at pleasure. Besides these three leading functionaries, there are Masters, Clerks, Registrars and Commissioners almost without number.

It is no rare thing to obtain two opposite decisions, in the same hour, from different departments of the Court. It is no matter of wonder, then, that chancery suits should be proverbially long, and that the suitors should become hopelessly impoverished in their results. The whole chancery system has, heretofore, met with little favor in this country.

We seem now, however, to be fast introducing its principles into our courts, and shall soon find our litigants eagerly pressing into the Chancellor's tribunal or before the Master. In our own state the subject of Chancery Practice is beginning to excite considerable attention in the Profession. It has been, heretofore, but little regarded as a general study.

The treatise of Mr Jeremy is well spoken of by those who are familiar with the subjects embraced in it. It is a single octavo volume of 600 pages. The Table of *Contents*, which will be found below, sufficiently indicates the topics of discussion in the work.

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*Chap.* 5.—*In cases of Account.*

ERRATA.—Several errors occurred in the Obituary notice in our last number. First line, after the word nature, insert '*which we call chance but*' &c. 4th line for cases read *causes*. 2d column, 34th line, from top, for conformed read *continued*. 44th line for thirst read *spirit*.

BIGELOW'S SUPPLEMENT.

HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 2. eopis2w.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

The work will be published with despatch.

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The work will be printed on a beautiful small type, and good paper, and will be comprised in four or five volumes, (probably not exceeding four,) royal octavo size, each volume to contain about 1000 pages; and will be delivered to subscribers at $5 per volume, in good law sheep binding, which is a very low price for a law work embracing so great a quantity of matter.

After publication the price of the work will be raised to $6 per volume.

RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan suggests.

July 10. ISAAC PARKER.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

Aug. 20.

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NEW LAW BOOKS.—JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

CONDENSED REPORTS of CASES decided in the SUPREME COURT of the United States, from the organization of the Court at August term 1791, to January term 1828. Edited by Richard Peters, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

This work is intended to contain the opinions of the Supreme Court, *in the language of the Judges*, in every case decided in that court from the establishment of the Government of the United States, to the commencement of Mr Peters's Reports at January term 1828. The reported decisions in the Circuit and District Courts of the United States, upon similar points, are also collected and digested in the work, as notes; and abstracts of those Cases, and also of the collateral decisions of the Supreme Court are given, so that the Professional Gentleman and the Student will be in possession of all the adjudicated Law of all the Courts of the United States, in an authoritative, condensed, and arranged form.

The work will be contained in not more than six volumes; the first volume is now published; the second volume will be published about the 1st of August, and the balance of the work during the present year and 1831.

Those who wish to possess this work will do well to make an early application as the greatest portion of the edition is taken up by subscription. They are for sale by the principal Booksellers in the United States, with J. Griggs's other law publications.

Price six dollars to those who subscribe, and seven dollars to non-subscribers, payable on delivery of each volume.

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Jones on Bailments in 1 vol. 8vo.

CHANCERY REPORTS. JOHN GRIGG, has in press the Decisions of the English Chancery Reports, upon the plan which has been adopted and successfully executed with the 'English Common Law Reports.' The work will comprehend, in a condensed form, all the Reports which have *not* been republished in the *United States*; and it will be continued, so as to present to the profession, annually, the Chancery Reports as they shall hereafter appear in Great Britain.

The work will also contain references to the decisions of the chancery courts of the United States, and of the several states.

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GRAY & BOWEN have received by late arrivals the following valuable Foreign Books, which they will sell at low prices.

Dibdin's Library Companion, second edition, one large 8vo. vol.

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Moore's Byron. Splendid quarto edition.

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Trabajos de Persiles y Sigismunda, 2 vols.

Teatro Italiano Antico, 8 vols. July 10.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep, $3,50—Calf, $4,00.

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BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

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# THE JURISPRUDENT.

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## MERCANTILE LAW.

### NO. IV.

[Continued.]

There is one species of contracts, which stands on a peculiar and somewhat precarious footing. Wagers are tolerated, but certainly not favored by the law. Indeed the pretexts, of which the courts have availed themselves for pronouncing them illegal, might occasionally provoke a smile. A wager, for example, on the event of a war was held invalid, because the person who lays such a wager has, it is said, a private interest *which may affect his wishes in a manner inconsistent with his public duty.** Again, wagers concerning the produce of any particular branch of the revenue have been repeatedly declared void *as tending to public inconvenience.*† With a more pardonable subtlety the possibility, however remote, of personal annoyance to individuals who have chanced to be the subjects of the wagers, has been considered a sufficient reason for invalidating them.†

It will probably not have escaped notice, that in the various cases of illegal contracts, which have been adverted to, we have treated it as immaterial, whether the objection arose out of the stipulation sought to be enforced, or the consideration on which it was grounded. It was, indeed, formerly supposed that a deed (in which the consideration is not always stated) could not be invalidated at common law by an illegality not apparent upon the instrument itself. In such cases therefore, the interposition of a court of equity became necessary.§ But it has been now long determined that the most fair-seeming instrument which ingenuity can devise may be set aside even at common law, where the objection of illegality applies in fact, and is brought under the cognizance of the court by an allegation specially pleaded to the action. To C. J. Wilmot and his coadjutors belongs the merit of this decision. The instrument which was the subject of it was a bond drawn up in the usual form for the payment of money, but in fact substituted by way of indemnity for a note given by the obligee with a view to the compounding of a prosecution. And it is impossible not to admire the sentiments contained in the judgment, however, as critics, we may cavil at the language in which they are conveyed. 'The manner of the transaction,' said his lordship, 'was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light.' 'All writers upon our law agree that no polluted hand shall touch the pure foundation of justice.' Even the dignity of a record does not always protect it from impeachment; for a judgment which has been obtained by collusion between two to the prejudice of a third, though binding on the parties themselves may be avoided by the other upon allegation and proof of the fraud.*

Nor is the taint of illegality confined to the contracts of the immediate actors. It extends to all transactions done in contemplation or furtherance of the unlawful act by persons privy to, though not directly participating in it. Accordingly a druggist who, after the 42 Geo. 3. c. 38.† and before the 51 Geo. 3. c. 87.‡ sold drugs to a brewer, knowing that they were to be used in the brewery,§ and a person who lent money for the avowed purpose of paying stock-jobbing differences,‖ were not allowed to recover, the former the price of his drugs, the latter the money advanced. Again, where the seller of goods, a foreigner and resident abroad, had knowingly assisted the buyer in packing them in a way convenient for smuggling into England, the courts of this country refused to give him any remedy for the price.¶

But though the principle of the rule just stated has never perhaps been questioned, the courts have at times differed materially as to the extent of its application. On the one hand an inclination has been manifested in cases where there was no intrinsic turpitude in the agreement immediately before the court, to wink at the illegality with which it was avowedly connected, in order to do what was just, in a moral view, between the parties themselves. Thus where two persons jointly engaged in an illegal stock-jobbing transaction with a third, and, a loss having arisen, one of them paid the whole and took the bond of the other for his proportion, it was decided that the bond was good, the transaction as between the two being treated as a mere loan of money, the lender of which was not concerned in the use made of it by the borrower.** And in a subsequent case, where one of the partners, under similar circumstances, paid the money with the authority and consent of the other, a majority of the Court of King's Bench decided that an action might be maintained against the other partner for a proportionate share.†† On the other hand, probably from an anxiety to give full effect to the policy of the law, it was in one case determined that money paid on account of an unlawful dealing could not be recovered by the person for whose use it was paid, even from an agent who was the mere instrument of transmission. The case occurred before Lord Kenyon at Nisi Prius. Two underwriters had engaged in an illegal partnership for the effecting of insurances, and one of them had paid his moiety upon a loss to the hands of a broker for the use of the other. His lordship ruled (and his opinion was adopted by the Court of King's Bench) that the latter could not maintain an action for it against the broker: no appeal, he said, could be made to a court of justice to enforce a contract founded in a breach of the law.* But after oscillating for sometime between these two extremes, the law has at length rested midway between them. The two former cases have been overruled by many decisions, in which the courts have taken cognizance, not merely of the contract technically presented to them, but of the unlawful transaction out of which it arose, and with which it was inseparably connected. The distinction between moral and merely prohibited offences, which was applied to those cases, has been, as we have said, denied, and the consent of the parties, which was a topic much insisted upon in the judgment, was designated by Lord Loughborough as 'a confederacy to break a positive law.'† On the other hand the case before Lord Kenyon seemed so outrageous a violation of the common principles of justice, that it was found impossible to support the decision. The law permits either of the parties to an illegal contract, however repugnant such conduct may be to honesty and good faith, to avail himself of that illegality as a defence to any action which may be brought for enforcing it. But this it does, not out of favor to the defendant, but because it will give no countenance to the plaintiff.‡ If the party who might on that ground have resisted the claim, think proper to waive the privilege, and fulfil the agreement, the courts will not permit another who is by accident only connected with the transaction, to take up the defence which the principal has abandoned, and make the law a cover for knavery and fraud. Whatever the nature of the original contract between the principal may have been, it would be grossly unjust that a man, whose hand merely is made use of for passing the money, should be allowed to intercept it in its transit, and appropriate it to himself. Undoubtedly, if by a contrary decision the court were furthering or even countenancing a transgression of the law, even this injustice would not warrant a departure from the strict rule. But in this case it is not so. The unlawful contract is already closed. It has been completed by what is virtually a payment to the party himself. Accordingly it has been since frequently determined that an agent cannot shelter himself by such a plea from paying the money over to the person for whom it was intended.§ Technically, the rule may be laid down thus. Whenever the illegal transaction forms a necessary and inseparable part of the subject matter of the action, the courts will neither enforce the contract when open, nor re-open it when closed: but if the case be so far independent of the illegal-

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* 1 T. R. 57, n. (b.) 7 T. R. 535. 3 Bos. & Pul. 194. 4 Taunt. 290.

† 2 T. R. 610. 3 T. R. 693. 2 Bos. & Pul. 130. 467.

‡ Cowp. 729. 4 Campb. 152.

§ Treatise of Equity, b. 1. c. 4 s. 4.

* Collins v. Blantern, 2 Wils. 347.

† Which forbids the using of any ingredients but malt and hops.

‡ Which prohibits druggists from selling drugs to brewers.

§ 1 M. & S. 593.

‖ 3 B. & A. 179 These cases have overruled those of Holman v. Johnson, Cowp, 341, and Hodgson v. Temple, 5 Taunt. 181, in which the knowledge of the illegal purpose was considered as not precluding the recovery of the price.

¶ 5 T. R. 599. See also 3 T. R. 454. 4 T. R. 467; and 1 East, 98.

** 4 Burr. 2069.

†† 3 T. R. 418.

* Sullivan v. Greaves, Park, Jus. 8. Lord Kenyon's principle is right. It is the application which is wrong. The contract was *not* founded on a breach of the law.

† 3 Ves. 373. The cases of Booth v. Hodgson, 6 T. R. 405.; Aubert v. Maze, 2 Bos. & Pul. 370; and Cannan v. Bryce, 3 B. & A. 179, have expressly overruled the decisions before alluded to. See also 6 T. R. 61. 1 M. & S. 594. 5 B & A 335, and 14 Ves. 192.

‡ The maxim is--in pari delicto potior est conditio defendentis.

§ 1 Bos. & Pul. 3. Ibid 296.

ity, that it may be kept out of sight altogether without prejudicing the right of action, then the objection will not be admitted as an answer. For example: an agent sued his principal for commission and money expended in the purchase of shares in a company which was illegal under 6 Geo. 1. c. 18, and it was held that the action could not be maintained, and that the defendant, who had employed the plaintiff to purchase the shares, might nevertheless set up the illegality as a defence.* To be sure, the defence was a most iniquitous one; but the court, however disposed, could not shut their eyes to the unlawful transaction which constituted the very foundation and essence of the plaintiff's claim. On the other hand, in the case of the broker before mentioned, although the money was paid to him in pursuance of an unlawful contract, yet no such illegality appeared or even existed as between the parties to that suit; and to sustain the action it was merely necessary to shew that the money had been in fact received by the defendant, and that it had been received for the purpose of being paid over to the plaintiff.†

The law, out of the abundance of its generosity, compels no man to do that which is impossible, Such is the maxim:‡ and yet, to say the truth, this kind consideration of the law has more of seeming than reality. Undoubtedly, if two men are absurd enough, with their eyes open, to conclude a bargain, the stipulations of which, on either side, are such as it is manifestly impossible to perform, it leaves the sufferer to the consequences of his folly, and treats the impossible stipulation as a nullity.§ But if one party, for valuable consideration, undertake to do that which he only, and not the other, knows to be impossible, the undertaking is justly deemed obligatory on him, and he is answerable to the party imposed upon for the non-fulfilment of it.‖ Again, the impossibility which avoids an engagement, must be an absolute impossibility, not a mere personal inability. It is no excuse for a man to say, 'I cannot do what I have undertaken to do,' if it be such that another might.¶ There is, moreover, this distinction: an act may be impossible at the time of stipulating, or it may become so afterwards. Now the rule, as applicable to the latter case, is as follows:—If a person, upon whom *the law* has cast a duty or a charge, is, without default in himself, disabled from fulfiling it, and has no remedy against any other on account of the disabling circumstance, in such case the law will excuse him: but if he create the duty or charge *by his own contract*, he is bound to make good his engagement, even though prevented by inevitable necessity; because he might have contemplated and guarded against the contingency, and the law will protect no man from the consequences of his own improvidence.** A single example will illustrate this. The charterer of a ship covenanted with the owner to send a cargo alongside at a foreign part. On arriving at the port, it was found that an infectious disorder was raging there, and that all intercourse was in consequence prohibited; yet the charterer was not released from his covenant.*

Contracts, it has been already said, are founded on a supposed reciprocity of advantage.† There may, indeed, be engagements purely gratuitous, proceeding from the impulse of kindly feeling, without an immediate expectation of return. But these, from their very nature, transcend the authority of law, the object of which is not, as we have seen, to enforce obligations merely honorary, but to regulate the intercourse of men in those transactions on which the maintenance of civil society immediately depends.‡ There cannot, of course, be a *bargain* without a consideration. It would be, as Lord Loughborough rightly observed, a contradiction in terms.§ But we go one step farther and say that neither can there be a *contract* without a consideration. Here, however, an important distinction must be observed. A consideration may be, to use the language of the law, either *good* or *valuable*. The affection of a father for his child, for instance, is a good consideration, but money, or money's worth is more—it is a valuable one. Now the former is sufficient to support and give validity to a certain description of deeds, and covenants evidenced by deed, but it will not, like the latter, sustain so as to give an obligatory force to an engagement not under seal. Even deeds, where natural affection is the only consideration, and *à fortiori* therefore deeds of mere gift may sometimes be set aside in favor, not only of after purchasers for valuable consideration,‖ but in certain cases, which will come under notice hereafter, of the *bonâ fide* creditors of the grantor. So carefully does the law (as indeed its legitimate province is) watch over the rights of those who deal together on the footing of a direct mutuality of benefit.

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* 3 B. & C. 639.

† We are aware that we have assigned a disproportionate space to the consideration of this subject. But the numerous cases which daily occur, and the confusion which has prevailed in it, are, we think, a sufficient justification.

‡ Lex neminem cogit ad vana, seg impossibilia.

§ Co. Lit. 179 a. 197 b. 206 a. By the civil law, an impossible condition rendered a contract void: for it was concluded, that by adding a condition which they know to be impossible, the parties intended that the agreement should have an effect. Inst. lib. 3. tit. 20. 11.

‖ 'Suppose,' says Lord Holt, 'A., for money paid him by B., will undertake to do an impossible thing, shall not an action lie against him for not performing it, and shall he not answer for damages?' 2 Lord Raym. 1165.

¶ 2 Lord Raym. 1165. 1 Lev. 111. and see 1 Freeman, 83. 1 Salk. 172.

** Aleyn, 27. Noy, 70. Sir Wm. Jones on bailments, 65. 68. 115, 116. 5 T. R. 217. 8 T. R. 267. 10 East, 530, 3 Bos. & Pul, 291, 3 M. & S. 267.

* 3 M. & S. 267.

† There is a long and very unimportant controversy about the legal acceptation of the word CONTRACT in Fonblanque's notes to the Treatise of Equity—a work which in our opinion has been puffed beyond what it deserves.

‡ Mr Fonblanque objects to our law, that it is defective in not enforcing these honorary obligations. To us the objection seems very unphilosophical.

§ 2 Ves. J. 188. The judgment in this case will well repay a perusal.

‖ By stat. 27 Eliz. c. 4. the *good* consideration mentioned in this stat. and that of 13 Eliz, c. 5. is construed to mean a valuable consideration.

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## MR JEFFREY.

There is an amusing passage in one of the comedies of Aristophanes, where the foolish old Strepsiades is brought in by some disciples of the Grecian philosopher, exclaiming impatiently, 'Open the door, gentlemen, open the door, and show me immediately the great Socrates!' Feelings of similar anxiety animated me, during a recent sojourn at the northern metropolis, to see, and judge for myself, of one of the most celebrated men of modern times; of one whose fame as a critic and a politician is so extensively diffused throughout Great Britain—who has exerted so powerful and permanent an influence on the literature of the age,—who is, in short, gazed on with admiration, as the very star of whiggism—I mean Mr Jeffrey. I had for years been familiar with the writings of this distinguished individual, and in common with thousands of others, often trembled beneath the fulminations, and exulted in the victories, of this far-famed autocrat; and I could not, but with feelings of awe, approach the very Olympus of the Jupiter Tonans. I did not, in short, lose the opportunity of contemplating Mr Jeffrey, under another than the usual aspect. I carefully considered his character and demeanor as a public speaker, curious to *see* whether his tongue was as powerful as his pen—whether he was equally great as a popular advocate, and an 'Edinburgh Reviewer.' The result of my observations, I have thought, might be interesting and acceptable to the reader.

Next to the Great known Unknown, Mr Jeffrey is, undoubtedly, the most prominent and admired character in Scotland. In Edinburgh, he is, in a manner, idolized. Walter Scott is his countrymen's ornament; Francis Jeffrey, their champion,—their tower of strength. He is their oracle, both of politics and literature; the theme of universal and untiring encomium. I had not mingled long in Edinburgh society, before I began to express an ardent curiosity to see and hear Mr Jeffrey in the courts. My inquiries were answered by a reference to the Parliament House with an intimation that, at eleven o'clock, on a certain day, he was expected to speak in a cause involving the liberty of the press. To the appointed place I repaired, a full half hour before the opening of the court, and had leisure to contemplate the stirring scenes of the Outer House—a long, noisy, legal promenade, filled with all grades of the profession. While I was gazing thoughtfully on the bee-like throng around me, the ringing of a bell announced that the Jury Judge had taken his seat. There was a general rush towards the door of the Jury Court, which I approached in the rear of the throng, just in time to be—too late. Whispers of 'Jeffrey 's up,' were tantalizingly exciting—for I could squeeze in no more than half my left foot and one arm, and after remaining in this interesting position for some twenty minutes, I was compelled to return with my curiosity unsatisfied, and await some future opportunity. That soon presented itself in the late important trial of Cooper *versus* the Marquis of Bute. Jeffrey was retained by the noble defendant, and was expected to make a powerful and splendid effort to save a hopeless cause. In my way to the Parliament House, I pictured to myself the person of Mr Jeffrey, according to the ideas of a man which one cannot help forming from a frequent perusal of his writings. He is certainly a tall thin man—I thought,—somewhat elderly, with a rich Italian countenance, an eye full of brilliance and acuteness, an expanded forehead, a head thinly covered with black hair. There will be, I amused myself with conjecturing, both conscious power and dignity in his bearing, with some tendency to hauteur. Such was the portrait occupying my fancy—and similar ideas, I am convinced, are entertained of his person by nine tenths of those who have never seen him. On entering the Jury Court, Lord Chief Commissioner Adam was seated on the bench, and Mr Robertson was opening the plaintiff's case. A little behind him sat the Great Unknown, with his slovenly black gown, his huge walking-stick, and a pile of MSS. before him; and on his right sate Jeffrey! I do not think I removed my eyes from him for nearly half an hour. But how shall I in words adequately picture him, whom every artist, from Sir Henry Raeburn downwards, has

uniformly failed in representing? Sir Henry exerted his utmost skill, but to no purpose; he produced a work, beautiful for its coloring and proportion; but the spirit and life and character of the original were wanting; it was not Jeffrey. The first thing that struck me as peculiar in Mr Jeffrey's appearance was, the absence of a wig. On inquiry, I found that, for some reason or other he has uniformly refused to wear one. The figure of Mr Jeffrey was far different from the *beau ideal* I had so long cherished. Let the reader fancy himself standing in front of a gentleman busily employed in writing; of short stature—say, five feet and an odd inch or two—dressed in a plain suit of black, his slight figure enveloped in a black gown, hanging negligently over his shoulders; over and above all, wearing a pair of heavy tortoise shell spectacles; and he will have a tolerably accurate notion of Mr Jeffrey, as he sits day after day in the Jury Court at Edinburgh. To descend, however, a little more to particulars. As to his forehead, although some have characterised it as 'superbly intellectual,' I confess I could not discover in it anything remarkable. Considering that the head is small, the forehead is certainly full and well developed, especially in those parts which the phrenologists have been pleased to allot to ideality; but as a forehead, it cannot be called either very lofty, or very capacious. When he looks up, it is furrowed all over with anxious wrinkles. His hair, short and thick, and once black, is now of an irongray color, and unaffectedly combed forward towards each temple, while the crown of the head is rather bald. His complexion is dark; and his features small, regular, and, when viewed in profile, rather handsome: his dark eyes are very brilliant and penetrating. Mr Jeffrey's countenance is evidently that of a thinking man, and is never destitute of expression. That expression, however, did not appear to me to be power—such as frowns in the rougher lineaments of Mr Brougham—but acuteness, energy, and vivacity. If I am not mistaken, there appeared, also, a settled expression of nervous irritability, or dissatisfaction, brooding over his features. On the present occasion, he was sedulously employed in taking notes of the facts and evidence of the case, not at all discomposed by all the noise around him. When I reflected that I was gazing on *Jeffrey*, in that slender, quiet, unassuming individual, apparently inferior in consequence to all his bustling brethren, I could scarcely persuade myself that my eyes were contemplating so far-famed a literary autocrat; or that so much power, so much bitter and searching sarcasm, so much refined subtlety, so much brilliant wit, in a word, so much versatility of parts, could, to use a homely English phrase, he packed in so small a compass.

Although the leading counsel of the noble defendant, and pitted against the formidable Solicitor General, Mr Jeffrey did not manifest any symptoms of anxiety. He did not cease writing, except for one moment, when he suddenly rose and put a question, which exceedingly discomfited a very fluent witness. He then resumed his pen; and continued so apparently indifferent to what was going on, that I began a second time to curse my ill luck in being disappointed, when I was assured by one of the counsel, that 'Jeffrey would be up in a few moments.' The Solicitor General had been on his legs for about an hour, answering several objections which had been started by one of the opposite counsel. As soon, however, as Mr Jeffrey perceived him drawing to a conclusion, he collected his papers, which lay scattered on every side of him, and began to chew hastily some small lozenges, with which his left waistcoat pocket is always filled. After swallowing a cup of coffee, he moved on towards the jury, and stood within a yard or two of the foreman: I stood between the two. Taking off his spectacles, he put them into a case, slowly and deliberately, and commenced speaking with the most perfect ease and nonchalance: he might have been addressing a friend at dinner. There is something very attractive in his voice and manner of speaking. His lively and intelligent eye glances freely around him, and his motions, though few, are graceful and natural. The only thing that appeared to detract from his perfect agreeableness (one has a right to be fastidious about such men as Jeffrey) was a certain mincing and over-refined Anglicism of intonation and phraseology, which seemed too artificial to be pleasing. He uniformly pronounces, for instance, the vowel *i*, with the quick and sharp sound of the English word *eye*, as in the word *idea*: '*I* can't conceive,' is his favorite expression. For some time he spoke with rather a pensive and thoughtful air, which seemed to me extremely prepossessing, as indicating a consciousness of the difficult struggle he was commencing and that he was marshalling into array all his resources. He kindles as he proceeds, slowly but perceptibly, into a less and less subdued vivacity and animation: nothing, however, of boisterousness of voice, no ungainly attitudes or motions, are ever to be detected in Mr Jeffrey, even in the moments of highest excitement. There is perceptible throughout, the power, precision, and calmness of the thoroughly practised intellectual gladiator. I had heard much of his extraordinary fluency, but, truly the half of it was not told me. Though I have listened to celebrated speakers in my time, I never heard any that rivalled the delightful fluency of Jeffrey; reminding one, at every step, of the mellifluous line of Horace,

'Labitur et labetur in omne volubilis ævum.'

Though every sentence he uttered was worded with sufficient accuracy, and rounded with sufficient polish, to appear admirable in print; though at one time his declamation was chaste and elegant, occasionally glowing with the richest flowers of rhetoric, and then, manly, bold, and spirit-stirring,—now the honey of dulcet sentiment turned into the gall of bitter irony and fierce invective; though, throughout, his phraseology was choice and appropriate; yet the eloquent speaker never once faltered or hesitated during a speech of three hours and a half—never appeared the least confused, embarrassed, or exhausted. I soon saw how much I had erred in thinking him indifferent to the interests of his client, by his apparent remissness during the earlier stages of the trial. The exquisite adroitness with which he strung together whatever had fallen from the opposite side capable of being tortured into a discrepancy or contradiction—the acuteness with which he detected and exposed the most artful fallacies—the calm, confident, and masterly style in which he contrived to make 'the worse appear the better side,' and plucked all the weaknesses of his own case from the recollection of the jurors, to replace them with those of his adversaries; all this convinced me, that he had concentrated the whole powers of his mind on whatever had transpired during the trial, and afforded an apt illustration of the beautiful language of the late Mr Canning, when speaking of a first rate ship of war,—'Though apparently passive and motionless, yet silently concentrating the force to be put forward on an adequate occasion.' I never before hung on the lips of a public speaker with such delightful suspense, for the long space of three hours and a half: his tones are so various, his allusions so extensive—in a word, his resources so inexhaustible, that he is never monotonous or tedious.

How I pitied the poor jurors! The Solicitor General had marshalled on his side a strong phalanx of law, so that when he sat down, each looked on Jeffrey as a man in the forlorn hope, with not a leg to stand on. Their faces were turned towards him with an air of listless expectancy, approaching to indifference; but as the speaker proceeded, I could perceive their features quickening into excitement and uneasiness, as though indicating a suspicion that they had jumped rather too quickly to a conclusion. Jeffrey perceived his advantage, but did not suffer it to hurry him. He kept his keen eye fixed on that of the foreman, and continued speaking with such a calm and convincing air as seemed to insure conviction. He called for a cup of coffee, and on its being brought, took it into his hand, stirred it with the utmost indifference and sang-froid, and continued sipping a little at short intervals. He looked as if he were at breakfast in his own study. Strangers, attorneys, jury, advocates, and the judge, all gazing on him with fixed earnestness, and he sipping and speaking, and speaking and sipping, as if he were dictating at home to an amanuensis. The Solicitor General looked at the Judge, and he at the Solicitor again, and they smiled. About an hour afterwards, Jeffrey perceived the latter drinking out of a tea-cup. 'Is that tea, or coffee, Mr Solicitor General?' he inquired, pausing a moment—'If it's coffee, I'll thank you for a cup, for mine is done.' This certainly appeared rather artificial. He would occasionally fold his arms on his breast, and say, 'Now gentlemen of the Jury, let us pause for a moment or two, to look about us, and see where we have got to;' and then, with a few emphatic pauses, recapitulate his leading arguments, and thus keep them full in the recollection of his hearers. The facts of the case were shortly these:—'The late Lord Bute had appointed a Mr Cooper, a theological student at Glasgow University, to be private tutor to his son, and after a few years, in compensation for his services, had presented him with a bond of annuity for life. Sometime afterwards, his Lordship procured Mr Cooper some livings in Wales, to the amount of £300 a year, and in 1811, Mr C. surrendered to his Lordship the bond of annuity. In 1820 he died; and the present action was brought by the father of the deceased, to claim from the present Marquis the annuity due from 1811 to 1820 inclusive. The case was tried on the two following issues: was the deceased sane or not, at the time of giving up this bond? and was the obligation extinguished by its surrender? The great point which the plaintiff's counsel labored to establish was the insanity of Mr Cooper, at the time of giving up the bond; and, certainly, evidence was adduced, which was irrefragible. It was, however, wonderful to see the confidence and apparent sincerity with which Mr Jeffrey undertook to grapple with the whole body of the obnoxious testimony, and explain away the most incontrovertible manifestations of madness, into anything but madness. He had a reason ready for everything. One circumstance adduced in strong corroboration of the alleged insanity of the plaintiff was, that he one morning leaped from his bed, with nothing on but his shirt

and a night-cap, and sallied forth with a sword in one hand and a pistol in the other, in pursuit of a hen, which he chased thrice round the garden. This was a desperate fact, and stoutly sworn to; but our counsellor 'found nothing in it indicative of madness'—and, after convulsing the court with laughter by a ludicrous caricature of this insane exploit, instructed the jury to look at it in no other point of view, than as the frolicsomeness of an eccentric young man! On one occasion, he said to the Jury, with the most impenetrable sang froid, 'Gentlemen, I address you as men of *plain and simple understandings*.' I observed the Jury; and each of them looked at the other with an odd air of wonder and concern, to hear themselves the subjects of such a sorry compliment! What I chiefly admired in Jeffrey was, his choiceness of expression and singular felicity of illustration.

To be concluded next week.

## ENGLISH CASES.

### PREROGATIVE COURT.—MAY.

Before Sir John Nicholl.

*Simpson vs. Choppin and Skelton.*

Sir John Nicholl gave judgment in this case. It was a suit to determine as to the validity of the will of the late Mr Charles Frederick Schweitzer, which was opposed by the relatives on the ground of the insanity of the testator. When the case was before the Court on the arguments, we stated the facts so fully that it is unnecessary to do more at present than to allude to a few of those which were the most prominent.

The testator was a man of most eccentric habits from his very childhood. His father sent him abroad for his education, but he behaved in such an extraordinary manner in several of the Continental cities, and uttered his sentiments on religion and politics so freely, that he was continually getting into scrapes with the authorities. Upon his return to this country, his father purchased a commission for him in the 27th regiment, which he soon after quitted without leave, and his commission was superseded. When his father died, the property came in equal shares between the testator and his brother, being about 1000*l.* a year to each. The brother ran through his share in the speculations of 1825. The testator lent him 1000*l.*, but, upon his spending that also, he would lend him no more, saying, that he deserved to suffer. From this period he continued residing at one coffeehouse or another until his death. He had made several wills, one in favor of a lady whom he had seen at a party only once, and whom he declared to be the finest woman in England. Another will gave his property to a Miss Morris, but this will he revoked, because Miss Morris had gone unattended in the evening from her father's house to a house a few doors off. The will in question was in favor of a child of three or four years of age, named Elizabeth Huggins, the grand-daughter of Mr Simpson, the proprietor of Simpson's Coffeehouse, Cornhill, at which place he frequently took up his residence. He had in former wills left legacies to the children of Mrs Choppin and Mrs Skelton, but in this will he had wholly omitted their names. He had taken, at an early period, to excessive drinking, and this habit increased on him towards the close of his life, and though he committed various irregularities, yet still he kept an account at the Bank, and transacted all his pecuniary matters there, without assistance, up to the period of his death. He was in the habit of wearing solid gold buttons on his coat, and he carried his money in something similar to a shot-belt. On one occasion he wrote to old Mr Skelton a letter, which he addressed 'To old Skelton,' and dated it 'This day of our Lord Jesus Christ the carpenter's son.' He was a professed atheist, and was in the habit, when intoxicated, of swearing oaths of the most horrible description. He also carried blasphemous prints in his hat, to assist him in his irreligious arguments.

Sir John Nicholl, after adverting to the principal facts adduced in evidence, said that the question for the Court was whether the testator was of unsound mind, or the contrary. The facts in support of either view of the case were pretty strong, and it appeared almost as if the relatives themselves appeared to think him sane, for they left to him the sole management of himself and of his property, up to the period of his death. It had, however, been proved in some instances that persons who had always conducted themselves and their property well, were nevertheless insane, and this was done by taking a view of the whole course of their lives. The partition between eccentricity and insanity was so thin, that it was difficult to say where the former terminated, and where the latter began. He was certainly both odd and eccentric, and had latterly given way to habits of intoxication to such a degree, that he would take nothing but champaign or brandy for breakfast. He was irritable, passionate, malicious, violent, suspicious, and given to groundless aversions. The combination of all these feelings had generally been taken as indicative of insanity. With respect to his atheism, he did not think that that necessarily indicated insanity, and he would not give judgment upon such a ground; but he did think the manner in which it existed in the mind of the testator, and the extraordinary mode which he took of communicating it to others, did indicate unsoundness of mind.—Under all the circumstances of the case, he must come to the conclusion that the deceased was not only an eccentric man, but that he was insane, and the will, therefore, must be set aside, and Mr Schweitzer be taken to have died intestate. The Court, however, would order the costs to be paid out of the estate.

*Kerr vs. Phillips and others.*

This was a question as to the testamentary intentions of Mrs Charlotte Phillips, the lady whose sudden death at Finchley excited so much public attention a short time since.

Dr Lushington supported an allegation praying the Court to admit two unfinished papers to probate, as they contained the intentions of the deceased with respect to her property. The deceased, under her mother's will, became entitled to a sum of 5,000*l.* and she had executed a regular will on the 31st July, 1829, disposing of this sum in a particular manner. Five days afterwards she drew up another paper of instructions, containing a different disposition of her property, which she placed in the hands of a Mrs Vesset, requesting they might be given to Mr Scott her attorney, to be put into a legal form. Before this was accomplished, Mrs Phillips died, and the admission of these papers to probate was opposed by her next relative, Mr Atkinson, who would be entitled to the property had she died intestate.

The King's Advocate appeared on behalf of Mr Atkinson, and contended that this paper ought not legally to operate, as the probability was, she had not finally made up her mind as to the ultimate disposal of her property.

Dr Adams appeared for the husband, Mr H. Phillips, and contended that the will of July, 1829, was not procured by undue influence of the husband, as had been asserted. With respect to the allegation, he declared it was a matter of indifference to his party whether it was admitted or not. The only important difference between them appeared to be a bequest of 500*l.* to Mr Phillip's natural daughter, and a different disposition of the moiety of 2,500*l.* to her husband.

The Judge said it was evident that the intentions of the deceased were contained in the will of 1829, and the instructions now propounded; and he should, therefore, direct the allegation to be admitted.

### COURT OF COMMON PLEAS.—MAY.

Sittings in Banco at Westminster Hall.

*Loder vs. Rowbottom.*

Mr Sergeant Jones on a former day obtained a conditional rule to set aside the declaration in this case, on the ground of want of service of the writ upon the defendant.

Mr Sergeant Wilde now showed cause against the rule, and read an affidavit to prove that the writ had been regularly served upon the defendant. The deponent stated that he called, at five o'clock in the morning, at the defendant's in James-street, Covent-garden, at the house commonly known by the name of 'The Finish,' of which he was the proprietor. He waited there until six o'clock, when he saw a man come up from the cellar with his coat off. He proceeded to the bar, and helped himself to some mixed spirits. From the description deponent had no doubt he was Mr Rowbottom. He addressed him, and said 'Pray, Sir, are you Mr Rowbottom?' 'Yes,' replied the person with his coat off, 'that is my name.' Deponent then asked him if he knew the plaintiff, and he said 'Yes, he is a d——d v——.' He (the Learned Sergeant) understood that Mr Rowbottom kept the Finish, and, no doubt, from his language, he was a finished man—(laughter). From the terms of the affidavit it was evident that the writ was regularly served, and he therefore hoped the Court would discharge the rule.

Mr Sergeant Jones thought there was no proof that the process had been served upon the defendant. The mere fact of seeing a man without his coat was no proof of his being the proprietor of the house.

The Chief Justice—It was rather a familiar way for him to help himself to liquor with his coat off.

Mr Justice Park—And take the spirits without paying for it—(laughter.)

Mr Justice Gaselee said that the defendant's affidavit was not sufficient: he must swear that he did not know that the writ was served. If the whole of his affidavit had been read, the Court would never have granted the rule.

After some further observations from the Counsel on both sides,

The Court discharged the rule for setting aside the declaration.

### JUNE.

*Pictou vs. Chapman.*

This was an action for slander, and the declaration charged the defendant with having said of

the plaintiff, who was a wine-merchant, 'He is a swindling rascal, and pays nobody; take care of him, as he is connected with bad people.' These words were proved at the trial before Mr Justice Gaselee, and evidence was also given to show that the plaintiff had suffered special damage in consequence of the alleged slanderous expressions. It was contended, on the part of the defendant, that these words were uttered in confidential communications, and consequently were not actionable. The Jury found a verdict for the defendant.

Mr Sergeant Wilde moved to set aside the verdict, on the ground of misdirection on the part of the Learned Judge. It was proved at the trial that the communications in question were not confidential, but the Learned Judge, in summing, directed the Jury to say whether they were or not. He (Mr Sergeant Wilde) should submit that that was a misdirection, as there was positive evidence (uncontradicted by the defendant) that the communications were confidential, and the Jury could not, in justice, find otherwise.

Mr Justice Gaselee read his notes of the trial, and observed that he was very much surprised at the finding of the Jury; so much so, that after the verdict was given, he asked Mr Sergeant Taddy (the defendant's Counsel) if he would consent to their reconsidering the verdict, but he objected. He (Mr Justice Gaselee) summed up with a great bias in favor of the plaintiff, and he was not aware that he had given any misdirection. The only question now was, if he should have directed the Jury to find for the plaintiff?

It was stated, in the course of the arguments, that the plaintiff and one of the witnesses were in prison for debt.

The Chief Justice said it appeared to him that there had been no misdirection by the Learned Judge who tried the case, and he should strongly recommend the parties to carry the proceedings no farther, and that there should be a stet processus.

Mr Justice Park observed that under the peculiar circumstances of this case he thought it would be cruel to suffer protracted litigation, and it would be well if this Court (like the House of Lords) adopted the plan of adjourning certain matters sine die—(laughter). He therefore hoped that the parties would consent to a stet processus.

Mr Sergeant Wilde said he should be glad to recommend such an arrangement, but his client objected to anything of the kind.

The Chief Justice said that the plaintiff could not have a new trial, without the payment of costs.

After some further observations from the Learned Judges and the Counsel,

The Court granted leave for a new trial, upon the payment of costs by the plaintiff; or that a stet processus should be entered, but strongly recommending the latter course.

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### POLICE—MANSION HOUSE.

A man named Simmons applied to the Lord Mayor for advice in what manner to act under the following circumstances:—

Being in want of a lobster for his wife's supper, the applicant went to a fishmonger at Billingsgate, and choosing a very fine-looking fish, agreed to give the sum of 1*s.* for it. The salesman had many other lobsters on his board, but he particularly recommended the aforesaid. When the applicant turned round the fish for the purpose of examining what he called the 'bowel part,' the salesman desired him to handle it in a particular way, for fear the beauty or the shape should suffer detriment. He accordingly handled the lobster—not by holding it up by the tail, as is the usual way, but by merely putting it on its back. All seemed right, the body of the lobster had a full appearance, and Mr Simmons went away perfectly satisfied with his bargain, and presented it to his wife. Mrs Simmons, however, perceived a blemish, which had escaped the eyes of her husband—there was not a morsel of 'bowel' in the enormous shell, so that, supposing her husband had been treating some unworthy woman to the contents, and that he thought proper to insult her, she flung his purchase at his head, and 'blowed him up most terribly.' He did all he could to pacify her, and took her to the fish-salesman, who made things worse, because he said he 'knowed nothing about the lobster.'

The Lord Mayor said the fish-salesman had no more bowels than the lobster, to deny the knowledge of the fish, when one word from him would have restored perfect harmony. His Lordship regretted that he could not punish so cruel and unjust a salesman; but he really thought the claws, which appeared to be full, were worth the shilling. 'I know,' said his Lordship, 'if I were to send for a lobster, they would charge me eight or nine shillings for such a one as that was.

Mr Simmons hoped the Lord Mayor would cause the salesman to be brought before him to account, not for the deficiency, but for the deception.

The lobster was here exhibited—the skin had been neatly tucked under parts of the shell, so that the hole through which the most delicious portion of the fish had been scooped was not visible until the tail was unfolded.

The Lord Mayor felt the lobster, and thought it was so light, that he doubted the *furniture* of the claws very much. He smelt it, but nothing could be more sweet. His Lordship then held it up to the light, and, to the surprise of all, said, 'Bless me, why, I could read a newspaper through any part of it!'

Mr Simmons exhibited the greatest possible indignation, and begged that a summons, at least, might be served upon the salesman. He, however, admitted that he had selected the lobster because it was ticketed 'one shilling,' and he produced the ticket, on which was discovered, under the words 'A fine lobster,' in very small letters, the word 'Shell.'

The Lord Mayor advised Mr Simmons to buy a lobster for his wife as soon as possible.

With this advice the applicant was dismissed.

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## MAINE.

*The President, &c, of the Kennebec Bank vs. Tuckerman.*

*Assumpsit* by the plaintiffs as payees of a promissory note, against the defendant as maker. The note was dated *Oct.* 27, 1817, in the usual form of a joint and several note, payable in fifty-seven days with grace, signed by *Benjamin Adams*, with the names of two persons underneath, as sureties, payable to the plaintiffs, and discounted at their bank. Before it was offered for discount the defendant wrote his name across the back of it.

At the trial before *Weston J.* the defendant contended that the note did not support the declaration. But this objection was overruled. The jury, being requested to determine certain facts, found that the defendant requested the plaintiffs to collect the note of the principal; that afterwards the plaintiffs did verbally agree with the principal to allow him further time; that the interest was paid in advance by the principal debtor, every sixty days, up to *July*, 1815; the last payment having been in *May* of that year; and that the plaintiffs, if they had used all the means in their power, after the request made to them by the defendant, might have collected of the principal debtor more money than they did, by the sum of $226,83.

The judge directed the jury to return a verdict for the plaintiffs, upon this evidence, reserving its legal effect for the consideration of the court; the parties consenting that the verdict might be amended accordingly, or set aside, and a nonsuit entered.

Mellen, C. J. delivered the opinion of the Court, at the ensuing *November* term, in Cumberland.

The defendant having signed his name in blank, on the back of the note in question, has made himself answerable in the same manner as though he had signed it in the usual form, as the other promissors did. All the four persons are to be considered as having promised jointly and severally. The only question is, whether the defendant, who, it is admitted, was only a surety, with others, for *Benjamin Adams* the principal, has been discharged from his original liability, by reason of the transactions which took place between the bank and the principal. This original liability of the defendant as a copromissor, seems established by the cases of *Carver vs. Warren*, 5. *Mass.* 545. *White vs. Howland*, 9. *Mass.* 314, and *Moies vs. Bird*, 11, *Mass.* 436.

As to the main question, the facts are few and simple. The note continued to be in the bank, from the time it was discounted, until *May*, 1825—nearly eight years—not renewed in form; but the plaintiffs agreed with the principal, to allow him further time, and the principal, every sixty days, paid the interest on the note in advance, during the above period. This course of proceeding was pursued, probably, for convenience; and as between the bank and the principal, at least, was equivalent to a renewal of the note every sixty days; and the receipt of interest, in advance, for sixty days, was an agreement to give credit for that term. The transaction can admit of no other construction, consistently with honesty and fairness; and it could not have been considered in any other manner, by the parties immediately concerned. It has been said that parol agreements cannot be made by a corporation; but they may be, and usually are by bank directors, in relation to subjects of this nature; we, therefore, do not deem this a valid objection. By the report it does not appear that this long delay and course of proceeding, were even known to the defendant; it is stated to have taken place after he had requested the plaintiffs to collect the note of the principal. It remains for us only to apply the law to these facts. A mere delay to sue the principal, and collect the money of him, does not discharge the surety; as is admitted by the defendant's counsel, and is established by *Locke vs. The United States*, 3. *Mason*, 446; and by numerous other decisions, which are collected in the case of *Hunt, executor, vs. Bridgham & als.* 2. *Pick.* 581; provided such delay be unaccompanied

by fraud, or an agreement not to prosecute the principal. But in the same case, and those therein cited, it is also settled that such an agreement does discharge the surety; and in *Pain vs. Packard*, 13. *Johns.* 174, and *King vs. Baldwin*, 17, *Johns.* 384, in each of which there was a request by the surety to proceed against the principal, and a prolongation of credit to him, though there was no contract for delay; it was decided that the surety was discharged. In the case at bar, all three of the circumstances which have been considered as tending to the discharge of a surety are found to exist; there was long delay and repeated credit given to the principal; there was a request by the surety to collect the note of him: and there was an agreement on the part of the plaintiff, to give further time; pursuant to which, all proceedings against the principal have been delayed. On these facts, the action cannot be maintained. *Verdict set aside and nonsuit entered.*

[*See* 8 *Pick.* 458—*Oxford bank vs. Lewis. Ib.* 422, *Oxford bank vs. Haynes.*]

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SUPREME JUDICIAL COURT,

Vol: 5, of Greenleaf's Reports contains the cases decided from May 1827, to April 1829.

*Chamberlain vs. Harrod.*

The purchase of a ship, in a foreign port, by the master, at a sale by authority, is generally to be considered as made for the benefit of the owners, if they elect so to regard it.

*Winslow vs. Prince.*

The provision of *Stat.* 1821, *ch.* 164, *sec.* 46, exempting the clerk of a militia company from the payment of costs to the defendant in any suit where the captain has indorsed on the writ his approval of the prosecution, extends to the costs in all subsequent stages of the proceedings, as well as to those accruing in the Justice's court.

*Sawtel vs. Davis.*

The forms of militia returns, prescribed and furnished by the Adjutant General, pursuant to the act of Congress of *May* 8, 1792, *sec.* 6, are of the same binding force as if they were contained in the act itself.

The day on which the name of a person, coming to reside within the bounds of a militia company, is placed on the muster roll, should be entered in the proper column on the roll. And parol evidence is not admissible to supply the omission of such entry.

*Ripley vs. Berry & al.*

Where land is conveyed by deed, referring to a plan, between which, and the original survey, there is a difference in the location of lines and monuments; the lines and monuments, originally marked as such, are to govern, however they may differ from those represented in the plan.

*Bean vs. Mayo & al.*

Where a fulling-mill and land were sold, and mortgaged back to the grantor to secure payment of the purchase money, and by his bond of the same date he entered into certain stipulations respecting the liberties and immunities which the grantees should enjoy, in the use of the water and dam, &c, and covenanted that he would forthwith build for them certain machinery for their mill; and that he would not follow nor permit others to pursue the same business there, while it should be followed by the grantees; and reserved to himself the use of a room in the premises for a limited term;—it was held that these stipulations amounted to a covenant that the mortgagors should occupy the premises, so long as they continued to fulfil the conditions of their deed of mortgage; and that they constituted a good bar to a writ of entry at common law brought by the mortgagee.

*Read vs. Jewett.*

Where both parties proved that a bill of sale, though absolute in its terms, was intended only as collateral security for a debt due, and this done with good faith; the transfer was holden valid as a mortgage.

Whether such proof is open to the vendee, if objected to, in a question between him and an attaching creditor of the vendor—*quære.*

*Baylies & als. vs. Bussey.*

Where a mortgagee joined in making a second mortgage to another person, who entered for condition broken, and afterwards, before the mortgage was foreclosed by the lapse of the three years, executed and tendered to them a deed of release of the premises according to a previous stipulation, which they refused to receive till five years after the time of entry; it was held that the effect of the release was merely to replace the estate in them as they held it before the second mortgage, restoring them to the original relation of mortgagor and mortgagee.

*Bullard vs. Hinkley.*

Land being under mortgage, A. a creditor of the mortgagor attached his right in equity of redemption. Afterwards B. another creditor, attached the fee. A. having obtained judgment, caused the right in equity to be seized in execution, and sold by the sheriff; after which the mortgagee made a deed of release and quitclaim of his right in the land, to the mortgagor.—It was held that by this deed the original mortgagor became the assignee of the mortgagee, invested with the character of a mortgagee;—and that B. the second attaching creditor, who subsequently obtained judgment in his suit, could not take the land for his debt, there having been no entry to foreclose the mortgage;—and that a deed of release and quitclaim afterwards given by the original debtor to the purchaser of the equity of redemption, vested in the latter the title to the whole fee.

A deed of quitclaim from the mortgagee to the mortgagor does not operate to extinguish the mortgage till it is delivered, although it may previously have been put on record by the mortgagee.

*Holbrook vs. Baker.*

The possession of a personal chattel, by the mortgagor, is not inconsistent with the mortgage, and furnishes of itself, no conclusive evidence of fraud.

Nor is it a valid objection, by a creditor against a mortgage of personal chattels, that it is made to cover future advances, if it is also made to secure an existing debt.

*Parsonsfield vs. Dalton.*

Where a town had become a congregational parish, by building a meeting house for that denomination, and settling a minister; and afterwards an act was passed incorporating certain individuals by name, with their families, having B. R. for their pastor, with their associates and such others as might afterwards associate with them, as the congregational society in the same town of P,;—it was held that this act did not create a new corporation, but only recognized and confirmed the rights of the parish already existing and entitled to the parish funds, and to the lands reserved for the use of the ministry in the town.

*Sewall & als. vs. Ridlon.*

It is no valid objection to an ancient record of partition by petition, under *Stat.* 1783, *ch.* 41, and *Stat.* 1786, *ch.* 53, that no interlocutory judgment was formerly entered, if it appear that notice was regularly given, and no one appeared to object, and that thereupon commissioners were appointed to make partition.

It is not necessary that commissioners, appointed to make partition under the statutes, should be inhabitants of the county in which the lands lie.

Proceedings in partition, in the Supreme Judicial Court, by petition pursuant to the statutes, may lawfully be in any county in the State, if no person appear to contest the title of the petitioner, or if the controversy is an issue of law. But when an issue of fact is joined, the record is to be remitted for trial of the issue, to the county where the lands lie.

But if the trial is in any other county, and without consent of parties, yet the judgment will not be void for want of jurisdiction; but will be good, till avoided by writ of error.

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THE JURISPRUDENT.

BOSTON, SATURDAY, OCTOBER 9, 1830.

Another Number of Pickering's Reports is just published, and for sale at Hilliard, Gray and Co's. This Number completes the 8th volume. It contains the cases decided from Berkshire September to Middlesex October term, 1829. Many of them are important and interesting. We are quite sure that every gentleman in the Profession, as much as he may feel the expense and inconvenience which arise from the rapid growth of Books, is glad to meet with a new Number from the untiring hand of our Reporter. His Numbers come forth rapidly, not because they are filled up with useless and irrelevant matter, but because he is diligent and active in giving early to the public the opinions of an industrious Court, crowded with business.

We believe we can, in truth, say of Mr Pickering, what we should be glad to be able to predicate of many others in the same vocation, that he never makes up his report of cases with a view to swell his Volume. He seems content with giving a succinct and perspicuous statement of the case, the authorities cited by Counsel, and the opinion of the Court. And what is somewhat remarkable now-a-days, he is willing to let a case off with a single statement of it; whereas in some Books of high authority, it is no rare occurrence to be obliged to wade twice and even thrice through the same prosy development of facts and circumstances.

The Judgment or opinion of the Court not unfrequently makes the smallest figure in the case. It is no difficult matter to make as many Volumes of Reports as Booksellers will buy, and more than they can sell, if every lawyer who makes a good argument, and will take the trouble to write it out, may have it published at the expense of the Profession. Reports made up in this way would 'grow to be like elephantini libri of infinite length' —mere collections of forensic speeches—books of eloquent specimens for declamation in the

schools. It would be only expressing what every one has thought, who has bought and read Wheaton's Reports, were we to say, that the arguments which are there published of some of the ablest Lawyers in the country, and on the most important questions which can engage the deliberations of a Court, although well worth reading and preserving, are too dearly bought, and not a little out of place in a series of Law Reports. However desirable it may be to preserve these efforts of our distinguished Jurists and to treasure up in some permanent form, what would be otherwise so easily and so soon lost, it is nevertheless very clear that a Book of Reports is the last place in which they should be recorded. They are as much misplaced as they would be in an Elementary Treatise. Being of no authority in themselves, they, for the most part, neither add to nor take from the weight of the opinion of the Court.

It is somewhere said that 'either the Judges of former times spoke less, or the reporters were not so ready-handed as to take all they said.' Both are probably true. Judges were then much less given to amplifying, and, as it is now called, *exhausting* a subject.

It was not thought necessary to carry the researches of the Court into every division and department of a class of principles, in discussing and deciding a single question which arises within it. There is with us, in some cases, a fondness for display of erudition and a parade of authorities, which on every favorable occasion, urges the Judge into the wide domain of principle, argument and precedents. The inquiry before the Court is often overwhelmed with illustration and learned commentary. A question on a Policy of Insurance, or the Statute of Limitations can hardly be discussed, much less decided, without laying the whole body of civil law under contribution, and selecting, comparing and classifying the whole list of analagous authorities from the Year Books down. If the opinion of a single Judge or a single Court, thus elaborately formed, could be regarded as binding and conclusive, there would be some hope left of reconciling conflicting authorities, and of narrowing the debateable grounds of the Law. But it is not so. Whenever the subject starts up again in some new form and new forum, the ground is to be perambulated afresh by some other Judge, and perhaps with different results. In the case above alluded to, of the Statute of Limitations, the subject was long ago supposed to be exhausted, and yet no topic in the law furnishes a wider range for discussion and learned amplification. Formerly, a party could be charged, as on a new promise, for saying nothing, and now he can hardly say enough for that purpose. He who learned his law upon the subject twenty years ago, will find it necessary to revise it, and that the recent decisions at Washington and Westminster Hall have entirely changed it. This is but one case out of many.

We have some doubt whether much progress is made in settling the law by the modern mode of expanding and dressing up opinions with so much real or affected erudition.

This much, however, is certain, that thereby authorities are manufactured, and books multiplied beyond all example and all hope of relief. While this latitude of discussion and statement of the grounds and principles of their judgments is indulged by the Courts, our Reports must, of course, be prolix and burthensome. It is a hard labor to be brief. Thought and effort are required to be concise. It is the perfection of Juridical skill and the height of legal learning to be clear, direct, conclusive. When the object is clearly seen, the way to reach it is rarely doubtful or difficult. If reformation is effected in this matter, it must come from the Courts. The remedy must be applied where the evil originates. We shall expect reform and correction here, when, and not before, Lawyers begin to learn that the fullest reports are not always the best, and the Judges to reflect that a collection of cases is not always a collection of law.

## NEW LAW JOURNALS.

A weekly quarto periodical under the title of 'The Jurisprudent' has been commenced in Boston. A semi-monthly publication in an octavo form has also been recently issued in Philadelphia, called 'The Journal of Law,' which is edited by an association of gentlemen. Doubts have been suggested whether these periodicals, with those of the same nature already established, will meet with adequate support. For ourselves, we see no reason why they should not. Works of this nature, if conducted faithfully, cannot fail of being highly useful to the profession. The number of Law Reports, Treatises, Abridgments, &c, that now annually issue from the press, and the many new and highly important points of law that are determined throughout our extensive and rapidly growing country, certainly require the aid of more than one or two Law Journals and Reviews to enable the profession to keep their knowledge of the advancing state of jurisprudence regularly 'posted up.' Professional learning is not now, as it once was, contained in a narrow compass, but is spread over so wide a field, that unless there are certain members of the profession detached for the purpose of watching and reporting information, and in tracing the causes, and in considering the propriety of sudden innovations and gradual and imperceptible changes which are making, lawyers, generally, must necessarily remain ignorant of what it much concerns them to know. There are many subjects too, of vast importance to the practitioner, that require to be treated of, but which would not make a treatise sufficiently large to warrant their separate publication; and in this respect alone, as we conceive, works of the above description, which contain essays upon such subjects, must be highly useful. Considering the number of *Theological* and *Medical* periodicals that are now issued in the United states, *four* periodicals (and each somewhat different in its plan from the others) devoted to *Law*, will certainly not be deemed an unreasonable number. The whole expense of the present number of Law periodicals does not exceed $12,50 per annum, a sum which would go comparatively but a very little way in satisfying the wants of the lawyer, should these periodicals be discontinued on account of a meagre subscription list.—*U. S. Law Intel. and Rev.*

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Extract from a Letter of a Professor in the London University, communicated to a gentleman of this city, in a letter from his correspondent, July 8th, 1830.

'I hope to be able to make some of the writings of the American Jurists better known than they are, at present, to the Lawyers of this country. I have read two volumes of Kent's Commentaries upon American Law, which are excellent, and make me very much desire to become better acquainted with any other works he may have published. Perhaps you could oblige me when you write your friend ——— next time, by mentioning that I have a great wish to have a list of the most approved Treatises written by gentlemen of the American Bar.'

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*Christian Examiner on Criminal Law.*—A letter has been received in this city from the Commissioners in England, appointed to prepare the new statute for the Criminal Code, under the direction of Sir Robert Peel, addressed to *the author of the article on Criminal Law, in the Christian Examiner for July*, 1830, expressing 'a high sense of the just and enlightened sentiments which pervade that article,' and requesting the aid of the writer in conveying to the Commissioners a further history of that branch of jurisprudence within the United States.

The writer of the article was Hon. James T. Austin of this city.—*Patriot.*

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GREENFIELD, OCT. 5.—*Case of Dr Cooley.*—At the recent Law Term of the S. J. Court, holden at Northampton, the motion in arrest of judgment in the case of the Commonwealth vs. Cooley, for disinterring the body of Pierce Chase, was argued last week. The Court on Saturday gave their opinion that the Statute regulating the subject had superseded the Common Law offence, and the defendant was discharged.—*Gaz.*

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At the Law Term of the Supreme Judicial Court, holden at Northampton last week, Henry Chapman of Greenfield, Edward Dickinson of Amherst, and George Ashmun of Springfield, were admitted as Counsellors; and William G. Bates of Westfield, Henry Starkweather of Ware, Frederick H. Allen of New Salem, and William M. Lathrop of Enfield, as Attorneys of said Court.

The following gentlemen were admitted, the 5th inst, as Attorneys of the Court of Common Pleas, now in session in this city, viz: Messrs J. Winslow Whitman, jr., Chas. Cushing Paine, Hamilton Hutchins, Jas. M. Barker, Edmund Quincy, Richard Hildreth, and John H. Gray.

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We regret to learn that some irregularity has occurred in the transmission of our paper to our New York subscribers. Such arrangements are now made, as will, we think, prevent any delay in future.

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## New Publications.

AMERICAN.

Vol. 8. No. 2. Pickering's Reports.

A Practical Treatise on the Law of Partnership by Niel Gow, Esq. 2d American from 2d London Edition, with Notes and References to American Cases.

ENGLISH.

Haggard's Ecclesiastical Reports, vol. II. part 4.

Judicial Letters, addressed to the Rt. Hon. Sir Robert Peel, in reference to the present crisis of Law Reform.

Cresswell's Insolvent Reports, part III.

Lloyd and Welsby's Mercantile Reports.

Barnewell & Cresswell's Reports, K. B. Vol. 9, part 4.

Brigham's Reports C. P. vol. 6, part 4.

Sir John Bayley on Bills of Exchange &c. 5th Edition, Edited by Francis Bayley.

Russell's Reports in Chancery. Vol. III. part III.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 2. eopis2w.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

The study of American Jurisprudence will always form an essential part of the education of every accomplished American Lawyer. And to the practitioner, as well as to the jurist, the decisions of the various Courts of Law and Equity in the United States, are daily becoming more important. The Jurisprudence of the several States, with a single exception, is founded upon the Common Law of England. On most subjects of general importance, there is a great similarity in the legislative enactments of the several States. And the judicial decisions of the Courts of the several States, are often cited and respected as authorities in the Courts of other States than those in which they were pronounced. The decisions upon local or statutory law, merely, are comparatively few, and even in these, from the similarity in the statutes and usages of the several States, precedents and analogies may be found, of general application. Few, perhaps, are aware of the number of volumes of American Reports, which now exceeds two hundred and fifty. It is believed that an Analytical Digest of these Reports, upon the plan of Mr Jeremy's consolidated Digest of the English Reports, is a desideratum. The advantages of such a digest, judiciously arranged, so as to bring into one view all the adjudications of all the Courts in the United States, upon each particular subject, will be duly appreciated by every practical lawyer. It is intended that the work shall contain all the reported cases to the time of publication, without any exceptions; and a Supplement containing the subsequent decisions will be published annually.

The work will be published with despatch.

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The work will be printed on a beautiful small type, and good paper, and will be comprised in four or five volumes, (probably not exceeding four,) royal octavo size, each volume to contain about 1000 pages; and will be delivered to subscribers at $5 per volume, in good law sheep binding, which is a very low price for a law work embracing so great a quantity of matter.

After publication the price of the work will be raised to $6 per volume.

RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan suggests.

July 10. ISAAC PARKER.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25

Aug. 20.

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NEW LAW BOOKS.—JOHN GRIGG, No. 9 North Fourth Street, Philadelphia, has just published the following valuable works.

CONDENSED REPORTS of CASES decided in the SUPREME COURT of the United States, from the organization of the Court at August term 1791, to January term 1828. Edited by Richard Peters, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

This work is intended to contain the opinions of the Supreme Court, *in the language of the Judges*, in every case decided in that court from the establishment of the Government of the United States, to the commencement of Mr Peters's Reports at January term 1828. The reported decisions in the Circuit and District Courts of the United States, upon similar points, are also collected and digested in the work, as notes; and abstracts of those Cases, and also of the collateral decisions of the Supreme Court are given, so that the Professional Gentleman and the Student will be in possession of all the adjudicated Law of all the Courts of the United States, in an authoritative, condensed, and arranged form.

The work will be contained in not more than six volumes; the first volume is now published; the second volume will be published about the 1st of August, and the balance of the work during the present year and 1831.

Those who wish to possess this work will do well to make an early application as the greatest portion of the edition is taken up by subscription. They are for sale by the principal Booksellers in the United States, with J. Griggs's other law publications.

Price six dollars to those who subscribe, and seven dollars to non-subscribers, payable on delivery of each volume.

PETERS' REPORTS.—Reports of Cases argued and determined in the Supreme Court of the United States, by Richard Peters, Esquire, Reporter of the Supreme Court of the United States, 4 vols. royal 8vo.

FONBLANQUE'S Celebrated TREATISE ON EQUITY. A new edition, with considerable additions, from the last London edition, by a distinguished Member of the Philadelphia Bar, in 1 vol. royal 8vo.

CHITTY ON CONTRACTS. A new and Practical Treatise on the Law of Contracts not under Seal, and upon the usual Defences to Actions thereon, with Corrections and Additional References. By a member of the Massachusetts Bar, in 1 vol. 8vo.

SAUNDER'S REPORTS, in 3 vols. 8vo. The 4th American, from the 5th considerably enlarged London edition.

Say's Political Economy, new edition.

TOLLER'S LAW OF EXECUTORS AND ADMINISTRATORS. With notes and references to American Authorities, by E. D. Ingraham, Esq. new edition, in 1 vol. 8vo.

Sugden on the Law of Vendors in 1 vol. 8vo.

Jones on Bailments in 1 vol. 8vo.

CHANCERY REPORTS. JOHN GRIGG, has in press the Decisions of the English Chancery Reports, upon the plan which has been adopted and successfully executed with the 'English Common Law Reports.' The work will comprehend, in a condensed form, all the Reports which have *not* been republished in the *United States*; and it will be continued, so as to present to the profession, annually, the Chancery Reports as they shall hereafter appear in Great Britain.

The work will also contain references to the decisions of the chancery courts of the United States, and of the several states.

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GRAY & BOWEN have received by late arrivals the following valuable Foreign Books, which they will sell at low prices.

Dibdin's Library Companion, second edition, one large 8vo. vol.

Bowring's Poetry of the Magyars.

Moore's Byron. Splendid quarto edition.

Belzoni's Researches in Egypt and Nubia.

Description of the Ruins of an Ancient City in South America, with plates.

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Histoire De France. Par M. Bignon, 4 vols.

Dictionnaire de Maximes. Par J. L. Malire, 1 vol.

Histoire du Congress de Vienne, 3 vols. 8vo.

Lafayette en Amerique, with Plates, 2 vols. 8vo.

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Obras de Quevedo, 11 vols.

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Las Eroticas Villegas, 2 vols.

Trabajos de Persiles y Sigismunda, 2 vols.

Teatro Italiano Antico, 8 vols. July 10.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep, $3,50—Calf, $4,00.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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NOW PUBLISHING, BY CARTER & HENDEE, A SERIES OF SCIENTIFIC TRACTS, designed for Instruction and Entertainment, and adapted to Schools, Lyceums and Families. Conducted by Josiah Holbrook and others.

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TERMS.—Not less than 24 numbers of a 12mo size, containing 24 pages each, will be published in a year, at $1,50, payable in advance. July 10.

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CARTER AND HENDEE have in Press, SELF EDUCATION; or, THE MEANS OF MORAL PROGRESS, *Translated from the French of M. Le Baron Degerando.* To this work was awarded the honor of being 'crowned' by the French Academy; a distinction annually confered on one or two works, deemed the most useful that have been published during the year. And a late Review remarks; 'We have no ethical work of any living English writer to be compared with that of Degerando.'

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NORTH AMERICAN REVIEW. Complete sets of this work (thirty volumes in all) can now be had, on application to the Publishers, on liberal terms. The number and variety of the topics discussed in this work, and the high reputation it enjoys both in this country and Europe, render it a most valuable addition to the library of literary men. A General Index of the first twentyfive volumes has also been published, in a style to match with the current volumes of the work.

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THE JURISPRUDENT

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, OCTOBER 16, 1830. NO. XII.

## MERCANTILE LAW.

### NO. IV.

[Continued.]

Our business then is chiefly with contracts properly so called, that is, mutual agreements founded on a valuable consideration. Now it is frequently said, that a consideration is essential to the validity of a simple contract, but not to that of a specialty; and the position for practical purposes is perhaps sufficiently accurate. But as it involves a seeming contradiction, it may be as well to explain that it is merely a secondary rule—the principle of which is this: that where an engagement is testified by a deliberate formality, such as is the sealing of a written instrument in which the terms of it are embodied, and the delivery of it, so authenticated, to the party for whose benefit it is intended, the law concludes, as common sense requires, that an act so solemn was not done without an adequate inducement, and will not, in general allow that conclusion to be questioned.* In short, as was intimated before, the party making the deed is estopped from denying the consideration. But a third person who has a claim upon the property conveyed by the deed, founded on a valuable consideration, is still at liberty to shew that no consideration passed to the giver, and thereby set up a superior title in himself. And where the transactions is not attested by those legal formalities which are presumed to indicate a deliberateness of purpose, the law will not recognise an engagement as obligatory, unless the consideration shall be made to appear by evidence. An undertaking wanting this is designated, by a term borrowed from the civil law, though applied in a somewhat different sense, as a *naked* engagement—*nudum pactum*. In order then to make a verbal promise binding, there must be either some advantage proceeding from the party in whose favor the promise is made, to the person by whom it is made, or to another at his request; or there must be some detriment sustained, at the instance of the party promising, by him to whom the promise is made. These distinctions have been adopted to meet the exigencies of particular cases, but they are all perhaps resolvable into the principle of a supposed mutuality of advantage. A simple instance of each kind will shew this. A. agrees to give B. 50*l.* for his horse, and B. agrees to let A. have the horse for that sum. Here the principle is obvious: the consideration of A.'s promise is the stipulated delivery of the horse, of B.'s the stipulated payment of the price. Again A. requests B. to supply C. with goods, undertaking that he shall be duly paid for them. This undertaking is binding upon A. and with reason: not, however, on account of the benefit to C., but because from the request there may be inferred a benefit to A. The same remark applies to the third case. Thus, a creditor, at my instance, forbears for a time to press his debtor, and this delay on his part is a sufficient consideration for a promise on mine. Here, undoubtedly, is no apparent advantage resulting directly to me; and yet the presumption of some advantage arises necessarily from the request. The transaction is in fact a *bargain*. Give *me* this forbearance, and I will give *you* so much in return.

To enumerate or even to classify the various considerations which will sustain a promise, would be as useless as tedious. It may be sufficient to give one or two examples in the negative. An undertaking to do what is merely a duty, obligatory even without the undertaking,* and a promise to forbear where there is no power to enforce, are considerations evidently nugatory and without value.† It has of late years been laid down that a *moral obligation* is a sufficient consideration for an express promise.‡ But it is a position which we consider at once dangerous and unnecessary—dangerous, as tending to introduce metaphysical subtleties as to the nature of a moral obligation; and unnecessary, because there is no instance in which the courts have had recourse to it, where the promise might not have been more truly referred to some other consideration, such as the law has always acknowledged to be sufficient. For example: A man who has been made a bankrupt and obtained his certificate, owed before his bankruptcy a sum of money to one who had advanced it to him in his necessities. By the operation of the law he is now discharged from all liability to the lender. But if after this discharge he voluntarily promise anew to pay the money, that promise is binding upon him in law. Now the reason ordinarily assigned is this: that after the legal obligation was removed, there remained an obligation of conscience, the satisfying of which is such a consideration as the law will recognize. But this reasoning not only leads to anomalous results, but is not, as it seems to us, strictly true in fact. Is not the process in the mind of the debtor rather this? 'You lent me so much money, and *therefore*, although I am not bound by law to do so, yet I will pay you.' The consideration is not so much the moral obligation as the pre-existing debt. And observe, that the law, when it exonerates the debtor by a certificate, does not extinguish the debt; it merely takes away, or rather suspends, the legal consequence, which consequence the debtor revives by a subsequent promise attaching upon the original consideration.

It has been already mentioned incidentally, that under the term *parol* agreements are included those which are reduced into writing, but not attested by the legal formality of sealing and delivering. The distinction between a simple contract and a specialty evidently had its origin in times when writing was a rare accomplishment. It has, however, been continued, with certain statutory exceptions, down to a period when the reason is no longer applicable. An opinion was indeed once intimated by two distinguished judges, that where the promise was *in writing*, want of consideration was not a valid objection;* but the doctrine was new to our law, and was not long afterwards solemnly denied.† There is one species of written instruments not under seal, which is somewhat favored in this respect. Bills of exchange and promissory notes, the former by the established usage of trade, which has been adopted into our law under the name of the custom of merchants, the latter partly by the common law, and partly by the operation of a statute,‡ carry with them *primâ facie* evidence of consideration. But although the holder is not called upon to shew, as a preliminary title to sue, that he has given value for the instrument, still, as between the acceptor and drawer of a bill, the maker and payee of a note, or any two parties, from one of whom the instrument has been transferred immediately to the other, it is a good and available defence that no consideration passed, or in other words, that it was an accommodation transaction. It is true that this will, in general, furnish no answer to the claim of a subsequent indorsee who has received the instrument from another; yet even in this case, if the party sued can shew, as he is at liberty to do, that no value has been given by the holder, his right of action is destroyed. The rule, in short, must not be understood as dispensing with a consideration altogether, but merely as shifting the burden of proof. Instead of requiring the plaintiff as in the ordinary case of a simple contract, to shew that there is a consideration, it calls upon the defendent to prove that there is none.

The effect of unlawfulness or impossibility in the consideration has been already sufficiently discussed. It remains only to point out one distinction. Where the consideration consists of several parts, of which some only or one is *impossible*, the contract may nevertheless stand good; but *illegality* in any part of the consideration incurably vitiates the whole transaction.

It seems to follow from the very notion of a contract, that the engagements should be contemporaneous as well as mutual. At first sight, therefore, it looks like a contradiction to read of a consideration as *past*. But it must be recollected that the term 'consideration' is used relatively to the 'undertaking' of the other party; and it is evident that although the duty and even the legal obligation may attach immediately on the performance of the consideration, the specific undertaking may be long subsequent. There is an inchoate contract subsisting before, which is made complete by the actual promise. In such a case the promise it said to be founded on an *executed* consideration; so the validity of which it is essential that the act which constitutes it should have been done at the request of the other. It is then a good foundation not only for an express but an implied promise. If the act were the consequence of a *previous*

* The civil law proceeded exactly on the same principle, though in a different mode. A verbal undertaking might be binding without shewing a consideration: but then it must have been entered into with certain prescribed solemnities. The person to whom the promise was to be made, proposed a question to him from whom it was to proceed, as 'Dare spondes? Facere spondes?' &c. If he answered 'Spondeo,' the obligation was complete. This sort of engagement was called a *stipulation*.

* Peake's N. P. C. 72. 2 Campb. 317.
† 4 East, 455. 1 B. & C. 373.
‡ See 3 Bos. & Pul. 249. (n.)

* Van Mierop v. Pillans, 3 Burr. 1663.
† 7 T. R. 350 (n.) ‡ 3 & 4 Ann. c. 9.

request, it is clear that a promise would be inferred immediately upon the performance. In such case, however, the consideration and the implied undertaking would be manifestly contemporaneous, and the former could not, therefore, with propriety, be said to be executed with reference to the latter. But it is not always necessary that there should be an express request. A subsequent adoption of the act done is considered by the law as equivalent to, or rather evidence of, a previous request; and here, as the implied promise does not arise until that adoption, it may truly be said to be founded on a past or executed consideration. What amounts to such an adoption may be gathered from the following instances. If a man, without any request from me, or even knowledge on my part pay a sum of money or buy goods for me, I am not in the first instance bound to repay him; but if I afterwards agree to the payment in the one case, or receive the goods in the other, this is equivalent to a previous request on my part, and binds me to repayment. And further, if the act done on my account be such, as there was a legal obligation on me to perform, the law will at once infer a request, and a promise to remunerate.*

A consideration is said to be *executory*, when although the promise is immediate, the act which is the subject of it is to be performed at a future time, and *concurrent* when the acts mutually stipulated are to be carried into execution at one and the same time. The ordinary case of a sale in which the purchaser is not entitled to the goods without payment or tender of the price, nor the seller to the price agreed without delivering or offering to deliver the goods, will serve for an example of the latter; and an agreement to pay in a month's time for goods to be delivered immediately is an instance of the former. These distinctions may perhaps seem too minute and trifling; and they are mentioned, not so much for their intrinsic importance, as on account of the frequent allusion which is made to them in practice. Occasionally indeed there arise out of them nice and somewhat difficult questions as to the construction and relation of the several covenants on the one side and the other. For instance, if two concurrent acts are stipulated for, as delivery by the one, and payment by the other, no action can be maintained by either party without shewing a performance, or what is equivalent to a performance, of his part of the agreement. It becomes therefore of importance to ascertain, whether the stipulations are independent as to the time of execution, or whether they are so connected, that the one is a condition necessarily preceding the other. But this would lead us into a wide field of inquiry as to the interpretation of contracts, into which we are at present forbidden to enter.

*1 H. Bl. 90. 2 East, 506. 1 B. & A. 105.

## NO. V.

If we were to listen to the invectives which have of late years been so liberally bestowed on the science of law, and upon no part of it so unsparingly as upon legal construction, we might be inclined to think that there existed a conspiracy against truth and justice, hatched by the founders of our system, and propagated through the successive generations of lawyers, from Glanvil even to Lord Tenterden.* According to these railers, the rules of interpretation, instead of being a lanthorn to guide unto truth, are but

> 'An ignis fatuus which bewitches,
> And leads men into pools and ditches.'

They never speak of law without an immediate association of quirks and subleties. 'Let us view the question,' they say, 'not according to the rules of legal nicety, but as men of common sense, and sound practical understanding'—as if law and common sense had solemnly divorced each other, and no man could hope to be a lawyer who had not first taken leave of his reason. The student who has heard these things (and who in our day has been fortunate enough not to hear them?) may not unreasonably, therefore, be startled at approaching so perilous a subject as the legal interpretation of contracts, and may, perhaps, think it necessary to sharpen his wits for an encounter with the powers of darkness and chicane, armed with every kind of sophistry and ingenious device for puzzling. We can assure him, nevertheless, that his apprehensions are groundless, and that he will need only the moderate exercise of his everyday understanding; that, so far from being intricate and perplexing, the rules of construction are remarkable only for their simplicity, and are in fact exactly such as every man of sound, well-cultivated mind, would adopt unconsciously for the attainment of the same object.

Let us consider, for a moment, what that object is. Contracts, we have already said, (and we are not ashamed of repeating a principle) proceed on a supposed reciprocity of advantage. Each party expects to gain something. Whenever, therefore, the interference of law is rendered necessary by a breach of faith in either, the first inquiry naturally is, what was the *mutual understanding* of the parties as to the terms of the bargain at the time of entering into it. To ascertain the *real* intention of either, is not, as has been rightly observed by Paley, to the purpose; one may have designedly misled the other; and to give effect to the real intention in such a case, would be to countenance and reward dishonesty. To do justice between the parties, the undertaking of each must be construed in that sense, in which he supposed it to be by the other;* and it will easily, we think, be perceived, that the rules of interpretation have been framed with a steady reference to this principle. We shall, for the sake of simplicity, consider them with reference chiefly to a written contract; because, in general, whatever is applicable as a rule of construction to words spoken, is of course equally so to words written. One important distinction however there is, which it may be as well to notice here; that, whereas an ambiguity in the terms of a merely parol contract may be removed by extrinsic evidence, (as, for example, the previous course of dealing between the parties) an ambiguity apparent on the face of a written instrument admits of no explanation but from the instrument itself; a distinction, the soundness of which we may find occasion to justify hereafter.

Premising then, as a preliminary limitation, that, when the language of the contract is plain and unequivocal, no interpretation is admissible, which is at variance with the obvious meaning of the words;* and secondly, that construction must never be pushed beyond that sense which the words are fairly capable of bearing;† the law sets out with the following concise maxim: *verba debent intentioni inservire.* We are first to consider what appears upon the whole to have been the general purpose of the parties in the transaction before us; and having ascertained this, we are to understand the terms of the contract in such a sense as is most agreeable to that purpose. 'The law,' says Chief Justice Willes, 'commends *the astutia*, the cunning of judges in construing words in such a manner as will best answer the intent.'‡ They must be construed, therefore, not according to any arbitrary standard of classic propriety, but with a due allowance for that inaccuracy, with which the generality of men in their ordinary communications express themselves—they must be taken in a free and popular sense—in that sense, in short, which such persons, so dealing, may be reasonably supposed to have attached to them.§ If an expression admit of two meanings, that must be preferred, even though somewhat strained, which seems consistent with the general scope of the agreement;‖ and constant regard must be had to the subject-matter, both for the explaining of what is doubtful, and the qualifying of what is general.¶ Suppose, for instance, a man having a flock of sheep for sale, at a fair, were to bargain with another chapman thus: 'I will sell

*Nay, the censure, to be just, should be carried still higher, and ought to fall on the sages of the Roman law, such as the Appius Claudiuses and Sulpiciuses of old—to say nothing of the comparatively modern names of Ulpian, Papinian, Trebonius, and the like; for as moral truth is the same at all times and in all places, the rules of interpretation will be found almost precisely the same in the civil as in the English, law.

*This has been carried so far as to overcome even the express words of an instrument. Thus a note made by a debtor, and delivered by him to the creditor, expressed to be 'for 20*l.* borrowed and received,' but adding, 'which I promise *never* to pay,' was held to be properly described as a promissory note, on which the maker was liable. See 2 Atk. 32. And on the same principle a bill of exchange, made payable to a fictitious person, has been treated in law as a bill payable to bearer. 1 H. B. 569.

**Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* This, of itself, ought to redeem the law from the scandal of departing from common sense.

† Doug. 277. 7 T. R. 214. 2 B. & P. 168.

‡ 3 Atk. 136.

§ 'Where the intention is apparent, too much regard must not be had to the native and proper definition, signification and acceptance of words and sentences.' Shepherd's Touchst. c. 5. p. 87.

It is impossible while on this subject to omit noticing the very apt and pertinent illustration given by Mr Chitty, in his Code of Commercial Law—'The words and language of *a deed*,' he says, 'must bear the sense which is attempted to be put upon them, and this sense must be understood to mean their plain, ordinary and popular sense, rather than the strict grammatical and etymological one.' And now comes the example: 'AS if a person borrow a horse, he is bound to provide for its keep, unless an agreement be made to the contrary.' The idea of borrowing a horse by deed, indented, of course, and delivered with the proper formalities, is certainly original; and the distinction between the etymological and popular sense of the word 'borrow' is so profound, so philosophical, so satisfactory, that it leaves nothing to be desired in the way of further comment or illustration.

‖ If an absurdity would result from strictly pursuing the expression of the instrument, courts of law will, equally with courts of equity, cast about to discover the mean by which the real intent may receive effect, notwithstanding the untechnical language in which such intent is expressed; 'for though an interpretation or construction ought not to be made against the letter of a deed, yet in some cases a strained and secondary interpretation may be admitted; and if the letter will bear a second and less genuine interpretation, it may be admitted, ne detur absurdum; but where the intention of the parties is not clear and plain, but in equilibrio, in such case a secondary and strained construction shall not be made, but the words shall receive their more natural and proper construction.' Per Bridgman, Ch. J. Carter's Rep. 108, 109. The above is note *n* of Mr Fonblanque to the Treat. Eq. b. 1. ch. 6. s. 18.

¶ *Verba generalia restringuntur ad habilitatem rei vel personæ.* Bac. Max. 'The matter which he is about is always supposed to be in the mind of the speaker.' Treat. Eq. b. 1. ch. 6. s. 16. See 4 Rep. 48.

you *all the sheep I have* for 50*l*.' Would it not be manifestly absurd as well as unjust, to consider these words as comprehending his whole stock of sheep, not only in the market but elsewhere? And yet in themselves they imply so much. We are almost ashamed to dwell on what is so plain and obvious, and we will confine ourselves therefore to one *real* example by way of illustration. A person warranted upon a life insurance to be *in good health*, was in fact, at that time subject to the gout. It was contended that this was a wilful misrepresentation, and the policy therefore void. Now the question was plainly this: what was mutually understood by the term 'in good health?' and the following is the judgment of Lord Mansfield—whether right or wrong is immaterial to our purpose. 'The imperfection of language,' he said, 'is such that we have not words for every different idea, and the real intention of the parties must be found out *by the subject-matter*. Such a warranty can never mean that a man hath not the seeds of disorder. We are all born with the seeds of mortality in us.' And he concludes thus: 'A man subject to the gout is a life capable of being insured, *if he has no sickness* to make it an unequal contract.*

* Park. Ins. 439. See also on this subject, 1 Powell, 403. and for instance 1 T. R. 701. 2 T. R. 436. 3 T. R. 525. 2 M. & S. 363. 5 B. & A. 416. 8 B. & C. 575.

## MR JEFFREY.

Concluded from page 82.

After all I have said, I fear it will be thought a hazardous experiment, if I presume to present the reader with the substance of one or two loose notes which I took of many happy sallies of Mr Jeffrey. Those who heard him well know the difficulty of the task. A further proof of Mr Cooper's insanity, was that during his residence at Pembroke College, Cambridge, he groundlessly fancied himself the aversion of the whole University—shunned by the students and hated by the tutors—and, in consequence, abruptly took his departure.

'And now gentlemen of the Jury,' continued Mr Jeffrey, folding his arms on his breast, and standing in an easy and negligent attitude, 'we come to another of the card-built castles of our opponents. Mr Cooper, conceiving himself an object of ridicule to both students and tutors, abruptly leaves Cambridge; and is, therefore, forsooth, if we were to admit the clever casuistry of my learned friend, (Mr Robertson,) insane. Why gentlemen, every man who does a very absurd and unaccountable action, with his eyes open, may be called, to a certain extent, insane: that is, not of a sound, well-ordered mind. But with regard to this Mr Cooper, I am apt to think his conclusions were not quite so chimerical and groundless, as to his being an object of curious speculation and droll remark to those around him. I will go so far as to say, that if I or Mr Robertson were at Cambridge, and received similar treatment to that which Mr Cooper received, we should be apt, at least I know I should, to decamp without much ceremony. It is, I say, very possible that Mr C. might be shunned at Cambridge, and therefore feel inclined to run back to dear Scotland, and her consolations. This, I am apt to imagine, shows rather sagacity and spirit, than madness. Let it be remembered that Mr Cooper went to Cambridge at a comparatively late period of life, when he would be no meet companion for his light-hearted juniors. And in what character did he mingle with the gay, spirited, and high-bred crowd, at an English University—with the bright tribes of Eton, Harrow, and Westminster? What did he appear to them, other than a great, gloomy, hulking Scotch Dominie, wandering about like a 'statue stepped from its pedestal to take the air,' having nothing in common with the vivacious youngsters around him, but his cap and gown? And then again, when the fastidious ears of the Etonians would be shocked by hearing the strains of Virgil or Horace shouted in the rich Northern brogue, and ghastly guttural intonations of Mr Cooper, not unaccompanied, perchance, with a false quantity to add to its attractions; is there, I ask, anything extraordinary in supposing them to be amused with these and similar *gaucheries* of the raw Caledonian? Nothing more natural, I am sure, gentlemen:—the simple fact of the case is this; Mr Cooper was very eccentric—a Scotchman—an elderly eccentric Scotchman, and his companions were very free and quizzical; the consequence was unavoidable. He was fair game for them; and not being able to stand the chase, he took to Scotland again for shelter.—Now was not this the very best thing he could do?—I think it would have been a much more unequivocal symptom of insanity, had he remained at Cambridge. I cannot, therefore, but admire the ingenuity and hardihood of my learned friend, in grounding on this part of Mr Cooper's conduct, a plea of insanity. Had I, in short, as I said before, been in Mr Cooper's circumstances, I am sure I should have taken a similar step; but to be brought in *mad* for it, oh, it is preposterous!'

I am conscious that this is but an imperfect attempt to embody in words the subtle, ethereal, and evanescent spirit of Mr Jeffrey's wit and sarcasm. Had my reader been present at the delivery of the above passage, and witnessed the ease, readiness and spirit with which it was uttered, he would have been charmed indeed. After having been speaking for rather more than three hours and a half, Mr Jeffrey sat down, apparently no more hurried, heated, or exhausted, than if he had been merely whispering a word or two across the table; sipped the remainder of his cup of coffee, drew on his spectacles, and recommenced writing as before. Most of the auditors left the Court; and after a sitting of six or seven hours more, the Jury returned a verdict for the plaintiff. Though the Court did not break up till midnight, Mr Jeffrey was at his place the next morning to conduct another equally arduous and much more complicated case.

In Court Mr Jeffrey is not chatty or communicative with his legal brethren; but, on the contrary, is silent and reserved. I do not recollect seeing his anxious and restless countenance once relax into a smile. He has his full share of lively sensibility, nay rather irritability, which is so frequently allied to great powers. I never saw a man more apparently free from vanity or conceit. His chief failing is an impatience in minor matters. The few opportunities I have had of observing Mr Jeffrey more closely, convinced me of the truth of a remark made by one of his warmest admirers; that a 'too restless display of talent, a too undisguised statement of all that can be said for and against a question, is, perhaps, the greatest fault that can be attributed to him.' This remark applies equally to his writings and to his pleadings in Court. He appears too apt at times to sink the counsel in the reviewer; but, at the same time, he contrives to effect a corresponding change in his hearers. Whether, however, in his character of writer or speaker, it is delightful to follow his rapid and graceful movements from one sparkling sentence to another, and from one harmonious cadence to another; always lively, always ingenious, always piquant. As a lawyer, Mr Jeffrey appears rather familiar with principles than practice; but paramount as he is in so many other characters, it is surely no heavy hardship for him to yield the palm of legal tact to others.

In company Mr Jeffrey is, as a friend styled him, 'a glorious creature.' His buoyant spirits never flag, his intellectual energies never droop. He is acute, eloquent, and communicative to the last. Without being that odious thing, a professed talker, he is the life of the select circle in which he moves, the centre of attraction, the mirror of courtesy. You cannot advance anything differing in any respect from his opinions, without being sure of a brilliant and often unanswerable reply. It is worth committing the fault, for the sake of the punishment. I cannot canceive a higher treat than to see Mr Jeffrey and Mr Coleridge brought together, and engaged in a metaphysical struggle.

'When Greek meets Greek, then comes the tug of war.'

No man can be long in Mr Jeffrey's company without a consciousness of being in communion with the concentrated spirit of the age. It is a man's own fault if he part from him without instruction;—without amusement, he cannot. I have little more to add. In the above sketch I have endeavored to describe Mr Jeffrey as he has not been described before; studiously avoiding the sickening tedium of repeating what everybody knows, namely, that Mr Jeffrey is a writer and a politician. I am not aware of the existence of any description similar to the one I have here attempted, of Mr Jeffrey as an *advocate:* and if I have been in some places too minute in my sketching, my only apology is anxiety to do justice to the character of one of the most distinguished individuals whom Great Britian can enrol among her many highly gifted sons.

## ENGLISH CASES.

### COURT OF CHANCERY.—FEBRUARY.

*Rawsthorne vs. Parr.*

The arguments of counsel were heard to an end in this case. The question was as to the effect of a promissory note. Messrs Ewing not being able to meet certain demands against them, applied to their creditors for time, which was granted, on condition that they would procure some person to guarantee the future payment. They then applied to Mr Parr, who consented to become their surety, and a promissory note, the subject of the present suit, was drawn and signed by Messrs Ewing in favor of the person to whom the debt was due, and Mr Parr signed his name under theirs, adding the word 'surety' to his signature. Messrs Ewing afterwards became insolvent, and Mr Parr died. The creditors filed a bill against his representatives, alleging that the note was a joint and several note, and that therefore his estate was liable, and praying for an account, &c. The Vice-Chancellor, on the cause coming before him, decided that the note was joint and several, and made an order for a reference to the Master accordingly. Against that order the present appeal was brought.

The Lord Chancellor, having heard counsel, said, he could not help coming to a different conclusion from that which was appealed against. It had been alleged that it was the intention of the parties that Mr Parr should become liable as a joint and several drawer of the promissory note in question, and that it was by a mere mistake that he had signed it as a surety only. It was impossible for the Court to say whether any such mistake had been committed; and he did not see how, if it had been made, the construction so contended for would rectify that mistake. It certainly did not appear upon the face of the note that it was intended to be joint and several, for Mr Parr had expressly signed it as surety only. In that case he could only be liable in the default of the principal: but if it had been a joint and several note, he might have been sued, in the first instance, jointly with the Messrs Ewing. His Lordship could not alter the effect of the note, nor would the construction now sought to be established carry the alleged intention of the parties into effect. The decision of the Vice-Chancellor was therefore overruled, and the deposit ordered to be returned to the appellant.

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COURT OF KINGS BENCH—FEBRUARY.

*Burrough vs. Moss.*

Mr Justice Bayley stated, that this case had been argued in the Bail Court before the three Judges sitting *in banco*. It was an action on a promissory note, given by the defendant, to a person of the name of Fearne and his wife, in respect of a debt due to the wife before her marriage. The note had been indorsed to the plaintiff after it became due. The defendant claimed a sum of 28*l*., as a debt due from the wife of Fearne, before her marriage; and insisted that he had a right to set off that debt against the note in question in the hands of the plaintiff. The learned Judge said, that at the time the case was argued, the impression on his mind was, that the defendant had a right to deduct the 28*l*., but the opinion of the rest of the Court seemed to be that an indorsee, although he took the instrument after it became due, was liable only to those equities which appeared on the face of it, and not to any collateral equities to which the endorser might be liable. The verdict must therefore stand for the amount of the note.

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ARCHES COURT—JUNE.

*Rogers vs. Rogers.*

This was an appeal from the decision of the Consistory Court, as to the inadmissibility of the allegation of the wife, charging connivance against her husband, in order to bar his right to a divorce which he sought against her, on the ground of adultery.

Sir John Nicholl now gave judgment. The principle, he said, of *volenti non fit injuria* had long been recognised in these Courts, and was a good bar to the right of a husband claiming a divorce on the ground of adultery; and though passive acquiescence might constitute connivance, still that passive acquiescence must be more than mere negligence or extraordinary confidence; it must be more than over dulness of apprehension; it must, in fact, amount to an intentional concurrence. The question for the Court to decide was, whether, in the present case, the allegations, if proved, would be sufficient to establish an intentional concurrence, on the part of the husband, in the criminality of his wife. It was alleged that the husband, in the present case, was cruel, morose, and penurious, and that he allowed his wife no society suited to her station in life, although she had brought him a fortune of 30,000*l*. It then went on to say that he accompanied her to Scarborough, with her sister; after which he returned to his own residence, near Retford; and, during several months that she remained there, he never visited her but once, and then stopped for two days only. This only showed that he had no want of confidence in his wife; and as it was at Scarborough that she became acquainted with Mr Whitaker, he was in no way accessory to the formation of the intimacy between them. Besides, there was at this period, no ground for supposing that there was any evil intention on the part of Mr Whitaker and Mrs Rogers; and still less could there be any such on the part of Mr Rogers. With respect to that part of the allegation which set forth that Mr Whitaker had, on one occasion, kissed her in the presence of her husband, even if proved, it might admit of explanation to show that it was innocent and harmless; and then it appeared that the husband was displeased; and, though quickly pacified, yet he showed a sufficient feeling on the occasion to prevent any renewal of such freedoms, for no kiss or indecent familiarity was alleged from that time, which was in 1820, up to the period of elopement in 1829. From all the facts of the case he could not fix the intention that these parties should commit adultery upon the husband, so as to bar him of his right to relief. In the case of Morsam v. Morsam, it was proved, that the seducer was in the habit of sitting with his arm round Mrs Morsam's waist in the presence of her husband; and though he dealt with the husband for timber, yet he came to the house in such a way, and at such hours, that the husband must have known that business was not his object. He was remonstrated with by Mrs Morsam's mother, who represented to him that her daughter's reputation must suffer from the visits of the gentleman; to which Mr Morsam replied, that he must not affront his best customer. In that case the Judge held, that negligence, even though it was so great as to make the husband an accessory to his wife's criminality, was not sufficient; and though it appeared evident that he was willing to keep his trade at the risk of his wife, still, as there was no proof of criminal intention on the part of the husband, that the wife should commit adultery, the Court felt bound to pronounce for the separation. The case of Crewe v. Crewe was also much stronger than the present; for in that case Sir Harry Eagleton visited Mrs Crewe at very late hours, and when the husband came home, instead of going to the drawing-room where they were, he went to the kitchen, where he remained until Sir Harry was gone; and so little care was there lest it should come to his knowledge, that when Sir Harry was let out, the slamming of the street-door might be heard all over the house. There was, in fact, no circumspection used to prevent its getting to his knowledge; and yet, in that case also the Court on the same principle, felt itself bound to pronounce for the separation. The case of Hodges v. Hodges, however, was the strongest of any; it was, in fact, a case of notorious connivance; for the wife had been guilty of great freedoms in the presence of her husband. The Judge, in that case, however (Sir Wm. Wynn), held that, if a husband connive at his wife's adultery with two or three persons, and that they subsequently live together and have issue, and if she afterwards commit adultery with another, the husband was not barred of his right, but was entitled to relief. The question whether he would have been barred of his right had the wife committed adultery subsequently with the party or parties, at whose intercourse with her he had formerly connived, did not arise in that case. In the present case, however, even if all the facts alleged were proved, they would not fix connivance on the husband. He might have been severe, inattentive, and negligent—and these facts would be important in any application to the Legislature; but such an application would rest on very different grounds from the present, which was only for divorce *a mensa et thoro*. Under these considerations, the Court felt bound to confirm the decision of the Chancellor of London, that the allegation was inadmissible—to reject the appeal, and refer the cause back again to the Court below.

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HOUSE OF LORDS—JUNE.

*The Amicable Society of Insurance vs. Bolland and another.—The late Mr Fauntleroy.*

This was an appeal from a decision of the Master of the Rolls, under the following circumstances:—The late Henry Fauntleroy effected an insurance on his life in the Amicable Insurance office, in the year 1815, 6000*l*. In 1824 Mr Fauntleroy became bankrupt, whereby all his property, including this policy of insurance, became vested in the respondents, who are the assignees under the commission. Mr Fauntleroy was executed in November, 1824, and, in the month of January following, the respondents filed a bill in Chancery, praying that they might be declared to be entitled to the said policy of insurance, and the money payable thereon. In May, 1827, the cause came on, for hearing before his Honor the Master of the Rolls, who, after hearing Counsel on both sides, decreed that the appellants, as Directors of the Amicable Insurance Society, should pay to the respondents the sum of 6,084*l*. 7*s*. 6*d*. the sum acknowledged to be then due. From this decree an appeal was brought to the House of Lords, where it was argued by Sir C. Wetherell and Mr Rose, on behalf of the appellants, who contended that it was against the general policy of the law and established principles that the insured, or those claiming under him, should recover for a loss caused solely by the criminal act of the insured himself; that if there was an express contract between the Society and the insured, that the amount insured should be paid even if the person insured had committed a *felo de se*, or had suffered by the law of the land; the law would not enforce that contract, as being contrary to public policy, a fortiori should the Courts of Law discountenance an implied contract to that effect. This case was analogous to a marine insurance, where an underwriter insures a vessel against the detention of Princes. If the owner of the vessel entered a port that was in a state of blockade, and the vessel in consequence was seized and sold by the Prince, the underwriter would not be liable to pay the amount of the insurance, because the loss was caused by the illegal act of the owner in entering a blockaded port. The law did not permit a wager to be made respecting peace or war, or contra bonos mores, and e multo fortiori, should it enforce the recovery of sum insured, where the life had been forfeited for a felony?

The Solicitor-General, with whom was Mr Koe,

on behalf of the respondents, maintained that, by the terms of the policy of insurance, it was valid at the death of Mr Fauntleroy. That the fact of the appellants having introduced new terms into their policies since that period, implied that in their former policies they had not provided against death by the sentence of the law.

The Lord Chancellor—Suppose there had been an express contract that the insurance should have been paid in case of death by the sentence of the law, it is evident that such a contract would be void as contrary to public policy; why then should the House imply a right which, if expressed, would be illegal.

Mr Koe—Such a contract would be undoubtedly illegal if expressed, because it might hold out an encouragement to commit a felony.

The Lord Chancellor—Will it not equally operate as an encouragement of crime if the House of Lords put that construction on the contract?

Mr Koe—The Court should be guided by the original intention of the parties. If the contract were expressed in such terms it would induce a presumption of an intention to commit a felony.

The Lord Chancellor—In this case the death was produced in consequence of the criminal and felonious act of the party himself, and if that party could not recover the sum insured, it was evident that those who claimed on his right could not recover it.

Mr Koe admitted that, if the intention of Mr Fauntleroy, in committing the forgeries, was to destroy his life, the respondents would not be entitled to recover; but as the forgery had only a tendency to cause his death, it did not amount to a forfeiture of the assurance money. The arguments on the other side went to say that the very fact of the commission of a felony operated as a forfeiture: if so, the same objection would apply if Mr Fauntleroy had died a natural death after he had committed the forgery. If Mr Fauntleroy had derived benefit from his own criminal act, by having his money left to his friends, it was not the necessary, but the accidental, consequence of that act.

Sir C. Wetherell having replied,

The Lord Chancellor felt that the question was attended with some difficulty. He doubted much whether the respondents were entitled to recover; but as it was a subject of general importance, he should take time to consider what took place in the Court below respecting it.

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COURT OF KINGS BENCH—JUNE.

Sittings in Banco.

*Beauchamp vs. Perry.*

This was an action tried some time since, and was brought by the plaintiff to recover the amount of a promissory note for 65*l.*, which had been indorsed by the defendant. It appeared on the trial that the note in question had been given by a person named Wade, in lieu of two others which were for the same amount, but had not been paid when they became due. The note was discounted by the plaintiff, who is a pawnbroker at Holborn-bars, and not being paid when it became due, the present action was brought. The defence to the action was, that the notes had been given in consequence of a gambling transaction, and therefore the plaintiff was not entitled to recover the amount. It was proved that Wade had declared he had given the notes for the amount of a bet which had been made between him and Perry on the Derby races at Epsom. On this being proved the plaintiff was nonsuited. Mr John Williams had obtained a rule to show cause why the nonsuit should not be set aside, and a new trial had, on the ground that the objection to the plaintiff's claim to recover the amount of the note was not valid. He contended that the evidence which had been produced by the defendant had nothing to do with the plaintiff. He had not known that the notes had been given illegally, and it was not to be supposed that he was to be the innocent sufferer.

Lord Tenderden today read the notes of the trial, and

Mr Campbell (with Mr Hutchinson) showed cause against the rule. He cited one or two cases, and submitted that the plaintiff was not entitled to recover the amount of the note, as it had been given on an illegal consideration.

Mr Williams having replied shortly,

Lord Tenderden said he was of opinion that the plaintiff had not known for what the note had been given, and, as he was unconscious of that when he discounted it, he thought that he could maintain the action for the recovery of the amount.

The other Judges concurring in this view of the case, the rule for a new trial was made absolute.

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ROLLS COURT.—JUNE.

*Vaughan vs. Millingham.*

This bill was filed to obtain the opinion of the Court on a will, and was occasioned by an amusing mistake. The testator made his will upon six half-sheets of paper, each of which was regularly signed andat tested. He bequeathed to his wife and *her heirs for ever* all his estates real and personal, &c, and he recommended that certain of the lands should be sold by her. The wife, having been privy to the contents of this will before the testator's death, communicated it to a female friend, a Miss Rawlinson, when the latter suggested a difficulty which sorely puzzled both herself and her friend—viz. that the estates being settled on the latter and *her heirs for ever*, this alarming transmission of interest to generations unborn must deprive her of all that power of sale which the testator wished her to exercise. Full of this fancied error, Mrs Millingham communicated her feelings to the testator (her husband,) who, in order to rectify the mistake, on the very day of his death tore off the offensive first half-sheet of the will, and wrote out its contents again, with some variation, omitting *the heirs for ever*. The new half-sheet was signed by him, and stuck to the will, and the old one consigned to the fire. Unfortunately, the new signature was not attested, and, as the conveyance of real property was involved, a doubt was thrown over the validity of the entire will. This bill was filed to obtain the opinion of his Honor on the subject. From the situation of the testator's family, no substantial differance could be occasioned to the parties beneficially interested in the will from its affirmation or negation, except that it rendered the sale of the property in question difficult, from ambiguity of title. It is unnecessary to add that the obnoxious expression in the original will had an import directly contrary to what occurred to the imaginations of its ingenious interpreters.

His Honor, being of opinion that a question of considerable nicety, in respect to the validity of the entire will, was involved in this substitution of the unattested first sheet, directed, in conformity with the wishes of the parties concerned, an issue of devisavit vel non, to be tried at the Carnarvon Sessions.

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COURT OF EXCHEQUER—MAY.

*Griffiths vs. Williams.*

The defendant in this case is a Minister of the Presbyterian denomination, and the action was brought to recover compensation in damages for a breach of promise of marriage. It was tried at the last Assizes for the county of Pembroke, and a verdict returned for the plaintiff, with 200*l.* damages. A rule had been obtained on a former day to show cause why there should not be a new trial, on the ground that that verdict was contrary to the evidence, Counsel on both sides were then heard at great length, and the Court this morning pronounced judgment.

Mr Baron Garrow, at great length, recapitulated the facts of the case. The Court, observed the Learned Judge, was not in the habit of giving way to feelings of indignation, such as was generally understood from that word; yet this was one of those cases which justified him in saying that his feelings of indignation, using the word in a qualified sense, or, perhaps, more properly speaking his feelings of the strongest disapprobation, were excited. The plaintiff's mother was a milliner, and a most respectable woman belonging to the Presbyterian congregation at Pembroke. At her house all the Ministers of the Presbyterian persuasion who visited the town were in the habit of taking their family dinners; and the defendant in this case was one of her visiters, and formed an intimate acquaintance with her family. The plaintiff first attended the chapel where the defendant used to preach in the year 1825, and continued regularly to attend his ministry until the year 1829, in which year she gave birth to a child. On the trial two questions were raised: the first whether the defendant was the father of the child, and the second, whether a letter, written to the plaintiff in a disguised hand, was the hand-writing of the defendant. The Jury found that he was both. In the commencement of the correspondence the defendant, as if fearful of alarming her, commenced his letter with 'My dear young lady;' he soon, however, waxed warm, and began to talk of the impression her angel image had upon his heart, and of her warm embraces, which appeared to be coming to closer quarters than the commencement of the letter warranted. In his subsequent letters, he begins with 'My dear Ann,' 'my dear, dear Ann,' 'My dearest Ann,' 'My ever-dearest Ann,' 'My dear wife.' And he concludes these letters by subscribing himself her affectionate husband. Now it really appeared that the defendant was not able to look the words husband and wife in the face, for he spelt them only with the consonants, leaving out the vowels. This showed a degree of art and cunning which weighed with the Court in considering whether he was or not the author of the anonymous letter. The Court were of opinion that he was the author of the letter and the father of the child. The defence set up was that she was the mother of a bastard child. If he was not the father of that child, it might have been a good defence for not fulfilling his promise. The letters of the plaintiff, written in April and May, would have been a perfect release to the defendant, if it had not been for this anonymous letter, which threw such light

on the subject, that it was impossible for any man to wink hard enough to believe that the letters were not the result of fraud and imposture on his part. Instead of writing this anonymous letter, what ought to have been his conduct towards a young lady, over whose religious conduct he had been four years watching? Such a circumstance as this came like a thunderbolt upon him. He would have written in his own name and character; he would have stated his regret that some vile and abominable man had taken advantage of some unguarded moment, and seduced her from the paths of virtue. He (Mr Baron Garrow), under such circumstances, would not say in what manner he ought to have addressed her, for it appeared that the Rev. Defendant was an eloquent man, for in one of his letters he expressed his sorrow that the plaintiff was not present on the previous Sunday evening, when he had been most happy in delivering a sermon, which was received with the unanimous approbation of a crowded congregation, and which he thought could only be the result of a visit to his 'dear wife' on the evening previous. After all this, he had now married another woman, since which period the plaintiff has died. Under such circumstances he was clearly of opinion the rule for a new trial ought to be discharged.

Mr Baron Vaughan said he never found greater difficulty in coming to a decision in any case than in the present. Putting out of view the last letter, it was clear the defendant must have obtained a verdict. The letters of April and May furnished him with a good and sufficient excuse for not performing his promise, and he thought there was a great deal of difficulty about the anonymous letter. That, however, was for the decision of the Jury; and, though he was not prepared to say that they came to a wrong decision, yet he must say, had he tried the cause, it were possible he might have found a contrary opinion: that, however, was no ground for setting aside the verdict, more particularly as the plaintiff was dead, and the cause, in consequence, could never be fairly tried again.

Mr Baron Bolland said he felt no difficulty about the anonymous letter; by comparing the orthography of that letter with those admitted to be written by the defendant, it clearly proved that he was the author. He fully concurred in the opinion of his Learned Brothers, that the rule ought to be discharged.

The Chief Baron gave no opinion.

Rule discharged.

## RECENT AMERICAN DECISIONS.

### STATUTE OF LIMITATIONS.

At the last term of the Supreme Court of the United States, in the case of *M'Cluny* v. *Silliman* (3 Peters' Rep. 278,) Mr Justice *M'Lean*, who delivered the opinion of the Court observed: 'Of late years the courts in England, and in this country, have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress, by action at law, within a reasonable time, a salutary vigilance is imposed, and an end put to litigation.

As still further evidence of the favor with which statutes of limitations are now regarded by the courts of the United States, we shall cite from the opinion of *Marcy, J.*, in the very late case of *Purdy* v. *Austin*, in the Supreme Court of the state of New York. In this case, the judge observed: 'The statute has been looked upon in times past with disfavor by the courts of England, and their example has been too generally followed in this country. Construction formerly went far towards depriving defendants of all the benefits designed for them by it. A different and better view of this salutary statute has been since taken, and more correct and liberal construction is now given to it. Defences under it are not now regarded, as they once were, discreditable, or at least are not so viewed to the same extent as formerly. It is assuming, as it was intended it should always have had, the character of a *statute of repose*. If the more recent decisions in relation to the effect of acknowledgments are to be sustained, defendants may speak of dormant claims preferred against them without necessarily losing the benefits of this law. As courts have been latterly receding from the positions taken by them in the construction of this act, and as we regard this movement as correct, it will be unnecessary to look at any but the latest decisions for authorities in the present case.' (3 Wendell's Rep. 189.)

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An account that is closed, is not therefore necessarily a settled account. *Bass vs. Bass. Pick.* 8 v. 187.

An account 'concerning the trade of merchandise, between merchant and merchant,' is not barred by the statute of limitations, although none of the items are within six years before the action was brought. *Ibid.*

The death of one of the parties to such an account, does not operate as a settlement or statement of the account, so as to bar it by the lapse of six years from the time of his death. *Ibid.*

Whether accounts concern 'the trade of merchandise between merchant and merchant,' is a question of fact to be decided by the jury. *Ibid.*

Such accounts are not merely accounts for merchandise bought and sold between the parties, but also include demands for money growing out of the trade of merchandise. *Ibid.*

The lapse of twenty years from the time of a debt's becoming due, does not operate as an absolute bar to its recovery, but affords a presumption of payment; which presumption may be rebutted by evidence, tending to show that payment has in fact been made. *Ibid.*

The defendant in an action upon a promissory note said 'he supposed that the note was paid by the land mortgaged as collateral, that he was willing to do what was right, that he should be willing to make some small additional payment, for the purpose of settling the business, but if the plaintiff thought proper to sue, without taking the land, he should resist the suit.' *Held*, that this did not take the demand out of the statute of limitations, although it was proved, that the value of the land was much less than the amount due on the note. *Gardner vs. Tudor.* 206.

A person, who sees the promiser of a note sign it, has no right, at another time, to subscribe his name as a witness to the note, without the consent or knowledge of the promiser; and therefore his thus subsequently putting his name as a witness, will not bring the note within the exception in the statute of limitations in regard to witnessed notes. *Smith vs. Dunham.* 246.

A note was signed by the maker in the presence of the attorney of the payee, the attorney having previously written upon it the word '*Witness*' in the usual place, and intending to subscribe it himself as a witness. But he did not inform the maker of his intention of witnessing the note, and accidently neglected to put his name to it as a witness while the maker of it was present. Two or three hours afterward the attorney subscribed his name as a witness, the maker not being present and not knowing or consenting to his so subscribing, and then delivered the note to the payee. *Held*, that the note was not so witnessed as to avoid the statute of limitations. *Ibid.*

But *it seems*, that the attorney having acted *bonâ fide*, his thus signing as a witness was not such an alteration as would render the note void. *Ibid.*

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The statute of 1791, *c.* 28, limiting suits against executors and administrators to four years, may be pleaded in bar to a suit at law. *Burditt vs. Grew.* 108.

In pleading the statute of limitations respecting suits against executors and administrators, it is sufficient for the defendant to allege that he posted up notifications of his appointment 'in public places in the city of B,' without specifying the places. *Ibid.*

It is not necessary to set forth in such a plea to a bill in equity, that such city was the place of the testator's residence at the time of his death, where that fact appears in the bill itself. *Ibid.*

It is sufficient in such a plea to aver, that the executors gave 'bonds according to law,' without saying that they were given to the judge of probate. *Ibid.*

An administrator's first account of his administration may be allowed by the Court of Probate, although not rendered until after the expiration of four years from the time of giving notice of his appointment. *Dickinson vs. Arms.* 394.

The same person being administrator on the several estates of A and D, and the estate of D, which was solvent, being indebted to the estate of A upon a promissory note, the administrator, in his administration account of the estate of D. charged the amount of the note as paid by himself at a date more than four years after he had given notice of his appointment as administrator on that estate, with interest to that date. *Held*, that the date was not conclusive against him as to the time of payment, but that the law would presume he paid the note as soon as he had sufficient funds in his hands. *Ibid.*

### GUARANTEE.

The act incorporating an insurance company required all policies to be signed by the president. A policy of insurance, which provided that a loss should be payable to the assured or his assigns, was assigned, and the company's assent to the assignment signed by the secretary only, and the assignee guarantied the premium note, the company having refused to assent to the assignment without this guarantee. In an action against the guarantee of the note, *held*, 1. That the assent of the office to the assignment was a sufficient consideration for the guarantee, as without it, an

assignee, in case of loss, could sue only in the name of the assignor: 2. That the act of incorporation did not require the assent to the assignment to be signed by the president: 3. That the secretary's signature *primâ facie* bound the company, and that having accepted the guarantee, it had adopted the act of the secretary. *New England Mar. Ins. Co. vs. De Wolf.* 56

Where upon the back of a promissory note made by S and A to the plaintiffs, were written the words, 'I guaranty the payment of the within note,' which were signed by the defendant, it was *held*, that he was a guarantee and not a surety. *Oxford Bank vs. Haynes.* 423

The guarantee of a promissory note will be discharged by a neglect of the holder to demand payment of the maker and to give the guarantee notice of non-payment, provided the maker was solvent when the note fell due but has since become insolvent. *Ibid.*

THE JURISPRUDENT.

BOSTON, SATURDAY, OCTOBER 16, 1830.

## THOMAS ON UNIVERSAL JURISPRUDENCE.

We cannot better introduce the above named work to the attention of our readers than by offering them the following notice of it from the Law Magazine. If they are not sufficiently satisfied with their brief acquaintance with the Author and his Book from reading the Review, they may be further gratified by reading the work for themselves and judging of this 'entirely novel attempt to condense the whole science of law into a small Volume and in a popular form.'

'We take shame to ourselves for not noticing long ago a work possessing such high claim to attention as Mr Thomas'; a work which has been honored with the approbation of one noble judge and several eminent judges, and warmly patronised by our most gracious sovereign and his most christian majesty of France.

'I look back,' says Mr T. in his dedication to George the Fourth, 'with unmixed joy to lucubrations which are recompensed by the exalted honor of your majesty's approval: and in the advertisement to the second edition, 'he takes the opportunity of acknowledging the condescending patronage of His Most Christian Majesty the King of France, with which he has been honored since the publication of the former edition.'

Most assuredly we ought to have seen and called attention to the work on the appearance of that former edition; but, odd as the apology may seem, we were really prevented from doing so by 'the condescending patronage' alluded to above. Not more eagerly was gold bought up in the most depreciated state of our currency, than this sterling work was singled out by foreigners from the flimsy productions of the day. We can confidently state that very few copies of the first edition were ever seen in this country, and are credibly informed that the greater part of the impression was almost instantly purchased, by the advice of the jesuits, for the King of France. We have experienced no difficulty, however, in procuring a copy of the second edition, and shall now endeavor to atone for the delay by a hasty sketch of Mr T.'s plan and a few specimens of his style.

Mr Thomas, it seems, having in the early part of his professional career felt the want of some clear and simple guide to instruct him in the rudiments of the science of law, determined, 'after surmounting the difficulties attending a general survey of political institutions,' to endeavor to remedy the evil. This, accordingly, 'is an entirely novel attempt to condense the whole science of law into a small volume and in a popular form.' The attempt, he admits to be one of great boldness. 'It seemed calculated to excite many prejudices, and to rouse much opposition;' but he confidently expects the gratitude of his country, as he has spared neither pains nor expense to deserve it, and has not failed to direct his mind 'to the pursuit of every science which appeared to have any analogy with the theme;' while 'the eternal dictates of truth, justice, and benevolence, have been the constant objects of his humble yet zealous solicitude.'

Now this is just as it should be: there cannot be a more gratifying spectacle than such a man so devoting himself; and we have great pleasure in assuring him that he has excited no prejudices, roused no opposition: that, so far as we have been able to learn, all his readers are in the best possible humor with him, and have derived amusement as well as instruction from his work.

The judgment shown in the execution is universally admitted to be on a par with the soundness of the plan. The author, in short, is not one of those ambitious, flashy writers who think original views or striking modes of expression essential merits in a work. On the contrary, he seems to have pursued with care the most celebrated of his predecessors for the purpose of picking out the most generally admitted truths, which he gives in plain, common, intelligible language, neither obscured by terseness, perverted by antithesis, nor unduly lowered by idiomatic familiarity. He has proved unanswerably that everything of real worth in jurisprudence and morals was long ago found out; and, had the treatise no other merit, we could conscientiously recommend it as an excellent illustration of the best saying of Solomon, 'There is nothing new beneath the sun.' When, too, he is compelled to touch upon a disputed point, he never tries to solve the difficulty, as a writer of less tact would do. Instead of playing the advocate and so exposing himself to the suspicion of an undue bias in favor of a particular side, he states both sides of a discussion and adopts neither; and we will venture to assert (which is no slight praise) that, from his remarks on legal reform (which, comprised as they are in three octavo pages, must be allowed to be an unparalelled instance of felicitous compression,) no man would discover whether he was for it or against it—nay, even that he had ever heard of the agitation of the question in this country.

Thus he tells us that 'the age of prophecy has ceased, and if the laws made today infallibly suit the purposes of the time, it does not follow that they will be expedient a century hence:' that 'Plato has probably expressed himself too positively upon the alteration of public laws:' that '*malum notum et cui jam assueris tolerabile*, is an argument not well applied by Louis le Roy in his edition of Aristotle's Politics;' that it should afford no surprise that no laws were made in Locris for 200 years, since, 'as Demosthenes informs us in his oration against Timocrates,' the Locrians were in the habit of hanging the proposer whenever a motion was negatived: that 'systems of national jurisprudence are generally found to be complicated in proportion to the antiquity, opulence, and civilization of the people.' And having thus supplied both principle and authority, he leaves the reader to draw conclusions for himself.

We shall now proceed to support our opinion of the work by a few brief quotations; simply begging the reader to beware of what appear to us the only faults in the work. In the first place, whatever it contains is either set down on respectable authority or is obvious to the common sense of mankind; but the propositions are now and then so placed and applied as to lead a student to consider rules of municipal as rules of natural law, *et vice versa*. A very young student, therefore, had better read the book with a tutor; but the propositions may be safely studied by any man who knows beforehand the mode of applying them and the limitations and exceptions to which they are subject. Thus, in ch. 4. sect. 22. Of Arbitrations (all the law of which is comprised in half a page,) he remarks, 'The written decisions of arbitrators, who have been authorised in writing, are entitled to judicial respect;' meaning, we presume, that parol awards authorised by parol are not so entitled. But is this natural justice or universal law? If so, the law of this country should be modified, for it certainly recognises what Mr T. impliedly condemns. As another instance of this sort of inaccuracy, we may mention sect. 5. ch. 8. On Promises. 'A promise, being *a mere personal obligation*, does not bind a man's heirs *or next of kin*.' 'Promissory notes are, as positive evidences of debts, binding against the deceased's estate, unless by other evidence, *equally* positive, it appear that they were given *not evidentially*, but in the nature of accommodation or loan, to the payee.' p. 70.

We never heard that any obligation, whether real or personal, would be binding on a man's next kin, contradistinguished, as in this passage, from heir. As for *evidentially*, we do not pretend to understand the term.

We have also occasionally detected what is called a *non sequitur* in argument, and an over readiness to draw conclusions from premises, from which they do not seem regularly deducible. Thus—

'Our right to use living creatures for food, is founded on the following reasons:—They cannot be the subject of common right and obligation with us; for they are not rational creatures. (*d*) A kind of war, *therefore*, exists between us and them. If they were all permitted to live, we could not. It is better for us to kill them, than that they should seriously annoy us.' (*e*) p. 45.

(*d*) See Count de Cat. S. of L. p. 89.
(*e*) See Hobbes. Harl. MSS. 1325. p. 207.

Now here Mr T. has not made out his point. We allow that it is better to kill than be killed; but he has wholly forgotten to prove that we are justified in eating whatever we are justified in killing. He might possibly confess and avoid the objection by slightly varying the terms and saying —it is better to eat than be eaten. Yet even this does not carry conviction; and, though a good reason enough for eating a lion, it is but a poor one for feeding on beef. As for greens—'Our right,' we agree with Mr T., 'to use vegetable substances in a reasonable manner will not be disputed.' p. 46.

But these are minor blemishes, and we prefer devoting the remainder of the short space we can afford to the indisputable beauties of the work.

To be concluded next week.

PROPOSALS for publishing by subscription an ANALYTICAL DIGEST OF ALL THE AMERICAN REPORTS. By WILLIAM HILLIARD, Jr. Counsellor at Law. Revised by BENJAMIN RAND, Counsellor at Law.

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RECOMMENDATIONS.

From Hon. JOSEPH STORY, Judge of the Supreme Court of the U. S.; and Hon. ISAAC PARKER, Chief Justice of the Supreme Court of Massachusetts.

The proposal of Mr Hilliard, to publish a uniform Digest of all the American Reports, upon the plan of the English Digest of Mr Jeremy, appears to me to be entitled to the patronage of the profession. No work of this kind, sufficiently accurate and extensive for general practice, at present exists. The want of one cannot but be felt by every lawyer, whose inquiries reach beyond the limits of the local law of his own State. Such a compilation, executed with the care, fidelity and ability, which so important a task demands, would be so highly useful, that it could scarcely fail of general approbation. As far as I have had the means of comprehending the plan of Mr Hilliard, from a personal communication with him, it appears to me entirely satisfactory. And the assistance and supervision of so distinguished a lawyer as Mr Rand, cannot but ensure an accuracy and completeness in the execution of the plan, correspondent with his just claims on the public confidence.

JOSEPH STORY.

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I have no doubt the Digest proposed by Mr Hilliard will be highly useful, and that it will have a tendency to relieve the profession from the great labor of looking through hundreds of volumes, or of indices, to ascertain whether points sought for have been treated of and decided. I also feel assured that Mr Hilliard's professional acquirements, and assiduity in legal researches, qualify him to give such a book, under the revision proposed, all the usefulness which the plan suggests.

July 10. ISAAC PARKER.

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Aug. 20.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

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## MERCANTILE LAW.

### NO. IV.

[Continued.]

It is a part of the same rule, that where, by known and established usage, certain words have acquired, in respect of a particular subject, a technical or secondary sense, this sense ought to be received in the exposition of contracts dealing with that subject. The usage of trade, as evidenced by persons conversant with it, frequently indeed determines the exact import of particular terms. Thus the words 'total loss,' 'average,' and many others in marine insurance, 'primage,' and 'dead freight,' in shipping, and even the more familiar terms of 'stock,' 'cash,' 'prompt,' and the like, have all a peculiar signification, defined by the practice of trade, and recognised accordingly by the courts.* Usage, however, though it may thus be called in aid to explain what is ambiguous, is never allowed to control a positive rule of law, or to interfere with the express agreement of the parties.† An express warranty, for example, is binding by the law; and the contract, so long as it continues open, may be rescinded, on the ground of a non-compliance with the warranty, within any *reasonable* time after the discovery. In a case therefore where an attempt was made to set up a custom in the trade by which the buyer was bound to reject the contract, if dissatisfied, *at the time of examining the commodity*, and neglecting to do so, was precluded from making any objection afterwards, such evidence was determined to be inadmissible.‡

With a like regard to intention, it becomes material sometimes to consider the time and place, at which the contract was entered into, or at which it is to be executed;—the *time*, for instance, in the ascertaining of value, as in the repayment of a loan, or in the case of fluctuating prices generally;§—the *place*, where the sense of certain terms varies in different districts. Thus, a *pack* of wool, a *load* of coals, a *measure* of wheat, denote perhaps different quantities in different parts of the country; and it is manifest that they must be construed according to their acceptation in that place in which the contract was made. In like manner, if anything be left, *defective* in the terms of an agreement, it may be *supplied* by a reference to local usage, for it is a maxim that *in contractibus veniunt ea quæ sunt moris et consuetudinis in regione in qua contrahitur.*‖ The rule must however, be understood with the same limitation which we before applied to the custom of trade.* Thus, the word 'bushel' having been fixed by law to mean the Winchester measure, evidence was not allowed to be given upon a contract for corn at a fixed price per bushel, that, according to the custom of the country, as well as the previous dealings of the parties, a different measure was intended.† The question of place is important also, as it respects the mode of performance. A man may undertake in London to pay 100*l.* in Dublin, and the undertaking will be satisfied by the payment of 100*l.* in *Irish* currency.‡ Upon the same principle, it is laid down in the case of foreign bills of exchange, that the time of payment is in general to be calculated according to the laws of the country where the bill is made payable;§ a rule which is reconciled with the foregoing maxim by the somewhat arbitrary dictum, *contrax-isse unisquisque in eo loco intelligitur, in quo ut solveret se obligavit;* but which is founded nevertheless upon the very reasonable presumption, that the parties to the contract must be supposed to have had in their minds the time and place, not of the formal engagement, but of the intended execution.

We have already seen in one or two of the above instances, that, where the terms of a contract are expressed in legal language, it is inferred that the strict and technical meaning must have been understood and intended by the parties. And it is a general rule, that such expressions shall be taken in their most comprehensive signification, as importing not only the ordinary meaning, but all which the law has thought proper to attach to them.‖ Yet this again is qualified by the more indulgent precept, that, where the strict construction would render the agreement unlawful,¶ or would tend to the injury of either party,** it shall not be pressed to such a consequence; for the law does not willingly suppose that a man intends what is unlawful; and designs its rules, not for the prejudice, but the benefit, of those who are subject to them. *Benigne interpretamur chartas propter laicorum simplicitatem*, is the patronizing style of our once clerical lawyers.††

In accordance with the same principle, which we have seen pervading the whole, is the rule, that, in ambiguous expressions, that interpretation is to be preferred, which will give an effect to the words, rather than one which would render them useless and inoperative. *Verba aliquod operari debent:* for we are not, without necessity, to conclude that expressions are introduced idly, and without some corresponding ideas present to the mind of the speaker or writer. The same rule applies, and for the same reason, to distinct clauses and covenants in a formal instrument of contract; none of which are to be passed over as insignificant or immaterial, if fairly susceptible of an interpretation, which would assign them an operation.* And, in order that every part of the agreement may receive its *due and proportionate* effect, the law enjoins that the construction shall be made, not upon insolated passages or detached clauses, but upon the whole instrument viewed together. *Ex antecedentibus et consequentibus optima fit interpretatio*, is a maxim as obvious as it is just: for thus the several parts illustrate the whole, and the whole again reflects back light on each separate part. By referenceto the context, the intention is gathered, ambiguities are explained, even express stipulations (though not indeed without caution) are sometimes qualified,† and the whole is made effectual and consistent.‡ A rule so evident, it would be waste of time either to amplify or illustrate: a single day's attendance on the courts will probably furnish the student with a satisfactory instance of its application.§

Such, however, is the imperfectness, not so much of language itself, as of the ordinary mode of applying it—such is the obscurity in which a sentence is sometimes, either from inadvertence or design, involved, that cases do occasionally occur in which all these helps to interpretation fail to remove an ambiguity, or to reconcile a contradiction. For such cases the law has provided by declaring, first, that in the last resort, words shall be construed more strongly against the person in whose mouth they lie;‖ and,

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* P. W. 396. 2 Salk. 443. 4 East, 135. 3 Campb. 16. 4 Campb. 385. 8 Taunt. 262. 1 Ves. 459. 2 Ves. 331. In the late case of Sigourney v. Lloyd. 8 B. & C. 622. this rule seems not to have been sufficiently attended to on the trial. Should not evidence have been given of the usage of trade in construing the effect of such an indorsement?

† Park. Ins. 416. 6 T. R. 320. 2 Marsh. 141. 3 Campb. 57. 8 Taunt. 92. 2 Dickens, 424. 1 Ves. 241. 333. 402. 6 Ves. 334. (*n*) 1 Sch. & Lef. 39.

‡ Holt's N. P. C. 95.

§ 2 P. W. 270. Com. Dig. Covenant. Treat. of Eq. b. 1. ch. 6. s. 12.

‖ Poth. 94. 6. T. R. 534.

* 6 T. R. 545. 2 B. & A. 746. So, now that the imperial measure has been fixed by law as the universal standard, it is clear that no other measure will ever be understood by the courts in construing a contract.

† 6 T. R. 543.

‡ *Consuetudo et statuta loci in quem est destinata solutio respicienda sunt.* Davis, 28. 2 B. & A. 307. 2 B. & C. 16. and see 1 P. W. 396. 2 P. W. 88. Ib. 696. Prec. Ch. 128.

§ Beawes, pl. 251. Mar. 102. Bayley on Bills, 112, 13.

‖ 1 Powell Contr. 402.

¶ Co. Lit. 42. *n.* 183. Sheph. Touchst. 88.

** 1 T. R. 446. 2 T. R. 744. 2 M. & S. 363. *Legis constructio nemini facit injuriam.*

†† Co. Lit. 36.

* The rule of construction, *ut res magis valeat quam pereat*, is of very extensive and important application. In a case upon the construction of an instrument containing an ambiguous expression, Lord Mansfield has these words: 'Our construction is to support the deeds of parties, give effect to their intentions, and protect property; the other is a subtlety to overturn property, and defeat the intention of the parties, without answering any one good end or purpose whatsoever. "*From*" may, in vulgar use, and even in the strictest propriety of language, mean either inclusive or exclusive; the parties necessarily understood it in the sense which made their deed effectual; the courts of justice are to construe the words of parties so as to make their deeds effectual and not destroy them, more especially where the words themselves, abstractedly taken, will admit of either meaning. Pugh. v. Duke of Leeds. Cowp. 714. See also Treat. Eq. b. 1. ch. 6. s. 18.

† Where the purpose appears distinctly from the recitals of the instrument itself, there is little danger in restricting general covenants to that purpose, but where the object is not expressly stated, but is to be collected from the substance of the agreement, great caution is necessary in the application of the rule. See 4 Rep. 13 6. 1 Ves. jun. 59. 171. 1 Lord Raym, 235. 2 Saund. 414.

‡ 1 Burr. 282. 'The first sense makes everything consistent and effectual; the second sense destroys half the lease as repugnant and contradictory to the other; there ought to be no doubt, therefore, in which sense the words should be understood.' Verba Mansfield, C. J.

§ Ab uno disce omnes. There is a very good illustration of the rule in the case of Colvin v. Newberry, 8 B. & C. 166.

‖ *Verba fortius accipiuntur contra proferentem.* Plowd. 156, Bac. Max. 2 B. & P. 13. It is remarkable

secondly, that where two clauses are found in direct opposition to each other, that which is first in order shall prevail.* And the reason is plain enough: in the former case the ambiguity is the act, possibly the *intentional* act, of the utterer: and in the latter, it is fair to suppose that what was really contemplated by the parties, would be uppermost in their minds, and consequently first reduced into form; and it would be absurd to imagine for a moment, that having once unequivocally expressed their purpose, they should intend by a subsequent clause in the same instrument to abrogate and defeat it.

We have said that, as it is forbidden, on the one hand, to travel out of a written agreement for the purpose of introducing doubts which do not exist in the words themselves; so, on the other hand, an ambiguity apparent on the instrument itself, or, in legal phrase, *patent*, can receive no explanation from without.† And the technical reason is this: The law places more reliance on written evidence than on the oral testimony of individuals. Wherever, therefore, a transaction has been reduced into writing, as it may then be proved by the production of the written instrument, it allows no parol evidence of the same facts. But if such evidence were admitted to explain something doubtful in the written document, it is evident that the proof of what the real agreement was would rest upon that evidence, and not upon the document, and so the rule would be infringed upon.‡ This may satisfy the lawyer: but the layman will probably reason thus: The writing is the *deliberate* act of the contracting parties, the formal record of their mutual obligations. It may be considered, therefore, as comprehending all which they contemplated in the bargain; and, consequently, the moment we quit it to seek for evidence from without, we are in danger of departing from what was mutually agreed, and introducing something which was not intended—a mischief far outweighing the possible hardship which may occasionally result from a strict adherence to the rule of exclusion. It may, however, happen, that a difficulty, not seen upon the face of the document, may present itself in the *application*, from a want of sufficient explicitness or particularity in description. This the law terms a *latent* ambiguity, and the rule is, that as the doubt is raised, so it may be removed, by a reference to extrinsic facts: *nam quod è facto oritur ambiguum verificatione facti tollitur.*§ Suppose a merchant were to sell by a contract in writing so many pipes of wine, described as 'wine now lying in bond in the warehouses of the London Dock Company,' and it turned out in fact that he had at that time both port and claret bonded there, each in sufficient quantity to satisfy the contract. It would thus be rendered doubtful what was intended by the description; and evidence would then be admissible for the purpose of shewing, either from a comparison of the current prices with the price agreed, or from the previous dealings, or from circumstances and expressions attending the bargain, which of the two wines was really the subject of the sale.

Except then in this instance of latent uncertainty (a case rarely occurring in mercantile transactions) parol evidence is inadmissible to explain or alter, much less to contradict the language of a written instrument.* It cannot even superadd a clause; for that would amount to an alteration. The rule is laid down by Lord Tenterden with his usual clearness thus: 'When the whole matter passes in parol, all that passes may sometimes be taken together, as forming parcel of the contract, though not always; because matter talked of at the commencement of a bargain may be excluded by the language used at the termination. But if the contract be reduced into writing, nothing which is not found in the writing can be considered as part of the contract.'† It is almost needless to remark that oral evidence is always received for the purpose of invalidating a contract on the ground of fraud or illegality, the object in such case not being to contradict the terms of the writing, but to defeat the transaction itself.

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enough that the rule of the civil law is in terms exactly opposite to this, and in principle exactly the same. *Fere secundum promissorem interpretamur.* In their law the person speaking was not the promissor, but the stipulator; the promissor merely yielded an assent. The words were, therefore, to be construed *against the speaker. Verba contra stipulatorem interpretanda sunt.*

* Hard. 94.

† See the cases collected in 1 Phill. Evid. ch. 10. 2 Vern. 624, 625. 6 Co. 68 (b.) 2 P. W. 137. 3 Bing. 112.

‡ 3 Stark. Ev. 1000.

§ 2 Atk, 372. Ambl. 175. Bro. Ch. R. 472. 2 Id. 85. 3 Id. 355. 1 Ves. 259. 6 T. R. 671.

* For an instance see Thomson v. Brown, 7 Taunt. 656.

† 2 B. & C. 634.

## MR BROUGHAM'S SPEECH

### IN THE COMMITTEE ON THE FORGERY BILL, IN REPLY TO SIR ROBERT PEEL, JUNE, 1830.

I am sure, Sir, I rise to discuss this important question in the same frame of mind as the Right Hon. Baronet who has just sat down; and who, after considerable argument, has expressed his conviction that the punishment of death for forgery cannot with safety be abolished. After all that I have heard upon the subject, I confess that I am induced to come to an opposite conclusion; and I will at once proceed to state the difficulties which have occurred to my mind, and which lead me to think that the substitution of a secondary punishment would operate more powerfully to prevent the crime of forgery than that of death. The Right Hon. Baronet says that we are to look, in the first place, to the immense paper credit, especially in the City, and to the vast number of transactions which depend upon that species of currency. He next directs our attention to the amount of property risked in these transactions; and then, as I understand, to the very small number of forgeries which occur. As an illustration of these facts, he has particularly instanced the Bank of England. Whatever difficulties other persons may feel on account of the severity of the criminal code, the Bank of England, says the Right Hon. Baronet, never fails to prosecute wherever a case of forgery occurs; and he therefore takes the prosecutions of the Bank of England as a fair criterion of the number of forgeries which take place; and because the number of those prosecutions has of late years been very small, he thinks it a fair argument to suppose that the number of forgeries has dimimished. From these premises he contends that we ought not rashly to change a law which, as it at present stands, appears to afford a sufficient security for those transactions on paper credit that are so peculiarly exposed to fraud and forgery. Now, Sir, the difficulty which I perceive in this argument of the Right Honorable Baronet, is founded upon the statement of facts which he has made to us. He contends that secondary punishments are not safe to trust to; and argues that proposition at great length and with much ingenuity, backed by several very minute and perspicuous returns on the unsatisfactory nature of the secondary punishment, which my Right Honorable friend has proposed to substitute for the punishment of death. He has instanced the effects of confinement and prison diet on constitutions of every kind, but more especially on those who have previously led a life of ease, perhaps of refinement. These persons, he contends, would sink under the infliction of solitary imprisonment, and would soon excite the public sympathy in their favor in a stronger degree even than that which is at present created for such offenders. The Right Hon. Baronet then goes to the punishment of transportation, which he seems to object to on two grounds:—first, that it is inapplicable in many cases of forgery; and secondly, that the difficulty of keeping those in custody, at a great distance from this country,—who have acquired money,—will be extremely great. All these facts the Right Honorable Baronet adduces for the purpose of showing that any secondary punishment cannot be effectual. Now here arises my difficulty. The law, says the Right Honorable Baronet, works well; there were only two prosecutions by the Bank of England—that never-failing, that unflinching prosecutor—during the last year, and at the present moment, there is not one pending. The diminution of prosecutions by the associated bankers of London is in the same proportion. Therefore, says the Right Hon. Baronet, it is best to leave the law as it now stands, since it appears to operate most effectually to prevent the crime of forgery. That, if I am not mistaken, is the basis of the Right Hon. Secretary's argument. But, Sir, what then becomes of the secondary punishments which are at present inflicted? What is it that makes the law, which the Right Hon. Secretary describes as so satisfactory, which he lauds as affording the best protection to commerce, and by the operation of which the Bank of England, with its 300,000 Stock accounts, and the London bankers with their transactions of 500,000,000*l.* are protected from any great loss by forgery? What is it, I say, that makes this law so satisfactory? Whence is all this security? Whence is it that the law so well performs its office? I contend, Sir, that it is owing to those very secondary punishments which the Right Hon. Baronet condemns; and which he has taken so much pains to show must be attended with unsatisfactory results. I am arguing now from the Right Hon. Secretary's own premises, and I contend that it is owing to the present administration of the law by the infliction, not of death, but of those secondary punishments, that the crime of forgery has been so much diminished. Within the last seven years, we are told, there have been 217 convictions for forgery:—217 men, then, have been tried, convicted, and sentenced to death for the crime of forgery. Now, Sir, in how many of these cases has the satisfactory punishment of death been carried into effect, and in how many have secondary punishments been inflicted instead? I find, Sir, that in 24 cases, only, has the punishment of death been inflicted—so that the proportion of those who have received secondary punishments, to those who have been actually executed, is upwards of nine to one. The line of argument, adopted by the Right Hon. Baronet, is that the terror of this one execution is sufficient

to deter men from forgery, because they can never calculate with certainty on the possibility of escape. I cannot agree with him in this view of the matter. I think that men enter into a different calculation on the subject, and at all times flatter themselves with the certainty of escape, because they find by the experience of other cases, that even if tried and convicted, the chances are nine to one in their favor. I know that the opposite argument to this has always been urged—it has been urged now; but I must beg leave to say, that it has never been satisfactory to my mind, and I think, indeed, that it is one of the most illogical inferences from simple premises that I have ever heard in my life. Let me remind the House, that the men who commit these offences are not such bad reasoners; they are, for the most part, practical, calculating men, who are not likely to overlook so important a fact as that the chances are ten to one in favor of their escaping capital punishment. If they do not so reason, audit quæstio; for then example has no influence at all upon them. But, besides all this, men who are about to commit this offence always picture to themselves favorable prosperity; men in such a disposition are always more sanguine than others. Now, Sir, are we to add to the sanguine hope of escape—are we to gild the fair prospect which these persons are apt to picture to themselves—or shall we awaken in them a true sense of the real danger which they run, by reducing the nature of the punishment to a certainty—as nearly as possible to an absolute certainty? Let me ask, Sir, whether we are not much more likely to deter a man from committing this offence by making it absolutely certain that he shall, if prosecuted and convicted, be punished, and severely punished—though not capitally—for it; than by leaving him subject to the punishment of death, with the chance of nine to one of escape? But, Sir, the chances of escape under the present law are even more than these; for, first, there is the chance of not being found out in time for prosecution—next, the chance of whether the injured party will prosecute or not;—then the chance of conviction;—and, lastly, the chance of ten to one against their being capitally punished. The Right Honorable Baronet will give me leave to observe upon a former part of his statement. But before doing so, I must beg to say, that he has treated this subject so candidly, that I do not look upon him in the light of an antagonist, but as one upon whom I may take my chance, at least, of making some impression. He has stated that, in one period of seven years, there were 700 and odd executions, being about 105 per annum; and that, in a subsequent period of seven years, the number was reduced to 400 and odd, being a diminution of nearly one half; but he did not state the proportions, in the two periods, of the convictions to the executions; so that I am at a loss to know whether, during the whole period, the diminution of capital punishment has been owing to the smaller number of prosecutions, or, the smaller number of convictions, or, in the third place, to the smaller number of inflictions. But I should rather think, from something he said in the latter part of his speech, that as regards this crime of forgery, the diminished number of executions in the last period of seven years, arises from the diminished number of prosecutions. Now I think the cause of this incident deserving of the most serious attention. It is said that one great difficulty is to find Juries who will convict for this offence of forgery. No doubt this operates to a great degree, and in some parts of the country more than in others, and I believe that it is a difficulty which is rather upon the increase; but this obstruction to the due administration of justice, great as it is, is not equal in practical effect to that to which I am about to call the attention of the House. The grand difficulty, then, is to prevail upon prosecutors and witnesses to come forward. That, I can assure the House, is much greater than the difficulty of getting Juries to convict; for when men are assembled together in a jury box, placed in an elevated situation before the eyes of their fellow citizens, and acting under the direction of a Judge,—the effects of which circumstances they best know who have most practised in Courts of Law—when, I say, you have men in that situation, forming part of a small select body, whose omissions, as well as commissions—whose errors, and whose ignorance, if you will,—are subject to review and criticism; it is more easy to induce them not to give way to their mistaken feelings, and to do what they ought to do, than if they were acting in their individual capacity, out of Court, placed in a situation where they have the power of following entirely and without control, the bent of their own inclinations. When an individual is not placed in the situation of restraint I have just described, let him be ever so callous and anxious to do his duty, he will meet with plenty to dissuade him from it. I shall not, now, argue the case of a man who carries his feeling to excess, but that of one as callous, if you will, as any solicitor ever employed by a public body or a committee of bankers, and who would be inclined to prosecute or not to prosecute just in proportion as he was certain or uncertain of procuring a conviction. Well, then, arguing the case of such a man, upon whom a forgery has been committed, he is sure to be surrounded with others of far different feelings. One will say to him, 'Oh, don't prosecute, the man is sure to be acquitted;' another will say, 'Here's Mr Justice so and so likely to come this circuit, and he leans against the punishment of death for forgery, so that you may as well save yourself the trouble of the prosecution;' and then another, perhaps, will say, 'Even if you convict him, you know he will make out a case for an application for mercy, and the Secretary of State for the Home Department is inclined to mercy;' and so they go on till, in most cases, even the callous are overcome. For the man of feeling, it is sufficient that he says to himself—'I will not put myself in the situation of being the cause of putting a man to death for such a thing as this,' and so he also refuses to prosecute. That this is the course of reasoning, not merely oftentimes, but times without number, all over the country, cannot be denied. To show that such is the effect of our law, I appeal, in the first place—to all men who have written upon the subject; in the second place, I appeal to all who have conversed on the subject; in the third place, I appeal to professional men, who have consulted their clients on the subject; and, in the last place, and this is the strongest appeal of all—I appeal to the petitions on your table. They come from practical men, from prosecutors—I mistake, I correct myself—they come from men who are not prosecutors—from men who complain that they are not prosecutors, who are sensible that they ought to be prosecutors, who fain would be prosecutors, who know and feel that daily depredations are committed on their property; but who cannot prosecute because they cannot convict. Some of them act from feeling; some from principle; but by much the greater number neither from feeling nor principle, but from a view of their own interests. Let, then, your calculations be what they may—it is clear that there are vast numbers of men whom you cannot get to prosecute and to convict unto death for depredations upon their property. I view the deference to be paid to public feeling exactly in the same light as the Right Honorable Baronet; for he has admitted, that in this question, of all others, we ought to carry along with us the feelings of mankind; as it is that concurrence alone which can make any punishment we may inflict effectual. So far I go along with him—but I go further, and contend that, not merely for this reason, is it right to have a punishment in which the people will sympathise—but for this other reason; that by another part of the Constitution, the law will not execute itself, and can be only executed by the participation of the people, whose feelings and principles, therefore, right or wrong, it becomes of the utmost importance to consult. For without their cooperation, you may make your law denounce what punishment it will; you may blacken or redden your Statute book as much as you please,—as it will in practice become mere waste paper, if not worse than nothing; for if it had been more merciful, it would have been sure to have been carried into effect by the people to whom its execution was confided. You have in this country no public prosecutor, as there is in Scotland, who, when forgery is committed, would take care that the forger is put upon his trial. That, I think, is a defect in our law, at the root of that bad impunity which crime often enjoys in this country, and certainly at the root of the capricious course often taken by criminal justice: this might be amended. But taking the law as it is, its execution depends upon the fancy of the individual who happens to be injured, or who, from being a witness to an offence, may happen to be bound over to prosecute. But the impediments to the execution of the law do not rest here. Witnesses must be had—and this is a difficulty which would arise whether there were a public prosecutor or not—but witnesses must be had; and who that knows anything of the administration of the law, is not aware of the difficulty of procuring witnesses to come forward, either against their convenience, or to speak against their feelings? Here let me remind the Right Honorable Baronet of one of the greatest abuses which exists in England, as regards the inconvenience to which witnesses are unnecessarily put; I allude to the assizes for one of the largest counties in England being held almost out of the county—I mean at Lancaster. Instead of being taken to Manchester or Liverpool, causes are twice a year taken for trial to that other remote corner of the country, to the great annoyance of the inhabitants. There is seen in the greatest perfection this difficulty of procuring witnesses. Even to persons who have some leisure, it is an annoyance to be taken forty or fifty miles as a witness; but, for a merchant of Liverpool or Manchester to be obliged to go to Lancaster, for fourteen days, perhaps, is the greatest injury that can be inflicted on him. He takes care, therefore, to say as little as possible of what he knows of any transaction, for fear it should reach the ears of the attorney of one of the parties, and that he might be summoned to Lancaster, and have a small sum put into his pocket, nominally, rather than really to pay his expenses. If that happen in civil cases, must not the same reasons operate in criminal trials? They inevitably must, and in a still stronger degree; for men do not like to run the risk

of hanging another for what they think an inadequate offence. So much for the number of convictions. With respect to the number of prosecutions, till we can tell how many forgeries are committed, and compare them with the number of prosecutions, it will be in vain to make any calculation of what they ought to be. All we can do is to argue upon principle and analogy, and doing so I think it cannot be doubted that the crime of forgery is committed again and again, and not prosecuted, for fear there should be a capital conviction. Is it not obvious, that the true mode of dealing with this subject is to make the punishment certain? I take this to be undoubted; that no man in his senses—no man who is, by the constitution of his mind, so far a rational being as to be the object of criminal judicature at all, would—nay, could—commit an offence if he were absolutely, positively, certain that within three or four months he would be detected, prosecuted, convicted, and punished. No man would forge a bill for 1,000*l.* if he were absolutely certain that he would suffer at the end of a month, even a moderate punishment of two years;—certainly, unless he was a madman, he would not. We cannot have a system so perfect in all its parts as to make punishment absolutely certain, but we can bring it very near to certainty, sufficiently so to make a man say to himself 'If I do this I am sure to be punished.' We shall have brought the law to the best possible state, when we have the smallest quantity of punishment, consistent with the due degree of care necessary to deter others from committing the offence. The present state of uncertainty as regards the offence of forgery is most unfortunate. I only beg the Committee to look at the difference of the returns as regards murder and as regards forgery. Of 217 persons convicted of forgery in seven years, only 24 were capitally punished, while of 99 convicted of murder, 88 were executed. Here the law is in admirable state; there is some proportion between the number of convictions and the number of punishments; and accordingly, if a man commit murder, besides the horror which the crime naturally inspires,—and which I admit is to be taken into the account, as tending to aid the law more than any horror which can arise in the case of forgery—besides this horror, I say, and all the various circumstances, some physical and others of a moral nature, which all join together to render it difficult for a man, guilty of murder to escape—the man so guilty knows for certain, that if detected he is sure to be tried, and if convicted, that the punishment, owing to the feelings of mankind, is sure to be inflicted. Therefore I say, that the certainty combines with the severity, to deter men from the commission of the crime of murder.—The Right Honorable Baronet has said that in looking to the cases of murder, the same sort of argument may be founded upon them that is founded upon the returns relating to forgery; for, says he, there are 400 and odd trials for murder, and only 99 convictions. Now that, in my opinion, is clearly owing to this fact,—that indictments for murder included two different offences; so that out of these 400 and odd trials for murder, it does not follow that there was one more murder committed than those comprehended in the 99 cases in which convictions were obtained. A man may be indicted for murder or manslaughter, and he may be indicted for murder and convicted only of manslaughter; consequently the Right Honorable Secretary, when he says there were 400 trials for murder, and only 99 convictions, proves merely that there were 400 altogether tried for murder and manslaughter, of whom about one quarter were really guilty of the capital crime. There is no offence known to the law in which so many distinctions may be taken as in the killing of a man; no crime in which nice points so frequently arise; and, that, not from any imperfection of the law, but from the nature of things, and the difficulty of applying the law to the fact, all which increase the chance of the conviction not being for murder, but for the lesser offence. The Right Hon. Baronet introduced one fact, with respect to the Bank of England, which tended to perplex, if not to puzzle, the case, to some Gentlemen, I have no doubt, from not attending to all the circumstances connected with it. He stated that the Bank had had only two prosecutions for forgery in the whole year—at the last assizes none at all. That is a very unsafe way of calculating the number of forgeries committed upon the Bank of England; for that, like all public bodies, is most justly anxious not to be defeated in any of its prosecutions, so that their legal advisers, both Counsellors and solicitors—generally and certainly men of great experience, professional talent, and distinguished for knowledge—will take special care to bring into Court only the surest cases. And even if proceedings have gone a good way, they will withdraw them if there is a chance of being defeated. I will venture to say that, if the Bank of England were to prosecute in all cases of forgeries against them, a very far different number would appear on the returns than,'two,' and that, as many ciphers put after that unit, would not more than represent their amount. It must be considered, too, that although as is truly said, the Bank itself may not entertain the feeling of disinclination to prosecute, which operates so strongly upon others, yet the witnesses, as well as the Judge and Jury, to a certain degree share in the general sentiments of the community. All these are circumstances tending to make the number of the prosecutions instituted by the Bank of England so small. Once more let me remind the House of the testimony borne to the too great severity of the law by persons mainly interested in this subject. We are told that practical men wish the punishment of death to be retained; but they have come forward by the score, by the hundred—I may say by the thousand—and your table groans under their petitions denying the imputation, not upon their feelings, but upon their good sense. These petitions proceed from those to whom paper credit is the breath of the nostrils, from those who are ruined if forgery go unpunished, and who declare that it must go unpunished as long as death is inflicted for its commission. That, Sir, is the fact, and it is upon that fact that my whole argument rests—and it is upon that fact I fearlessly appeal to all impartial persons—to none with greater confidence than the Right Honorable Baronet—for a mitigation of the present disproportionate punishment. Now I really must say, that my idea of the great value of the labors of the Right Honorable Baronet in the department of law would not have been lessened had this Bill gone much further than it goes. In my opinion, it does not go far enough to justify, in any way, the eulogy which I heard pronounced upon it by an Honorable Friend of mine, a worthy Baronet, who I am concerned not to see in his place (Sir Michael Shaw Stewart) at an early period of the evening, when he presented a petition from a large body of his constituents at Glasgow, in favor of the remission of capital punishment. On presenting that petition he frankly and honestly stated that he differed in opinion from the petitioners, and said, that he agreed with the Right Honorable Baronet opposite, who was for going gradually and cautiously, and acknowledged the great progress made in repealing capital punishment in cases of forgery, and professed himself quite satisfied with what the Bill did, which he thought quite enough. In short, he remarked that it was a great step gained, and that he had no doubt the experiment would answer. I must say that I thought I had read the Bill; but when I heard this panegyric go so far, I again looked jealously through it, to see how far it really went, for I thought there might have lurked some clause which had escaped my first scrutiny. I should have been delighted had I found such a one, but there is no such thing. The Bill certainly does take away capital punishment in some cases, such as bonds, deeds, accountable receipts and others, acknowledging fines, acknowledging recoveries, and acknowledging judgments. Now, alas! these are cases so infinitely rare, that, practically speaking, the Hon. Baronet has flattered his constituents upon having made exactly no progress at all—that, practically speaking, the great improvement is so mighty gradual, so astoundingly slow, that its degrees may be rated at Zero. In point of convenience it makes a step backwards, in point of inconvenience it advances, and in point of principle it makes no progress at all. When we talk of the punishment of death for forgery, we always mean the forgery of negotiable bills, of bank-notes, and not of fines and recoveries, deeds, and bonds, of which there is not a forgery once in ten years, and of some of them so rarely as hardly to be known in practice. I can only say, that if it be any satisfaction to those who consider the present concession a great step, I will meet them with an equal step; and, all hostile as I am to retaining the capital punishment at all, I will make them a concession, which, if they list, they may retain to the end of their criminal code. They say, 'take away capital punishment from bonds, deeds, fines, and recoveries, and we shall make a great step.' I say to them, as the great advocates of capital punishments, 'Keep the forgery of the Great Seal a capital offence; nay, I even throw you in the Privy Seal into the bargain, and let him who would forge either be hanged; and if you think that a valuable step towards capital punishment, I think I have made as great a concession as you on the other side have, by abandoning it on bonds, fines, and recoveries.' That is to say, that practically speaking, about the same amount of good or evil would be effected by either concession. But for my own part I cannot see what reason there is for making any distinction in the punishment for forging an instrument with a fraudulent intent, be it of what kind it may. Why should the forgery of an accountable receipt be not capital, when the forgery of a promissory note to execute the self-same fraud is liable to be capitally punished? In law the effect is precisely the same in both cases, the consequence being to make a party liable to pay who ought not to pay. What reason then is there for any difference in the punishment of the offence? I beg pardon for detaining the House so long, but entertaining strong opinions on the question—opinions which I have entertained for many years, indeed ever since my lamented friend, Sir Samuel Romilly, first opened the eyes of the public upon this important subject, and having since joined with those good men who, in and out of this House, have at last done the work as I hope

it has been done, I could not remain silent, although to speak were some inconvenience to myself. I cannot help congratulating the Committee on the progress made—I do not mean in the Bill, but in the discussion which the Bill has received within these walls, and still more on the important and overpowering testimony to the merits of the plan of mercy which these discussions have excited from the country; and I do tender heartily and respectfully to my Right Hon. and Learned Friend near me the tribute of my humble, sincere, and cordial congratulations that he has lived to see this his day of reward.

## ENGLISH CASES.

### SECONDARY COURT.—MAY.

*Clements vs. Flanagan.*

This was an action for libel; and the defendant having suffered judgment to go by default, the Secondary and Jury sat as usual under a writ of inquiry, to assess the damages.

Mr Brougham and Mr Earle attended for the plaintiff, and the Common Sergeant and Mr Evans for the defendant.

Mr Brougham said his client (Mr Clements) was the proprietor of a respectable and well-kept academy at Stoke Newington. The defendant was a learned gentleman, a friend of his, (Mr B.) and a distinguished member of the same profession. Whatever respect was due to the defendant's character, and notwithstanding his privileges as a barrister, he was amenable for any injustice which he had done to the plaintiff, if it appeared, as it did appear, that he had, through an overzeal, or, from any other cause, over-stepped his duty, and inflicted an injury upon the plaintiff; and it was for such injury (for injury had been done) the Jury were called upon to assess commensurate damages. It was not necessary for him, as the plaintiff's Counsel, to prove that the charges which had been brought against his client were without foundation; the defendant had himself, by allowing judgment to go by default, acknowledged them to be unfounded. This was the conclusion to be drawn by the Jury; indeed it was, he would say, the inevitable consequence. The facts of the case were these:—Mr Clements had at his school two boys, the sons of a Mr Homan, a tradesman of the City, who withdrew them without the customary notice, and in violation of a written agreement to give a notice of three months. A dispute arose between the parties; and Mr Clements, thinking he was entitled to the three months' pension, brought an action, which was tried in October last, in the Palace Court, and there recovered damages to the amount for which he sued. The present defendant was the Counsel who was instructed to resist the action; and the ground of defence was, that the boys had been taken away in consequence of the cruel treatment which they had received from Mr Clements. The case for the plaintiff was conducted with talent and discretion by his Learned Friend Mr Earl: and Mr Flanagan, as Counsel for Mr Homan, addressed the Jury with his usual force and spirit. The Learned Gentleman had certainly a right to act upon his instructions, and to establish, if he could, the defence—namely, that of cruel treatment, and general mismanagement of the school, on the part of the plaintiff; and he had the further right of making any comments germain to the subject, however painful they might be to the plaintiff, or injurious to his character. These privileges of the Bar were of great importance in the preservation of the properties, the liberties, and the lives of the community, and had been always guarded with great care—so much so, that no attempt to curtail them had ever been tried with success; so was it also with Members of the Legislature; they were invested, for the benefit of the people, with a perfect freedom of speech in Parliament, and whatever they might say there could not be called in question elsewhere. But to all these privileges there were boundaries. The doors of the legislative hall were the limits of a Member's privileges, and outside the walls of a Court-house the barrister was unprotected. An action had been successfully brought against the late Lord Abingdon, for the publication, in a pamphlet, of a speech which he had delivered in Parliament. The same doctrine had been held with regard to barristers, who had no right to publish elsewhere even what they themselves said in a Court of Justice. No doubt, the correctness of a report of proceedings in Courts of Justice, whether given by barristers, reporters, or booksellers, would go a great way in mitigation of damages; but the right to publish such proceedings had not yet been established. The law, however, gave a means of vindication, and a party sued for the publication of a report could justify himself by proving the truth of the statements which he put forward, and if, in a moment of excitement, the writer committed a slight inaccuracy, the circumstances under which he acted would go in mitigation. The libel complained of was contained in the *Times* newspaper of the 2d of November, and purported to be a report of the trial between Mr Clements and Mr Homan, at the Palace Court, on the preceding Saturday. This report was furnished by Mr Flanagan, and contained imputations most disastrous to the credit and reputation of Mr Clements' school. That such imputations were unfounded was admitted by the defendant's act of letting judgment pass against him, and he (Mr B.) had if he wished, a right to assume that no such trial had taken place; but he should not do so; a trial certainly did take place, but, as he was informed, what took place in Court was widely different from the report which the defendant had furnished. In that report Mr Flanagan is represented as having addressed the Jury in the following terms:—'If the application of the most cruel, brutal, unmanly, and ignominous torture for an offence, or rather an act which, to a man conscious of not having given any just grounds for its commission, would rather have excited laughter than revenge—if such an unnatural, wanton, and peevish exercise of authority can recommend a school-master, or a keeper of an academy, to the protection and support of the English public—if fathers and mothers will be induced to replenish the plaintiff's school, and give him an increased supply of scholars upon those grounds, then, certainly, Mr Clements, the plaintiff, had a right to make this supposed claim for the probable loss which he says he had encountered; and a still more solid motive for continuing to inflict, upon that new supply, the same cruel and ignominous marks of what then must be considered his diligence and attention to "school dicipline."' And in another part of the reported speech Mr Flanagan is made to call upon the Jury to say to their country 'whether they would, by their verdict, sanction those horrible practices which had been laid before them—whether they would further permit, so far as the influence of their verdict went, that unbridled and capricious indulgence in those tyrannous and cruel exhibitions which the plaintiff had so long wantoned in—whether they would record their horror and detestation of such barbarous practices by proclaiming to the country, by the verdict they would return, that such a system of what, in mockery, was called school discipline was no longer to be endured—that as fathers of families they abjured and reprobated it—or whether, on the other hand, by giving a verdict for the plaintiff, they would proclaim to their countrymen, that although in former days the halbert, and the scourge, and the brine, were the disgrace of our army, though now, thank God, nearly extinguished and abolished by the commanding influence of great and superior minds; yet that those instruments of torture were to remain in our public schools as the finest incitements to liberal learning, and the truest sources of honor, virtue, and every disposition which exalts and ennobles mankind.' Now, he (Mr B.) would at once admit, though he was not bound to do so, that a birch dipped in brine had been used, not however for the purpose of giving pain to the boys, but in order to render the punishment the more imposing in effect, Mr Clements thinking that it was better to produce a terror of committing offence on the mind of the boy, than to inflict any severe corporal punishment; and the fact was, that the application of the birch was light in proportion to the apparatus which was used. It was also true that young Homan, when brought up for punishment, produced a letter from his father, requesting that no corporal punishment should be applied to him; but the plaintiff had also a letter from Mr Homan, in which he approved of the plaintiff's conduct in chastising his son with a cane, upon a former occasion, and the letter in the boy's hands only objected to that mode of punishment for which Mr Clements substituted the birch, as described. The offence committed was that of running away from school, an act which in itself comprised a breach of all the rules of school discipline. The course which the defendant had taken precluded his client from proving all this in evidence, but Mr Clements, in bringing the present action, defied the most rigid scrutiny into his character as a teacher, and exposed at once to the defendant the whole economy of his school, for which he thus made himself responsible. It was to him of the last importance that no impression should go abroad that he treated his boys with cruelty, and yet these aspersions had been cast upon him merely at the suggestions of Mr Flanagan's client, who did not dare to come forward and substantiate his charges, which were injurious to the plaintiff, even if confined to the Palace Court, but which became more ruinous by their dissemination to the world, through the means of their publication in the public Press. The Jury knew that nothing acted more forcibly upon parents' minds than the idea that children were subject to torture, particularly when they were told it was a 'cruel, brutal, and ignominous torture,' such as described in the libel; and the greater effect must have been produced from the forcible and glowing terms in which the libel was couched. Such an oratorical display might have been justified if confined to a Jury; but the present Jury would judge what foundation there was for those charges when they learned that the Jury in the Palace Court had found an instantaneous verdict for Mr Clements. That Jury which had heard the whole circumstances, had, by their verdict, pronounced the charges to be groundless. The charges were,

however, repeated; and again did Mr Clements come before a Jury, and challenged his accusers. That defiance had not been accepted, and he sought of the Jury such a verdict as would be a certificate to the public of the humanity of his conduct; and nothing but damages commensurate with the injustice which he had experienced, could repel the aspersions which had been cast upon his character; and the peculiar force with which they had been cast upon him the more imperatively required the sanction of their verdict with adequate damages. There was an aggravating circumstance connected with the publication of the libel:—it was the writing of a most offensive letter to the defendant's attorney, who applied to Mr Flanagan to acknowledge the incorrectness of the report, or name his attorney. To this letter from the attorney, Mr Flanagan replied, saying that he thought, when Mr Clements' fit of insanity had subsided, he would rest satisfied with what had occurred without obliging him again to bring forward the same charges. Whether this course was wise or not, he, Mr F., left to the consideration of the 'lying ruffian' whom the attorney was obliged to represent. This letter, he (Mr B.) thought an evidence of an ill-humor towards his client, which was uncalled-for and unjustifiable, and formed an important ingredient in the case, and one which the Jury were to take into consideration in estimating the damages.

Mr Wm. Harrison was then called by Mr Brougham—He holds a situation in the *Times'* office. He called in January last upon Mr Flanagan, with the manuscript from which the report was printed. Mr F. acknowledged it to be his. The report appeared on the 2d of November, and was a faithful print of the manuscript.

Mr Denman, on the part of the defendant, required no further proof of the publication.

The libel was then read, and is entirely too long for publication.

Mr Denman, for the defendant, said he was sure it was not necessary for him to bespeak the careful attention of the Jury to a subject of such importance, and which required to be sifted and weighed well. His Learned Friend had, in the exercise of a good discretion, addressed them in a tone of moderation, leaving the statements which he had made to work for themselves, and to operate favorably to his case on the minds of the Jury. It had been stated, and stated truly, that Mr Flanagan had shown a want of temperament, which it was desirable that lawyers, as well as others, should lay aside, for, though his warmth of temper might be of benefit to his clients, it might operate very injuriously to Mr Flanagan's own interest. This action, it appeared, was not brought so much to repair character, as to obtain a certificate from the Jury that the plaintiff was a man of great humanity; and in order to do this, the defendant was to be mulcted in heavy damages. In this case his client had great difficulties to contend with. In order to establish a justification, if he had entered such a plea, it would be necessary for him not merely to prove the accuracy of the report, but also the truth of the statements which it contained. It was not necessary for him to dwell upon the importance and necessity in the best interests of the community that the proceedings of Courts of Justice should be open to publication; but the decision of the Courts showed what responsibility attached to such Publications; but he would take the liberty of saying that such proceedings should be published, provided they did not offend public decency. There was no analogy between the present case and that of Lord Abingdon. That Noble Lord had abused his privilege as a Peer, in attacking the character of an attorney, who had no opportunity of repelling the attack; and, not content with making a speech in the House of Peers, he published an abusive pamphlet against the same individual; and that pamphlet differed materially from the other reports which got abroad. The present was a totally different case. His client had no knowledge of the plaintiff until the month of October last, and could have no animosity towards him. The pamphlet of Lord Abingdon arose out of some dispute which that Peer had with the man whom he abused. The right of giving publicity to the business of public Courts would, he hoped, be carefully guarded by Juries. It was essential to the administration of justice that there should be no restraint on such publication, and that they should come forth without mutilation. The statements, the evidence, and the speeches of Counsel, should all be reported. He wished to impress upon the Jury that his Learned Friend was not right in assuming that the passing judgment by default was an acknowledgment that what the defendant had stated was unfounded. It was no such thing; it was a confession that the defendant could not establish a technically legal defence. His Learned Friend even went the length of saying that he had a right to assume even that no such trial as that referred to had taken place at the Palace Court; but he half retracted, and admitted not only the trial, but the truth of some of the statements; and then he read a letter of the defendant, which was commented upon in aggravation, and which he (Mr D.) did not mean to justify; but that letter, intemperate as it was, could do the plaintiff no injury. It was not given or intended for publication, and might, to that moment, have been confined to the plaintiff's attorney. That letter, however, had been most ingeniously introduced into the declaration; and if the defendant had succeeded in proving the truth of all the statements in the report, still a verdict must pass against him on account of this letter. No explanation was given of the circumstance which gave rise to that letter, or of the excitement under which it was written. Not only was there this difficulty with regard to the letter, but if the defendant failed in proving the truth of every particular mentioned in the report, a verdict must be had against him. It was strange, too, that, at the Palace Court, only one witness had been called; and, if the object of the plaintiff was the vindication of character, he might have called witnesses now to show either that the statements were untrue, or never passed at the former trial.—[Mr Brougham here rose and said his Learned Friend well knew that he was not permitted to call witnesses to disprove the libel, the defendant having pleaded guilty to the whole. Had the defendant adopted a different course the plaintiff would have disproved every part:]—It was not to be wondered at that Mr Flanagan should feel strongly upon hearing it acknowledged that boys of a tender age had been subject to the humiliating and painful punishment of being flogged with a briny birch, and the Jury should keep in recollection that this fact remained undisputed; nay, indeed, acknowledged by the plaintiff's Counsel. This fact was to be kept in view by the Jury when they were giving what the plaintiff asked for, a certificate that they approved of his conduct. He thought this was a dangerous instrument for a schoolmaster to be armed with. No man of discretion should intrust himself with it, subject as he might be in a school to sudden excitement, and to the dangerous application of so formidable an instrument. Whatever might be the opinion of Mr Clements as to the utility of his own mode of discipline, there was something offensive to the eyes of others in his mode of punishment; and the Jury were in fact called upon to sanction such practices, and to declare that such was proper treatment for the backs of English youths. Mr Clements might be in error or not, but he (Mr D.) thought such a mode of punishment was degrading to youth, and left not only a lasting impression upon their minds, but marks upon their backs not unlike those inflicted upon convicts.

Mr Brougham said there was no proof and no foundation for saying that there had been any marks on the backs of the boys: besides, the defendant had pleaded guilty to the charge, and it was not competent for him afterwards to enter upon a justification of his conduct.

Mr Denman denied that his client had pleaded guilty, but he could not legally give the correctness of the report in a justification, and he had a right to comment upon the facts which had been admitted, and put it to the Jury whether they approved of the application to a boy's bare back of a birch steeped in brine; he had a right to ask them whether they thought a schoolmaster ought to be armed with so formidable a weapon, for that was one of the offences which had been committed. He wished again to remind the Jury that his client could have no hostility against Mr Clements, who might as well have desisted from bringing either the first suit or the present. Not content with his first verdict, he again appeared in Court, and asked not only for a certificate of his humanity, but also endeavored to put himself in possession of considerable damages. It would, he thought, have been wiser in the plaintiff to have told the Jury that he had altered his school discipline, than to call upon them to sanction, by a verdict, a mode of punishment which was offensive to every Englishman. The Jury had it in their power to read a useful lesson to the keepers of schools, who would, in future, as well from interested as from humane motives, refrain from all undue severity to children.

The Secondary shortly summed up the case for the Jury, who retired for about 15 minutes, and then returned a verdict for the plaintiff—Damages, 50*l.*

## RECENT AMERICAN DECISIONS.

### ATTACHMENT.

1. An officer went on board a ship with a writ, in order to attach goods as the property of a consignee, and the goods being in the lower hold covered up with other goods, he did not go below or see the goods, but paid the freight to the master, and left a keeper to take charge of the goods as attached, and returned on the writ, that he attached them at the time when he went on board. The keeper continued on board several days and took possession of the goods when they were hoisted from the hold. It *seems*, that the proceedings of the officer while he was on board, constituted a valid attachment of the goods, which was completed at that time. *Naylor vs. Dennie. Pickering*, 198.

2. It is a sufficient attachment of hay in a barn, for the officer to go within view of it, declare that

he attaches it and post on the barn door a notification of the attachment. *Merrill vs. Sawyer.* 397

3. Where the person appointed by a sheriff to take custody of personal property attached, abandons it, and it comes into the possession of an adverse claimant, the lien created by the attachment is lost. *Carrington vs. Smith.* 419

4. A mortgage was made of a factory and certain machinery 'in preparation soon to be placed there,' but no possession of the property was taken at the time, and the mortgager still continued to occupy the factory. The machinery was afterwards attached in the factory, in a suit against the mortgager, and a person at the factory was appointed by the attaching officer to take charge of the machinery attached. This person subsequently absconded, and the mortgagee took possession of the mortgaged property, real and personal, including what had been attached. An execution having issued in the suit in which the attachment was made, the attaching officer took the machinery out of the possession of the mortgagee, and sold it on the execution. *Held*, that the possession of the machinery taken by the mortgagee perfected his title under the mortgage; that at the time the officer took the machinery on execution, he had lost the lien created by his attachment; and that the mortgagee might maintain trespass against the officer. *Ibid.*

5. Where a town house was erected on land of the town under a contract with the builder that the town should occupy part of it at a certain rent, and should have the right to purchase the house at an appraised value, it was *held* that the house was the personal property of the builder, but that an attachment of it in the manner in which real estate is attached, no actual possession being taken by the officer, was valid. *Ashmun vs. Williams.* 402

6. Where the owner of chattels suffers them to be mixed with those of another person, so that they cannot be distinguished, an officer will not be liable to an action of trespass (nor, it *seems*, to any action) for attaching them as the property of such other person. *Shumway vs. Rutter.* 443

7. But if after the attachment, such owner point out his goods to the officer and demands a redelivery of them, and the officer notwithstanding sells them, the sale will be a conversion. *Ibid.*

8. If such owner exhibit to the officer a bill of sale of articles of the same kind with others attached by him, which they were intermixed so as to be undistinguishable, the officer will be justified if he select and give up the least valuable articles corresponding with the bill of sale. *Ibid.*

THE JURISPRUDENT.

BOSTON, SATURDAY, OCTOBER 23, 1830.

## THOMAS ON UNIVERSAL JURISPRUDENCE.

Concluded from page 95.

It begins with a description of the nature and attributes of the Deity—

'The universe is not God. The object of a will cannot be the will itself. An accomplishment cannot be the power of accomplishing. An act of volition cannot be the seat of volition. The effect cannot be the cause. The thing governed cannot be the governing power.' p. 1.

And then, after assuring us that a great many other things are or are not a great many other things—

'God has been the great original before all things: for all things have had a cause. But being the first cause, he must be uncaused. He is called masculine, by the custom of language; but he is without gender.' p. 2.

With equal eloquence he dilates upon the nature of man—

'The body of man is made up of several organs of life, motion, and enjoyment, which gradually develope themselves until their maturity; after which they decay, and become insufficient to perform the demands made upon them. Death, which puts an end to all suffering, ensues. It *occurs but once*. We do not perfectly understand it. We ought not to condemn it. It is doubtless a wise appointment.' p. 15.

The next specimen is from the chapter on Personal Defence, and settles a question which medical jurists have not been able to settle; viz., whether a woman can ravish a man. Mr T. assumes the possibility of the offence, and very properly puts it upon the same footing as when the female is the sufferer.

'If a forcible attempt be made *by a member of either sex, upon the chastity of one of the other*, the same principle before stated, of using all necessary means of resistance, will apply to the case, and the life of the ravisher may be taken away, (*a*) if, in the judgment of the person attacked, that infliction be necessary for protection's sake. *For another has no more right to the disposal or use of a person's body, than he has to maim or kill that body.*' p. 101.

(*a*) See Just. Inst. 4. 3. 2. Civ. L. Digest, 48. 8. 1. 4. Grove's Mor. Phil. ii. p. 358. Paley, ii. c. 1.

To fit the reader for appreciating the above, we ought to state that, in the page before, it is laid down that 'our liberty to use our limbs would be of little service, if we were under an obligation to submit to any injuries attempted to be done to them.'

The passages we have quoted must be taken for the most part on the *ipse dixit* of the writer. This, however, is not always the case. Whenever he gets on debatable ground, he takes good care to strengthen his position and show a range of reading such as, we believe, no living cotemporary can boast, except perhaps Sir James Mackintosh.

'A man is not at liberty to kill himself, *(a)* even to avoid the most ignominious suffering. *(b)*

(*a*) See Aristot.; Paley, i. b. 1. c. 7.; Grove's Mor. Phil. 2. p. 277.; Blaise; Pascal; Plutarch; Gellius; Civ. L. Digest, 48. 21. 3. 4.; Plat. Phæd.; Cic. Tusc. Quæst. lib. 1.; Andron. Rhod. lib. 3. c. 7.; Collier's Essays, p. 3.; Eurip. Hecub. Chorus; Locke on Gov. b. 2. s. 6.; Godw. Pol. Jus. 1. p. 22.; Spav. Puff. 1. p. 192.; Virg, Æneid, 6. v. 434.; Montaigne Essias, lib. 11.; Martial, lib. 11. ep. 57. 80.; Hor. lib. 3. ode 3.; Lucan, lib. 17. v. 104.. Montesq. Esp. des Lois, liv. 14. c. 12.

(*b*) See Spav. Puff. 2. p. 302. p. 41.

Having now illustrated all the other peculiar merits of Mr Thomas, we shall give one specimen of his eloquence, by way of a *bonne bouche* to conclude. It is part of the dedication to the King.

'The age of gold, which early fable sketched, is realized in your majesty's auspicious sway. Science, by rapid strides, is approaching towards perfection, beyond which she is fated not to pass. The splendors of legislation and peace are, in your majesty's magnanimous mind, far more estimable than the achievements even of your victorious forces. Your majesty has raised a splendid pyramid of peaceful glory, in the institution of a royal college of literature; which will transmit, to distant ages, the recollection of your majesty's munificence.*

'The splendor and extent of your majesty's sway is shown in the fact, that the sun is never absent from your majesty's dominions. When it departs from this country and from Gibraltar, SierraLeone, the island of Ascension, and St Helena, which are almost longitudinally parallel with us, it rises upon Newfoundland, continues its course over the northern isles, Labrador, and Canada—passes on, in its path of grandeur, from Lake Superior to the West Indian Isles,—travels to the immense island of New Holland—then sheds its glories upon Ceylon—and proceeds over the extensive empire of Hindûstan.'

We can scarce conceive a finer compliment: taste and loyalty are happily combined; and our admiration is heightened by a circumstance which a lower grade of critics would blame. We mean the admirable paraphrase of the hyperbole, 'The sun never sets upon the Spanish flag;' which is, we take it, the original of Mr T.'s opinion that the sun is never absent from his majesty's dominions. An unimaginative reader might puzzle himself with conjecturing how the sun, supposing him to travel, could get from one of our colonies to another without being absent from the English dominions; but it must be remembered that the sea is an admitted part of them; and we are bound to suppose that, when the great luminary has proceeded over the empire of Hindûstan, he turns up his nose at Tibet and China, and quietly retraces his steps. Then can there be a more magnificent conception? Do even the inspired writings excel it? The sun stood still at the command of Joshua, in order to do honor to Israel: it hops, and skips, and jumps, at the command of Mr Thomas, in order to do honor to England.

We part from our author with unfeigned regret, and hope he will soon publish again. 'Oh! that mine adversary had written a book,' exclaimed Job. We say the same of our friends.

*And of which the author of Universal Jurisprudence is, as may be seen by his title page, 'Fellow.' Mr T. has a section—'Of Literary Dignities,'—in which he briefly sets forth the duties of those enjoying them; to wit, 'professors and fellows of colleges, *or royal societies*.' These duties are 'to make no by-laws contrary to the supreme ones; to promote those purposes for which their establishments are incorporated, &c; and to teach nothing which is hurtful to the state which incorporates them, or sanctions their dignities;* or inconsistent with reason. This is required by *the honorable distinctions* with which they are invested.' p. 274. If this be all, they have certainly no reason to complain of having too much exacted from them.

* See Laws of Roy. Soc, of Lit.—[Mr T. 's note.]

## RECENT PUBLICATIONS.

Petersdorff's Abridgment of the Law Reports. Fourteenth Volume.

A Practical Treatise on the Law of Slander and Libel, and incidentally of Malicious Prosecutions. With a Preliminary Discourse, and Appendix of Precedents of Forms of Declaration, Justification, Indictments, &c. Second edition with very considerable additions. By Thomas Starkie, Esq. of Lincoln's Inn, Barrister at Law.

Additional Cases; being a Continuation of Cases at Nisi Prius, before Lord Kenyon and other eminent Judges, taken at different times between the years 1795 and 1812. By Thomas Peake, Esq., Sergeant at Law. With Notes by Thomas Peake, Jun., Esq., of Lincoln's Inn, Barrister at Law.

GRAY AND BOWEN, No. 141, Washington Street, Boston, have recently published the following valuable works.

I. A DESCRIPTION OF TREMONT HOUSE; WITH ARCHITECTURAL ILLUSTRATIONS.—4to.

'Jam scires ab introitu primo—herculentum et amvenum videre et diversonium.' APULEIUS, M. A V.

This work is embellished with a copper-plate engraving, representing the front of the house, and thirty lithographic prints, exhibiting the details of the structure. Its object will be understood by the following extract from the preface.

'The present publication is intended to satisfy a curiosity, which frequent inquiries for a description of Tremont House were supposed to indicate.

'Its original plan was to furnish such particulars relative to this establishment as strangers might wish to possess, but it has been extended so as to comprehend many architectural details, which will probably be interesting to mechanics; as much of the ornamental work of Tremont House was copied or adopted from books, not commonly in their hands, and has not before been executed in this country.

II. AN EPITOME OF UNIVERSAL GEOGRAPHY; or, a Description of the various Countries of the Globe; with a view of their Political Condition at the present time. With sixty Maps. By NATHAN HALE.

III. A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By GEORGE CRABB, A. M., Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

IV. THE VESTAL—A TALE OF POMPEII. 1 Vol. 12mo.

'Oh Time, thou beautifier of the dead,
Adorner of the ruin.' CHILDE HAROLD.

V. AUTHORSHIP. A Tale. By a New Englander over Sea. 1 Vol. 12mo.

VI. AN ORATION; Delivered before the Phi Beta Kappa Society, Cambridge, Mass. August 26th, 1830. By the Rev. ORVILLE DEWEY.

VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 23.

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PICKERING'S REPORTS, Vol. 8th. This day published and for sale by HILLIARD, GRAY & CO. Oct. 23.

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This day received by GRAY & BOWEN, 141 Washington Street.

THE WESTMINSTER REVIEW, No XXV. for July 1830.

Contents: 1, The Ballot: 2, Carwell: 3, Government of Lower Canada: 4, Wilson's life of Daniel de Foe: 5, Greek Lexicons: 6, Physiology and Cultivation of Trees: 7, Game of Life: 8, Dobell's Siberia: 9, Bishop of London and Sabbath Breaking: 10, Three Courses and a Dessert: 11, Clarendon: 12, Moorsom's Nova Scotia: 13, Religious Disabilities: 14, Stamp Act and Synod of Somerset House: 15, Patronage of Art, and the President of the Royal Academy: 16, Distress of the Country: 17, Egyptian Notation: 18, Great Britain and France: Postscript to the Article on the Ballot.

The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis; relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist. Oct. 23.

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DANE'S ABRIDGMENT OF AMERICAN LAW, in 9 vols. with an appendix. A few complete sets for sale by HILLIARD, GRAY & Co. H., G. & Co. will also supply the ninth vol. and the appendix to those who are owners of the eight volumes, and the appendix separate to those who have the ninth. Oct. 23.

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ENGLISH LAW BOOKS. This day received and for sale by HILLIARD, GRAY & Co.

Browne's Chancery Practice, under the New Orders with the Sanction of the Court, in 2 vols. 8 vo.

Willoch on the Laws of the Medical Profession, 1 vol. 8 vo.

Finelly's Law aud Practice of Elections, 1 vol. 12 mo.

Crabbe's History of the English Law, 1 vol. 8 vo.

Oct. 23.

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PRINTING. The Printing House of I. R. BUTTS, corner of Washington and School Streets, is supplied with materials suitable for Book, Job, and every other description of Printing. Oct. 23.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, { *Clerk of the District of Massachusetts.*

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GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Europe possess Dictionaries, which have kept pace with the advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is trusted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

It will be comprised in one large volume, 8vo. Oct. 23.

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HILLIARD, GRAY & CO. No 134 Washington Street, Boston, have in press a Trearise on Corporations, with an appendix of the Corporation acts of each state, by Joseph K. Angell, author of a Treatise on Water Courses, Tide Water, Limitations, &c. Oct. 23.

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LAW BOOKS.—HILLIARD, GRAY & Co. 134 Washington Street, have on hand a large Stock of *American and English Law Books*, comprising a complete assortment of the best editions of all works in general use. They also purchase and sell second hand Law Books—terms liberal.

H., G. & Co. supply any volumes that may be wanted of Massachusetts or Pickering's Reports.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep,3,50.—Calf, $4,00

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THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, OCTOBER 30, 1830. NO. XIV.

## MEDICAL JURISPRUDENCE.

### INSANITY.

The subject of insanity presents a difficulty different both in nature and degree from those we have hitherto encountered in treating of medical jurisprudence. In our former articles, we attempted to point out the nature of the evidence to be required in cases of violent death by an unknown cause or agent, and while we admitted that very intricate questions must now and then arise, we proved by numerous examples how very seldom a court of justice could fail of ariving at the truth, when duly availing itself of the science of the physician and the acuteness of the lawyer in conjunction. It was there our comparatively easy task to enumerate the means of deducing a correct conclusion from certain established premises, but in the present instance we are stopped at once by the absolute want of all data, perplexed at the outset by this simple, but, we fear, unanswerable query, What is insanity? Locke long ago informed the world, that it was 'that state of mind which is not reason,' and other writers have described it by negations; but, as far as our researches have extended, no one has yet been found to declare what *it is*, correctly, or even intelligibly; and of all the accounts given of it, no two at all resemble one another. Judges and M. D.s alike have failed and differed; but the former, as the more confident, have been the surpassing in absurdity: with specimens of their lucubrations we will not now fatigue the reader, but in the progress of this article we may have occasion to quote some few of their dicta delivered on cases of importance.

It would appear the excess of presumption to aim at deciding in a matter where all doctors disagree, and which has baffled the subtlety of jurists successful otherwise in defining and explaining every title of that involved and heterogeneous mass 'the law of England.' Let us then take a hint from the prudent Dr Burrows, who some time ago discovered that endeavors to expound the nature of insanity to courts of justice served only to expose himself and his brethren to ridicule and contempt, and were often employed for the purpose of invalidating their testimony by the wily advocate. 'Having observed,' says he, 'many successful attempts of this kind, I long since determined to resist being inveigled into any definition of insanity, whether acquired incidentally by the court, or purposely by counsel. Accordingly, when giving evidence on a recent commission, and I was asked to define unsoundness of mind, I respectfully, but decidedly, declined it, on the avowed ground that, 'I had heard the question frequently put to medical men of the greatest eminence, and never heard any one of them, by his explanation, make it at all clearer.' And I advise medical men to follow this example when called as witnesses, if they wish that their testimony should be respected.'* On the classification of the various species of insanity by medical scholars, under names perhaps more learned than appropriate, we shall here make no remark, as being unconnected with our object, and indeed quite useless to the legal student, who will find his practical inquiries limited to ascertaining the degree, and not the kind of madness.

The investigator of those cases, where real or supposed insanity has been made the subject of legal proceedings, must immediately remark the very different amount and quality of evidence required, accordingly as the question may be of a criminal or of a civil nature. A commission of lunacy is found every year against some luckless individual, upon such proof of mental unsoundness as certainly would not save him from being hanged, as *doli copax* for any capital felony, by any court in Christendom. This fact, among others, has given rise to much malicious sneering at the paternal care displayed towards the wealthy, under our just and free institutions, when the rich man is condemned to the moral death of guardianship and confinement for such previous exhibitions of madness, as could not possibly preserve the poor from the natural death of the gallows and the gibbet. Yet is the principle correct; firstly, because it cannot be denied that a man, incapable of managing his own affairs, may yet possess sufficient reason to restrain him from the commission of enormous crime; and secondly, because the safety of society demands that nothing short of positive demonstration of an insanity cotemporaneous with the criminal act, should exempt the agent from the consequences of guilt. Our learned judges have hitherto in vain essayed to fix the precise degree or standard of insanity at which moral responsibility may be supposed to cease; but they have mostly leaned to the severer side. Lord Erskine has laid down the proposition, that 'in cases of atrocity, the relation between the disease and the act should be apparent;' and again, 'I think, as a doctrine of law, the delusion and the act should be connected;' and Lord Eldon, on two or three occasions, used nearly the same words. Were these principles enforced to their full extent, small, indeed, would be the number of madmen escaping the penalties of the law. An individual, who should take another's life, under the delusion that such a sacrifice was necessary to procure the salvation of mankind, might, indeed, escape being hanged; but the poor wretch, who constantly and sincerely imagines himself the Almighty, or the Emperor of China, and knocks his neighbor on the head for failing in due respect to his dignity, could scarcely hope to find favor with their lordships, since there appears no necessary connection or relation between the idea of imperial power, or even of Deity itself, and that of homicide. Hale, C. J. is somewhat more mild in his opinions. 'There is,' says he, 'First, a partial insanity; and secondly, a total insanity. First, partial insanity is either in respect of things, when they, who are competent as to some, are not so as to others, or else it is partial in respect to the degree. This is the condition of many, especially of melancholy persons. As to such, a partial insanity will not excuse them; for that persons who are felons of themselves, and other felons, are under a degree of it when they offend.' Again, he says, 'Crimes committed by lunatics,* in such their distemper, are under the same judgment as those committed by men partially insane. The person who is absolutely mad for a day, killing a man in that distemper, is equally not guilty as if he were mad without intermission. But such persons as have their lucid intervals, have usually in those intervals at least a competent use of reason, and crimes committed by them are of the same nature, and punishable in the same manner, as if they had not such defect.' After all, this acute lawyer, hopeless of discovering a rule to satisfy himself or others, leaves it to judge and jury to draw the line: 'Lest on one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes;' and in this, we think, most reasonable men will agree with him. With the learned judge's general rule, that 'a person, who has ordinarily as great a share of understanding as a child of fourteen years of age, is such a person as may be guilty of treason or felony,' it is rather more difficulty to coincide, as there certainly may be found several clever children, who, at fourteen, possess a greater share of understanding than the majority of mankind attain to throughout life.

The true, but somewhat appalling statement of this question seems to be, that by far the greater number of atrocious felons are partially insane or imbecile, inasmuch as they perpetrate their crime under the influence of motives insufficient to actuate what society agrees to call a reasonable man. In many murderers, for example, there is found an abasement and hebetude of intellect scarcely consistent with moral responsibility; in others, a miscalculation of the chances of impunity hardly explicable in a creature capable of reflection; with others, the motive is so trifling and inadequate, that few persons under its influence would be at the pains to cross the street; with others, absolutely no motive whatever. All these persons, though in various degrees, must be accounted partially insane, and yet every one of them would be executed, unless proof could be produced of glaringly irrational conduct previous to the commission of the murder; and such proof there is no reason to expect. To take the strongest case of the total absence of all motives,—we remember that a woman at Paris, never before suspected of insanity, on being requested by a neighbor, with whom she lived on the most friendly terms, to take charge of her infant for a few moments, was seized with such an irresistible propensity to destroy it, that she cut off the child's head, and tossed it from the window into a carriage passing by. Lacretelle relates, in his History of France, that the Count of Charalois, in Louis XVth's time, committed several murders, without interest, anger, or vengeance; but his motive was, perhaps, partly the exhibition of skill, as it appears that he particularly delighted in shooting tilers, for the pleasure of seeing them fall from the tops of houses. But history abounds in examples of individuals loving

*Commentaries on Insanity, by George Man Burrows, M. D. Lord. 1828.

*Lunatics, so called because their paroxysms were supposed to come on at the time of full moon, an opinion some time exploded; but the term is now correctly applied to those maniacs who have lucid intervals.

murder for its own sake, who yet betray no other symptom of insanity. Similarly of crimes less atrocious; an irresistible inclination for theft, unattended by any design of using the stolen article, is to be found even among the highest classes. Now these persons are indisputably unsound of mind, although upon one point only; yet what judge or jury would be justified in abstaining to visit upon them the severest penalties of the law? It seems to us, indeed, so impossible to establish a sure boundary between the ever varying confine, of reason and madness; so many crimes are committed by persons habitually insane, at a moment when they are under rational impulses, if we may so speak; and so many, on the other hand, are the acts of men overcome by imbecility, temporary delirium, or unrestrainable monomania, that the idea of doing strict justice to the culprit in all cases must be abandoned in despair, and the security and well-being of society made the only end in criminal judgments. But this end, it may be urged, would be attained as well by substituting imprisonment for death, in all cases of a dubious nature; and to this we have nothing to reply, observing only, that it adds one to the long list of arguments which may be urged against all capital punishments whatever.

In this discussion we have wandered a little from the direct course of our subject; but shall now proceed to point out what seem to be the best means of ascertaining the existence and extent of the accused person's insanity, and also what has been and still is the usual practice of our criminal courts in such a case. To do so the more effectually, recourse must be had to Dr Haslam's brief, but excellent work, on the Medical Jurisprudence of Insanity; and we may quote his Advice to the Medical Practitioner, as a guide for the examining counsel. 'It has been stated,' he observes, 'in a former part of this work, that the medical evidence, in order to impress and satisfy the tribunal before which his testimony is given, should not merely pronounce the party to be insane, but ought to adduce sufficient reasons for the foundation of his opinion. For this purpose it behoves him to have investigated accurately the collateral circumstances. It should be inquired if he had experienced an attack at any former period of his life; if insanity had prevailed in his family; if any of those circumstances, which are generally acknowledged to be the causes of this disease, had occurred; as, injuries of the head; mercurial preparations, largely or injudiciously administered; attacks of paralysis; suppression of customary evacuations, &c. It should likewise be ascertained if previous depression of mind had prevailed, resulting from grief, anxiety, or disappointment; and it should not be neglected to collect any written document; as insane persons will very often commit to writing their feelings and opinions, although they may suppress them in discourse.'

Dr Haslam objects warmly, as being unfair and useless, to the custom of counsel in criminal cases inquiring of the medical witness, if he knows whether the supposed madman can distinguish evil from good and right from wrong, for as he urges, 'when a medical person is employed concerning any one to whom insanity is imputed, his principal inquiry is concerning insanity; it is not *his object* to ascertain how much reason he possesses, but how far and on what topics he is insane. And having guaged his insanity he has performed his duty.' Substitute only the words, *in his power*, for '*his object*,' and we believe this observation will be found incontrovertibly correct. The great source of criminal conduct among madmen, is some erroneous conviction regarding the propriety of certain actions, or the dispositions of certain individuals. Dr H. goes so far as to say, that false belief is the essence of insanity. On this ground he censures so much the custom of inquiring into the maniac's notions of wrong or right; for however correct these may be on general subjects, yet on all those connected with this disease, he has entirely a right and wrong of his own, and 'his belief in the truth of his principle, his faith in the right of his actions, are superior to argument.' 'Sane and insane,' he continues, 'hold false beliefs, but a sane person can be reasoned out of them, an insane never.' How far this dangerous distinction might attach the imputation of insanity to certain noble lords, country gentlemen, learned conveyancers, and others, we shall not here venture to inquire, but proceed to give a short abstract of the trial of Earl Ferrars, one of the most important that can be considered as bearing on this subject, and highly illustrative of the difficulties attending the proof of insanity in all cases.

The Earl Ferrars was tried before the House of Lords, in the year 1760, for the murder of one John Johnson, then resident on his estates, and whom he had once employed as his receiver. His animosity had been excited against the unhappy victim, by a suspicion that the latter had been instrumental in procuring a bill of separation between the earl and his lady, passed two years before, and that he had also conspired to disappoint him in a contract regarding certain coal mines. *It did not appear upon the trial, that these suspicions were at all founded on fact.* Highly indignant at these fancied injuries, the earl endeavored to eject Johnson from a farm he had formerly promised him, and which, indeed, he held possession of at that time. Failing in this attempt through the interposition of trustees, his lordship appears to have resolved on a more terrible revenge. For this purpose, he again assumed, and maintained for months, a friendly air towards Johnson, and at length, one Sunday morning, made an appointment for an interview on the ensuing Friday. His mind being now resolved on murder, he deliberately prepared for the deed, by sending out of the way before the hour of meeting, his men servants, his children, and a Mrs Clifford, who took care of them. There remained in the house only three female servants. Johnson came and was at first civilly received. The parties went into a private room together, and the door was locked. One of the women listening outside, heard shortly after some high words, and then the report of a pistol. The earl came out and called to them, saying, he had shot Mr Johnson, had him conveyed to a bed, and shortly after sent for his daughter and a surgeon. The wounded man remained in his murderer's house through great part of the night, and was then removed to his own, where he expired the next morning. In the course of the day a posse of the neighbors collected, and the earl was seized in a garret without any violent resistance, although he had barricadoed his doors and windows, and was armed with a great number of weapons. But few other important facts were stated by the evidence for the prosecution.

Anne Johnson, the daughter of the deceased, deposed, that when sent for to her father, the earl met her at the door, and informed her with great coolness, that he had shot him; that, afterwards he said, he thought he had not shot him; then going into the room where the wounded man lay, he turned the clothes down, and said he saw he had shot him, but afterwards observed, that he did not know what he had done, he had shot him and that was what he designed.

Mr Kirkland, the surgeon employed, stated, that the earl told him, he had shot Johnson on his refusing to sign a paper confessing his villany; that he expressed great satisfaction at the deed, and a perfect conviction of its propriety; but seemed in great fear of the consequences, often asking if the man would die. That he, Kirkland, to humor him, said Johnson would recover, and that he would be a witness in his favor. That the earl kept himself intoxicated by constant drinking from the time of his arrival until retiring to bed, which he did about twelve. That on one occasion he became very violent, threatening to kill Johnson, and going into his room endeavored to tear the clothes off, but was easily prevented, and for the most part seemed only anxious to ascertain that his victim would recover, which when satisfied of, he retired to rest.

The defence set up was insanity.

Nearly all the witnesses deposed, that they had long considered the earl mad, and that they had often without apparent cause seen him raving, swearing, stamping, talking to himself, and spitting at himself in the glass. His brothers proved, that his father and two female relatives had been insane, and that it had been more than once proposed to take out a commission of lunacy against the earl himself, expense and the fear of his violence if not found of unsound mind alone deterring them. His attorney, or agent, gave in evidence, that he considered him occasionally mad, and that he had some time before declined to continue doing business for him, on account of his extreme violence on one occasion.

A curious specimen of confusion of ideas was given on this occasion by the Solicitor General in cross-examining a witness, who deposed to some irrational proceedings of the earl, as persevering in endeavors to set aside the settlement of an estate, when all the first lawyers had advised him that he could not by any possibility succeed. 'Now my Lords,' says the advocate, 'I should be glad to ask this witness whether he conceives such an action proceeded from tenaciousness of opinion or insanity of mind?' A strange distinction, when Dr Haslam and other eminent writers have observed that this same tenaciousness of opinion, which is impervious to reason, is among the strongest evidences of insanity.

The Earl put several able questions to the witnesses in the course of the trial, and concluded with a defence highly acute, perspicuous, and affecting. He was condemned and executed. The circumstances as we may conjecture, that weighed most against him with his judges were, the deliberation with which the murder was plotted, the evident knowledge of the distinctions between right and wrong possessed by the criminal, and the great ability and reasonableness of his defence. Yet subsequent experience has shewn, that all these are compatible with derangement of the understanding, and that maniacs often entertain the most correct moral views on all but one subject, and appear in discussions of all kinds pre-eminently rational and acute. Perhaps the strongest proof of criminality made out was, Lord Ferrars' manifest fear of the consequences of his dreadful act, so that however his conscience might be satisfied of its propriety in the eyes of his divine Judge, the violation of human law and its results were constantly and fearfully present to him; and it can hardly be denied that the infringement of the laws

of society knowingly by any member of it, makes him, setting all higher considerations aside, a fit object for punishment. Lord Erskine has some remarks on this case, which we shall presently refer to.

[To be continued.]

## JUDGE WASHINGTON.

Among the judicial virtues, impartiality stands foremost. No learning however profound, no intelligence however cultivated, no patience however unwearied, no deportment however dignified, if this be wanting, can make a judge truly respectable. It is in their union that judicial excellence can alone be found. The late Judge Washington was a true exemplification of their blended influence. He always distributed justice with an equal hand. The most eminent and influential counsel with a bad cause and a fallacious argument, could never exercise an undue control over his mind, while the youngest, and the feeblest, were sure, that its full weight would be given to everything they might urge. Regardless of persons, he looked only to the just administration of the Law. While on the bench, partial favor was shown by him to none, constant courtesy and a patient ear were yielded to all. No man ever more truly appreciated or admired legal excellence and private worth. Such was the respect felt for his character and conduct, that the good uniformly treated him with respect and deference, because they revered him, and the turbulent were in his presence awed into decorum. Here, where his judicial character was best known, his memory will be a cherished recollection. We take great pleasure in publishing the following interesting communication, for which we are indebted to the kindness of an intelligent friend to whom we would express our thanks.

### LAST ILLNESS OF JUDGE WASHINGTON.

Hearing of the severe indisposition of judge Washington, and feeling the most lively interest in him from long personal acquaintance, and also a family connexion, I called to make inquiries of his health on the 20th of November (six days before he died.) I was asked into his chamber, and found him much emaciated, and jaundiced deeply, but without pain. Though stretched on the bed of sickness, he manifested his usual cheerfulness, and in a short time our conversation was directed to a variety of subjects, then the topics of the day, as the Virginia Convention, the Virginia University, the general political condition of our country, the origin, policy and powers of the court of which he was a member. He asked several questions about the Convention, stating that it was only within a few days that his mind had recovered sufficient tone for him to read the papers on the subject.

In the course of this interview I expressed a regret at the unsettled state of the internal politics of our country, its frequent changes, and the disposition to introduce a proscriptive system against the exercise of a constitutional right of suffrage. In these he acquiesced without saying much. I went on further to express an opinion that the noble tribunal of which he was a member seemed to be the only feature of our republican system having permanence, and upon which could rest the hopes of those desiring a settled condition of things, and an unvarying interpretation of our constitutional privileges. That owing to the dignified and cautious course which this court had adopted, a decision of it had a more satisfactory influence upon public opinion, than an act of congress; that it was to be hoped, that its independence would never be taken from it, that it would never be converted into an executive tool, or become the instrument of an ephemeral predominance of party, and that it might always remain as a corrective to the incompetent knowledge of legislative bodies. I also added that I considered it a dispensation of providence for our good, that there had been so few changes in the constituents of his court since its organization; that this circumstance alone must have given rise to many decisions which would determine with precision the theory of our government.

These observations evidently put the judge in a train of thought which animated him and gave him pleasure to pursue. He admitted unhesitatingly the correctness of these views, observing that though all the decisions required had not been made, yet there were enough to establish principles, and to define the boundaries of state rights, and those of the general government. He said that to avoid giving offence to states, it had always been a maxim in the court, to presume that their legislatures meant well, that therefore on indifferent points their pretensions were admitted; but when their pretensions were such that the operations of the general government could be cramped by them they were quashed. He then quoted several instances of decisions against the acts of state legislatures, some of which had given much offence at first, but were finally acquiesced in. For example, the claims of states to tax a stock emanating under the authority of the general government, were invalidated by the decisions of his court, because the smallest concession of such a right might ultimately produce an undefined extension of it, to the effect of cramping or defeating completely the objects of the general government in the establishment of stock. Again any pretensions of a state to tax the salaries of United States officers were inadmissible because competent salaries were the guaranty for obtaining competent men, but if a state by taxing it could reduce such salary, it thereby obtained the power of fixing the description of individuals who occupied the offices of the general government. The judge in proceeding, mentioned that on a decision of his court annulling a law of Pennsylvania, the late judge Brackenridge of this state meeting him the day after at breakfast, said to him in his jocose way, 'so I find you have upset our law on such a subject. —'Yes,' was the reply, 'it could not be helped;' 'Well' says B. 'you have done exactly right, it was an abominable law, but it was more than our bench dare do, to pronounce it unconstitutional, though such a decision was much demanded.'

After these general topics, judge Washington talked on private matters, and seemed ripe for conversation, some of which was of a playful kind, and directed at his lady, who sat, at his side, for her apprehension of steam boats, in consequence of which they had to make a wearisome journey from Mount Vernon to Philadelphia and back again so frequently. She had never been in one. This interview lasted for an hour, and was truly delightful to me. The judge seemed so animated, that I took it for granted he would recover —he was seized, however, in a few days afterwards with a swelling of the glands in his neck, which made swallowing so difficult, that Dr Physick had to pass a catheter though his nostrils into the throat, to introduce nourishment. His mind was most fully prepared for death, both by the tranquillity with which he viewed the event, and the perfect arrangement of his temporal affairs. A few days before death he had drawn up by a confidential friend, instructions to his near relatives on the disposition of his body on demise. These go to show how closely he had applied the circumstances of death to himself, and how much opposed he was to an ostentatious funeral. He directed that no change should be made in his clothes or person,—and that the sheet on which he died should be wrapped around him, and used as a winding sheet—the coffin was to have a flat top and be covered with plain black cloth. There were some other instructions which it may be unnecessary to specify.

On the 26th of November, 1829, he died and his body was removed the next day to Mount Vernon. His wife, to whom he was tenderly attached, and whose destitution at his loss, formed perhaps the only subject of anxiety to his death bed, by a decree of providence, died suddenly on the road near Philadelphia, while following his remains to their home.—*Journal of Law.*

## ENGLISH CASES.

### POLICE—MANSION HOUSE.

Antoni Antonio, the Italian Doctor of civil and Ecclesiastical Law, who was a few days ago brought before the Lord Mayor, charged with having armed himself with a brace of pistols, with which he contemplated mischief to somebody, was confronted with his wife before his Lordship, and an account was given by the lady, which excited universal astonishment. The following is a brief statement of the case:

Mrs Antonio said, that she was a Limerick woman, and had her Irish husband, who was a waiter at the great Inn there, and with whom she lived very happily. The doctor one day walked into the Inn, and calling her Irish husband aside, told him that he [the doctor] had just arrived from London, and that he happened to be out of cash, but expected a remittance every moment of money due to him in England. This story was believed, and the waiter became responsible to a certain extent for the doctor's diet and lodging, but finding that his customer's friends in England were not very punctual, he took him home, where he might live more frugally. As the doctor was a good scholar, tuitions were at once provided for him, but still no money arrived, and he was very fond of good living, so that the family began to feel the incumbrance to be serious.—The doctor at last induced them to take a house, upon his assurance that he would pay the rent. The first quarter approached with great rapidity, but no money appeared, and then the doctor said that he would go off to London, to his friend Prince Esterhazy, to whom he had lent the cash.—(Laughter

The Lord Mayor—And did you believe all this? —Mrs Antonio, (with the greatest simplicity)—God knows best, your Lordship, we believed every word of it. But money was wanting. Well, we were afraid to let the doctor go by himself, and my husband was not able to leave his business, so my mother and I thought it would be best for us to go, and off we set for Dublin along with him. The doctor said, that he was much in want of a wife, (a laugh,) so we gave a little party in Dublin, and asked some ladies to tea, to give him his choice, but he was very desirous to make us drink, and he prevailed upon my mother to take some mixture, which soon put her to sleep, but I would

not take any. Well, off he ran to a ship that was going to Scotland, and off I ran after him.

The Lord Mayor—What! and left your mother asleep? Mrs Antonio—Fast asleep. So the ship sailed, and didn't stop till we came to Scotland. —(Loud laughter.) Well, I was afraid to leave him, because I knew that if Prince Esterhazy paid him, he wouldn't pay us, except I was along with him; but he suddenly took it into his head to marry me.

The Lord Mayor—To marry you! and you having a husband living in Limerick? Mrs Antonio—Yes; he told me that if I refused he would expose me to my husband, so I agreed to be his wife, and the ceremony was performed by a Scotch clergyman.

The Lord Mayor—Come, come, you ran away from your Irish husband with him, and now you are tired of him? Mrs Antonio—I'll take my oath, your Lordship, that I never ran away from my Irish husband; I have written to him, and expect him every day.

The Lord Mayor—Did not you sleep along with this Ecclesiastical Doctor before you married him! Mrs Antonio (with great vehemence)—Never! I'd lose my life first. What! sleep with a man without marrying him? The Lord knows I wouldn't do any such wicked thing—(Laughter.)

The Lord Mayor—Well, how did he treat you? Mrs Antonio—Oh, then, God knows, I wish I never saw his face: he's a shocking man.

The Lord Mayor—Has he beaten you? Mrs Antonio—No, he never struck me, but I am sure he will destroy me. He is in possession, he says, of an imperceptible poison, and he has threatened to use it upon me, if I leave him; but I will leave him, for I find it's all a lie about the money, and there is not the least use in marrying him.—(Loud laughter.)

The Lord Mayor—How did he get those pistols? Mrs Antonio—I gave him the last sovereign I had in the world, and he went and purchased them with it.

The Lord Mayor—And who paid the passage money, and all the incidental expenses? Mrs Antonio—Why, my Lord, you see my Irish husband was a little too liberal with his money when he carried it about with him, so he used to give it to me; and we had put by 40 sovereigns of his savings. Well, I took the sovereigns.

The Lord Mayor—What all? Mrs Antonio—Every one, your Lordship, because you see we wanted to get the money from Prince Esterhazy, to pay the rent which was fast coming round. So I paid all the expenses.

Mr Hobler—And who discharged the matrimonial expenses. Mrs Antonio—I did. I paid the Scotch Minister, but I found the Doctor did not want a wife at all, at all.—(Loud laughter.)

Dr Antonio—I paid for the marriage. I did pay a great deal of money; I did spend my money in Limerick, along with my wife's other husband; but she sha'nt be his wife no more—never no more —— me—(Laughter.)

Mrs Antonio—I won't have anything to do with you, I tell you.

The Lord Mayor—Upon my word, Doctor, you have acted very unlike a professional gentleman. Not content with running in the poor man's debt, you ran away with his wife and seduced her.

Mrs Antonio would not allow that she had been seduced; she could, she declared with an appealing look to the whole room, produce the certificates of both her marriages. [Loud laughter.]

The Lord Mayor believed the woman's statement, and believed that she considered in marrying the Doctor, she had committed no offence. His Lordship declared that in the course of his life he had never heard of so singular a proof of credulity and simplicity.

During the whole of this conversation this female spoke without the slightest hesitation, and with an air of sincerity which it was impossible to question.

The Lord Mayor thought that the case was one in which government ought to interfere, by sending the Doctor, by virtue of the Alien Bill, to practice at home.

Mr Hobler observed, that government would not, in all probability, act upon the Alien Bill, except in cases of political offence.

The Doctor was then sent to the officers of Whitechapel parish, with directions that a very sharp eye should be kept on so dangerous a person; and Mrs Antonio, who seemed shocked upon hearing that she had done wrong, was discharged.

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ROLLS COURT.—MAY.

*Hunloke vs. Gell.*

This case came on for decision, on the question whether a power of appointment under a marriage settlement should be cousidered to be executed by a will, which, without allusion to the property over which it had extended. By the decision of this proposition the property of the late Sir Thomas Hunloke would be extensively affected. By his marriage settlement the late Sir Thomas Hunloke had a power of appointment given to him over a considerable property, in reference not only to the interests of his future heir, but to provisions for younger children. He died at a very early age, leaving a son and two daughters. At that time he possessed other estates besides those subject to the marriage settlement, all of which were included in the words of his will, without reference to the power of appointment. In case the will should be adjudged a sufficient appointment the chief portion of the settled estates would accrue to the heir, together with the accumulations of a very long minority. In the event of a contrary decision, the major part of the accumulations would fall to the two daughters of Sir Thomas Hunloke, one of whom is Lady Albemarle, to the amount of nearly 26,000*l.* each.

Mr Pemberton supported the proposition of the validity of a will, as an execution of a power of appointment, where, from its provisions, such appeared to have been the intention of the testator, although not directly expressed. This view of the point he rested chiefly on the case of Lownds v. Lownds, 1 Young & Jervis, 445, which was lately decided in the Exchequer, before the present Chief Baron.

Mr Tinney and Mr Munro supported the same view of the question.

Mr Bickersteth appeared for the daughters of Sir T. Hunloke, and contended against the intention of executing the power of appointment being manifest on the face of the will.

His Honor decided that the disposition of property permitted by the power of appointment to Sir T. Hunloke, had been made by him inclusively in the general provisions of his will. He was of opinion that the will which he would read thus—after the words 'all my real and personal estates,' he would add, 'including my settled and unsettled estates,' was a full and valid execution of the power of appointment. The results of this decision would be most consistent with Sir T. Hunloke's power and the interests of the family. It would have been monstrous that these young ladies should receive 26,000*l.* each out of the family property, and leave the heir inadequately supplied with the means of supporting his title and station.

His honor then directed some minor details in the arrangement of this property, respecting the fortunes of the ladies, and certain annuities and other charges.

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*Gale vs. Pitt.*

Mr Lovatt for the plaintiff. This bill was filed against the trustees to a marriage settlement for breach of trust. In 1802, the plaintiffs were married. Defendants became trustees to a sum of 1000*l.* settled on the husband and wife for life, remainder to their children. This sum was at that time invested in mortgage, and the interest was well paid till 1816, when, with the consent of the plaintiffs, the mortgage was assigned, and defendants received the 1000*l.* which they held in their hands uninvested to the present day, paying the interest, however, regularly. By the words of the settlement they had been directed to invest this sum in Government security. Since the year 1816, the public stocks had risen considerably, and the plaintiffs now prayed that defendants should make good the loss which had been incurred, by not having made an investment in 1816.

Mr Bickersteth, for the defendants, represented that the second trustee had never acted, and should not be considered liable to this suit, as the other trustee and defendant had always proceeded with the concurrence of the plaintiffs.

His Honor said that the second defendant should not certainly be rendered answerable for the proceedings of his co-trustee. With respect to the latter, it was evident he had acted with the consent of the plaintiffs. They were, therefore, not entitled to relief against him. But as they had, on the contrary, acquiesced in what was certainly a breach of trust, he should direct the money to be now invested for the benefit of the children, and leave each of the parties to pay their own costs.

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## RECENT ENGLISH DECISIONS.

BILL OF EXCHANGE.

Held, on special demurrer, to be not necessary to aver an acceptance to be *in writing*, though the statute 1 & 2 Geo. 4. requires acceptances to be so.—*Chalié vs. Belshaw*, 6 Bing. 529.

A bill, purporting to be accepted by S. and C., who banked with the plaintiffs, was presented the day it became due, and paid by the plaintiffs in the belief that the acceptance was genuine. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants: Held, that the holder of a bill is entitled to know on the day when it becomes due, whether it is an honored or a dishonored bill; and that if he receive the money and is suffered to retain it during the whole of the day, the parties who paid it cannot recover it back. Bayley J., who delivered judgment, observed, 'In this case we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given on the very day on which the bill was paid.—*Cocks vs. Masterman*, 9 B. & C. 902.

Action by indorsee against acceptor of a foreign bill, drawn in a set. The first part, accepted

by the defendant, was produced. The second part had arrived in England before the other part was accepted by the defendant, and immediately indorsed by him to his father, redeemable on the substitution of other securities. It was so redeemed when due. The defence attempted was, that the property in the subsequently accepted part (the first,) passed to the father, and that, therefore, nobody but he had a right to sue upon any part of the bill. Held, that the plaintiff was entitled to recover,—by three Judges, on the ground that the transfer to the father was conditional; by Parke J., on the ground that the acceptor was estopped, by the act of acceptance, from taking the above line of defence.—*Holdsworth vs. Hunter*, 1 L. & W. 163.

[On this case the reporters remark, in a note: 'The reasons which led the court to a unanimous resolution are so various, that it is not easy to state any principle determined by it. The preponderance of opinion, however, seems to be, that the acceptor cannot, when sued himself, set up his own act as invalidating the bill, although he cannot, on the other hand, by any act, vary the rights and liabilities of the other parties to the instrument.']

A. accepts a bill for the accomodation of B., who has drawn it in a fictitious name, and afterwards indorses it (for value) in the same name; A. being sued by the indorsee, cannot dispute the indorsement.—*Cooper vs. Meyer*, 1 L. & W. 172.

The indorsee cannot recover against the acceptor of a bill of exchange, where the acceptance is not in his own handwriting, without proving either a general authority from the defendant to the party who wrote it to accept bills for him, unrevoked at the period of the acceptance in question, or a particular authority to accept the particular bill; unless, indeed, the indorsee have taken the bill on the faith of on authority in that party to accept bills in the defendant's name.—*Cash vs. Taylor*, 1 L. & W. 178.

Where a bill of exchange is given for the price of goods, which, it was stipulated, should be of good merchantable quality, it is no defence to an action on the bill, that the goods have proved to be of inferior quality.—*Obbard vs. Betham*, 1 L. & W. 180.

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FORGERY.

On an indictment for forging a note of the Royal Bank of Scotland, it is not necessary to show by the charter of the bank, that it has power to draw or issue notes; such power is sufficiently recognised by the 48 G. 3. c. 149. s. 16., and the 55 G. 3. c. 184. s. 23. (Stamp Acts.)—*Rex vs. M'Keay*, 1. Ry. & M. 130.

Where, in an indictment for forging or uttering a receipt at the foot of an account, merely the initials of the name of the person purporting to give the receipt were used, the indictment was held bad, as it did not shew what the initials meant.—*Rex vs. Barton*, 1 Ry. & M. 141.

It must appear on the indictment, that the person, whose name is forged, had authority to receive the money.—*Id. ibid.*

On an indictment for forging an order, it is necessary that the order should import, that the person, in whose name it is made, has a disposing power over the subject of the order; or it should be proved, that the person, in whose name it is made, had such power.—*Rex vs. Baker*, 1 Ry. & M. 231.

Where the prisoner, at the time of uttering a note, represented that the maker lived at a particular place, and in a particular line of business; it was held, that proof of this representation, in addition to proof that the note was not made by the person so described, is sufficient to prove it a forgery. And though it appears in evidence that there is another person of the same name, but in a different line of business, in will not be requisite for the prosecutor to prove that the note was not made by that person.—*Rex vs. Hampton*, 1 Ry. & M. 255.

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FORMER RECOVERY.

Plaintiff sued the defendant for negligence, alleging special damage. The matter was, by an order of Nisi Prius, afterwards made a rule of by Court, referred to an arbitrator, who directed a verdict for the plaintiff. The order of reference precluded the plaintiff from bringing any new action. The plaintiff having commenced a fresh action against the defendant, the declaration in which was the same as in the first, with the addition that the plaintiff alleged himseif to have paid certain sums for which he before merely alleged himself to be liable, and named other additional persons who had ceased to employ him in consequence of the defendant's negligence; the Court refused to stay the proceedings; although they said that, looking at the plaintiff's declaration, it would be mercy to him to do so; and Gaselee J. added, that he was of opinion that the first action might be pleaded in bar to the last.—*Dicas vs. Jay*, 6 Bing. 519.

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HOUSEBREAKING.

If a person raise the sash of a window, which was before partly open, so as to admit himself into a house, this is not a breaking of the hoase.—*Rex vs. Smith*, 1 Ry. & M. 178.

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HUSBAND AND WIFE.

If, on a joint charge against husband and wife for receiving stolen goods, the husband is committed, the wife cannot be committed also.—*Rex vs. Archer*, 1 Ry. & M. 143.

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INTERESTED WITNESS.

The broker who effected the policy being produced as a witness, refused to part with it, until assured by the Judge that if the plaintiff recovered the Court would prevent the money from being paid over till the witness's lien upon it for premiums was discharged. Held, that he was nevertheless a competent witness for the assured.

In answer to a question from the defendant's counsel, he stated that the plaintiffs had become bankrupts, and that he expected a dividend. Held, that this also did not render him incompetent.—*Hunter vs. Leathley*, 1 L. & W. 125.

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INSURANCE.

A person insuring is bound to communicate every intelligence he has that may affect the mind of the underwriter either as to the point whether he will insure at all, or as to the point at what premium he will insure.—*Rickards vs. Murdock*, 1 L. & W. 132.

The question being whether the loss was total or partial, it ought to be left to the jury to say whether the particular injuries could not have been repaired so as to render the ship seaworthy for the voyage, and not whether she was generally not worth repairing thoroughly.—*Thompson vs. Colvin*, 1. L & W. 140.

A commercial treaty between Great Britian and Portugal, gave a full reciprocal liberty of commerce and navigation as to all goods, except articles the property of enemies of either power, or contraband of war. Another clause specified certain articles which were to be considered as contraband or prohibited: Held, that the exception applied only to importations in time of war.

Goods consisting principally of arms and ammunition were shipped for Madeira, and declared in the manifest. They were insured for the voyage, and specified in the policy. The consignor's agent at Madeira, acting under an impression that the importation of such goods was prohibited, and that he was doing the best for all parties, gave information of the shipment to the authorities; the goods, before they were landed, were seized by the government, and never restored: Held, that the underwriters were liable.—*Willbraham vs. Wartnaby*, 1 L. & W. 144.

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LARCENY.

On an indictment for larceny, it appeared that the prisoner having goods in pawn at a pawnbrokers, took other goods of greater value than those pawned, for the purpose of redeeming those already pawned and borrowing further sums; instead of giving the goods which he had shewn to the pawn-broker's servant, he substituted other goods of less value, sealed up in a parcel similar to that in which the goods before shewn, were contained, and received the things first pawned in exchange. Held, that the receipt of the latter pledged by the pawner is not larceny.—*Rex vs. Jackson*, 1 Ry. & M. 119.

Obtaining a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if taken *animo furandi*, is a larceny.—*Rex vs. Longstreeth*, 1 Ry. & M. 137.

If a postman deliver a letter to the wrong person, who receives it supposing it to belong to himself, and on finding that it does not, appropriates money contained in the letter to himself, this does not amount to larceny, there being no *animus furandi*, when the letter was first received.—*Rex vs. Mucklow*, 1 Ry. & M. 160.

Where a prisoner had prevailed on a tradesman to bring goods, which he proposed to buy, to a given place, and promised that they should then be paid for: and further prevailed on the tradesman to leave the goods with a third person, and afterwards obtained them from that third person, without paying the price: this was held to be a felonious taking, if *ab initio* the prisoner's intention was to get the goods into his possession, and not to pay for them.—*Rex vs. Campbell*, 1 Ry. & M. 179, and *Rex vs. Pratt*, Id. 250.

If a person take goods which he has agreed to buy, and which he did not intend at the time to pay for, but meant to get them into his possession, and dispose of them for his own benefit without paying for them; the taking will be deemed felonious.—*Rex vs. Gilbert*, 1 Ry. & M. 185.

If a man take away goods, jointly with the owner's wife, it may be a larceny in the man, notwithstanding the consent and assistance of the wife.—*Rex vs. Tolfree*, 1 Ry. & M. 243.

## RECENT AMERICAN DECISIONS.

### BILL OF EXCHANGE AND PROMISSORY NOTE.

1. Where I, an endorser of a protested bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest, and notice, promised M, a subsequent indorser who had taken up the bill, to repay him, and afterwards received the bill from M, proved it in his own name against the estate of the drawees who had failed, and received a dividend upon it, and retained the bill; it was *held*, that I was liable on this promise to repay M, unless he could prove that his promise was made under a mistake of the facts. *Martin vs. Ingersoll.* 8 *Pick*, 1

2. During the Christmas holidays vessels are not allowed to clear out at the Havana; *it seems* therefore, that during the continuance of the holidays, it is not necessary to write a notice of the dishonor of a bill, to be sent to a foreign port. *Ibid.*

3. The maker of a note, who has been committed to jail on execution on a judgment in favor of the holder, but has not paid the note, is still liable to be sued by an endorser who pays the amount of the note to the holder; and the suit of the endorser may be brought while the maker is still in jail in the prior suit. *Cole vs. Cushing.* 48

4. An action for money had and received may be maintained by the endorsee of a note against the maker, although the note was signed by the maker merely for the accommodation of the payee, and the maker never received either money or any other consideration for signing it. *Ibid.*

5. Where the holder of a note with several endorsers in blank, sues the maker and writes over the name of the first endorser an order to pay it to himself, the holder, but without striking out the names of the subsequent endorsers, he does not thereby discharge them; and therefore one of them who pays the amount of the note to the holder, may sue any of the prior parties. *Ibid.*

6. A bill of exchange, which was endorsed by C of New Orleans, and was payable in Boston, was owned by T of New York. The bill was dishonored by non-acceptance August 11, and H, who was T's agent at Boston, wrote to T by mail the same day, informing him of the dishonor of the bill. T, by an answer dated August 13, requested H to give the notices. H accordingly had the notice to C put into the mail at Boston, August 19. *Held*, that the notice was not seasonable, even if T was justifiable in sending to H, instead of sending notice himself directly from New York to New Orleans. *Talbot vs. Clark.* 51

7. It *seems*, that T was bound to send notice direct from New York to New Orleans. *Ibid.*

8. In an action by the holder of a bill of exchange against an endorser, a subsequent endorser, is not a competent witness to charge the defendant, without a release from the plaintiff. *Ibid.*

9. The defendant, a merchant in the country, directs the plaintiff, his correspondent in England, to purchase goods and to draw for the price on a banker in London; who also authorizes the plaintiff to draw. The plaintiff, having similar orders from other persons, purchases goods in his own name for them and for the defendant indiscriminately. On the 30th of July he draws a bill in his own name at three months' payable on account of the defendant. The bill is drawn on account generally, in payment for several parcels of goods, and not in payment for goods purchased for the defendant; the defendant however being indebted to the plaintiff to the amount of the bill for goods already sent to him. The banker accepts the bill, having then in his hands only a small balance due to the defendant, but in September he receives funds beyond the amount of the bill. A few days before the 2d of November, when the bill falls due, the accepter becomes a bankrupt. On the 26th of November a stranger, through mistake, pays the bill for the honor of a person not a party, claiming however to hold the plaintiff and all the other parties, but no notice of the dishonor is given to the plaintiff. Afterwards the person who paid the bill recovers judgment against the plaintiff upon a default by consent. In an action by the plaintiff against the defendant to recover the price of the goods, it was *held*, that the plaintiff, having had reason to expect that the bill would be paid by the drawee, was entitled to notice of its dishonor; that he could not waive notice to the prejudice of the defendant; and that the action could not be maintained. *Grosvener vs. Stone.* 79

10. A judgment in an action against the endorser of a note in his favor, on a verdict which was rendered on the ground that the action had been brought before notice was given to him, is no bar to another action commenced after notice was given; and consequently such judgment is no bar to a suit in equity brought against the endorser and his assignees in order to enable the plaintiff to obtain the benefit of the assignment. *New England Bank vs. Lewis.* 113

11. Where a note is made by A payable to B and endorsed by C at the time it is made, C becomes a promiser on the note, and may be declared against as such. *Baker vs. Briggs.* 122

12. It *seems*, that from the form of the note, without any other evidence, C will be regarded as surety to A. *Ibid.*

13. In an action by B against C as a promiser of such a note, the declarations and admissions of A are not admissible against C, for A is himself a competent witness. *Ibid.*

14. A bill of exchange was drawn in Boston, by J. R. B. on H. & Co. of Richmond, who accepted it for the accommodation of the drawer, and on his engagement to place funds in New York, where the bill was payable, to meet it at its maturity. The bill was endorsed by the plaintiff, also for the accommodation of the drawer, with a knowledge of all the circumstances, and he advised the drawer to adopt this mode of raising money. The drawer having failed and assigned his property for the benefit of his creditors, before the bill became payable, it was dishonored and returned to Boston, where it had been discounted for the drawer, and where the plaintiff took it up as endorser. The assignment provided for indemnifying the plaintiff against all endorsements made by him on account of the drawer, and there were funds in the hands of the assignees to which he could resort for the payment of the bill. *Held*, that the acceptors were exonerated, and that the holders must resort to the funds in the hands of the assignees, for payment of the bill. *Bradford vs. Hubbard.* 155

15. *Held*, also that the recovery by the acceptors, in a process of foreign attachment commenced for their indemnity of a sum of money due to the drawer, but which was subject in their hands to the control of a court of equity in Virginia, did not affect the case. *Ibid.*

16. A covenant by the payee of a promissory note not to sue the maker within a limited time, cannot be pleaded in bar to an action brought within the time by a person to whom the note was endorsed after it became due. *Perkins vs. Gilman* 229

18. Two notes dated in October and falling due in January and February following, were endorsed by the defendant, who was an Englishman, a master mariner and an unmarried man, having no home in this country, and, when in England, residing in Liverpool. On the 12th of December he wrote from Boston to the holder at Providence, that he should leave Boston in a day or two for Liverpool, but in fact he remained in Boston till the middle of March. The holder did not know of this fact nor of his residing in Liverpool, and sent no notice to him of the dishonor of the bill; neither did it appear that the holder made an inquiries for his residence. *Held*, that due diligence had not been used to give notice to the endorser. *Hodges vs. Galt.* 251

18. A promissory note given to a creditor, is not payment of the previous debt, where it is not intended as such by the parties. *Watkins vs. Hill.* 522

### CONTRACT.

1. An indenture whereby a party agrees to furnish money for the purpose of 'carrying on the general business of brokerage, embracing, as time and opportunity shall give, the *vending of lottery tickets*,' is illegal on the face of it. *Williams vs. Woodman.* 8 *Pick.* 78

2. Assumpsit on the following memorandum, viz. 'It is agreed that B is to have the refusal of a certain farm situated &c, which was bought by me for the sum of 1940 dollars upon his complying with certain conditions from the first day of April next, which conditions the aforesaid B has complied with.' *Held*, that this was a valid contract, and that it expressed the price for which the land was to be conveyed. *Bird vs. Richardson.* 252

3. Where an agreement, signed by three persons, was afterwards altered by the consent of two of them, by adding seals to the names of the signers, and interlining the words '*jointly and severally*,' and was afterwards delivered by those two, it was *held*, that the alteration did not vitiate the instrument with regard to those two, but they were bound by the instrument in its altered form. *Warring vs. Williams.* 322

4. A and B having been partners, A gave an obligation to B to indemnify B against a note on which C was promiser, C having become so merely as surety for A and B; C afterwards advanced money to B, with which B paid the note. *Held*, that A was liable to B on the obligation, for the amount of the note paid by B. *Ibid.*

5. If A sign his name on a paper in blank, and by parol authorize B to write an agreement of a certain description over his name, he will be bound by such agreement when written over his name by B. But if B add a seal to the name of A, and deliver the instrument as A's deed, A will not be bound. *Warring vs. Williams.* 326

6. Where a promissory note payable in machine cards at cash price, was made to a person who was afterwards put under guardianship, and the guardian assigned to the plaintiff 'the balance

which may be due on the note after deducting what may be due to one H. not exceeding 500 dollars,' the note being then in the hands of one F. pledged for the payment of H's debt, and the guardian guarantied to the plaintiff 'the payment of the note according to its tenor, after deducting the claim of H, which shall not exceed 500 dollars,' it was *held*, in an action upon the guarantee, that if H. had lost his lien, still the plaintiff's claim under the guarantee was not thereby augmented, for only the balance after the amount due to H, was assigned and guarantied to the plaintiff. *Carew vs. Denny.* 363.

7. *Held*, also, that the assignment and guarantee did not include a sum which had been previously paid and endorsed upon the note, there having been no fraudulent concealment on the part of the guardian, of such endorsement. *Ibid.*

8. *Held*, also, that H's demand, not exceeding 500 dollars, was to be paid in money, so that although cards of more than 500 dollars' worth at the appraised cash price were sold to produce that sum, only the balance of cards remaining due on the note was assigned and guarantied. *Ibid.*

9. Such balance having been accepted by the plaintiff, of the maker of the note, it was *held*, that if there was any fraud as to the quality, the guardian was not responsible for it, it being the duty of the plaintiff to examine the cards. *Ibid.*

10. Where the plaintiffs agreed to perform work for the defendant upon a canal, and the defendant agreed to make payments 'from time to time by certificates from the engineer as the work advances,' it was *held*, that the plaintiffs might bring an action without having given notice to the defendant of a certificate previously made, each party being bound to take notice. *Pinderson vs. Shepherd.* 379.

11. The defendant gives the plaintiffs a written contract, by which, after reciting that he places his son with the plaintiffs to learn the art of printing, 'to stay till he is twentyone years of age,' the defendant agrees, 'in consideration of the son's being so old' (he was then eighteen), to pay the plaintiff a stipulated amount if the son does not continue in the plaintiffs' employment six months after he is twentyone. The son enters into the plaintiffs' employment in pursuance of the agreement, and is instructed by the plaintiffs in the art of printing, for some months, when he leaves the plaintiffs without cause. *Held*, that there was a sufficient consideration for the defendant's contract and that he was liable on it to the plaintiffs. *Phelps vs. Townsend.* 392.

THE JURISPRUDENT.

BOSTON, SATURDAY, OCTOBER 30, 1830.

## CRABBE'S HISTORY OF ENGLISH LAW.

A great many of the topics of inquiry usually embraced in Histories of English Law, as they have been and are, for aught that appears, likely to continue to be written, have become matters of patient antiquarian research rather than profitable investigation to the Student at Law.

The field is wide and fruitful in material to those who feel inclined to enter it either for the gratification of the curious, or for the purpose of preserving, in the recollections of the judicial scholars of the present age, the specimens of skilful and refined logic, of subtle and abstruse disquisitions which pervade the early cases in law and equity—or with the hope of raising a monument to departed and obsolete Law. But one would suppose it had been so often gleaned that the harvest which the most industrious could gather and beat out would hardly pay the labor. It has never yielded a fruitage of very grateful or nutritious character—or been like a 'vintage of showering grapes.'

To every body but Lawyers the subject has always been repulsive and uninviting. And their attention, especially on this side of the Atlantic, has been drawn to it more from the necessity imposed on them of comprehending, in some degree, the spirit and reason of some portions of this early system of Jurisprudence, than from the attractiveness or interest of the study.

The very annunciation with which all the writers on this subject set out, from Fortescue down, and the object which they avow, as their purpose to accomplish, viz.—to shew *that the English 'Laws are not only all good, but the very best,'* strikes the reader with such a conviction of hopelessness in the task, as to lead him to forego the labor of accompanying them through the attempt. They seem to think it necessary to begin their commentary or history by assuming or asserting that their Law is the richer for its mixed and dissimilar character; wiser for its continual additions, accretions and mutations from Saxon, Dane and Norman Codes; freer and more liberal from the introduction and incorporation of the arbitrary principles of the civil law—the Bulls of the Holy See, and the decrees and opinions of ancient, but not always wise Ecclesiastics; in short as the perfection of reason two hundred years ago and improving ever since. These persevering attempts to find a sound reason for everything in the English code, to shew that wisdom is at the bottom of the well, and to try to draw it up—are no less absurd than hopeless. If we are never to know their law till we know the reason thereof, we may as well give up the pursuit now as ever. The universal sentiment of men has passed its disapproving sentence upon many of its doctrines, and will upon more, and justly. It is not altogether that the times or the Law have changed. New directions have been given to the pursuits of men, and, of course, new applications of the principles of the ancient law have been made; but those principles remain. It is the false covering which has been cast off—the perverse construction which has been abandoned, the abuses which have been corrected.

We believe a much more useful service would be performed by those who attempt historically to illustrate the Law, if, instead of carrying their readers, step by step, through all the changes, revolutions and diversities thereof, from the Confessor down to the last of the Tudors, they would be at the pains of embodying the principles of Jurisprudence now operative and in force, in some tangible form and within moderate dimensions.

If they find no better era, let them start with Sir Edward Coke as the connecting link between the ancient and modern Law. Let them gather up and assort the wise maxims, the learned decisions and the sound doctrines of the old jurists; and running down in 'the clear and bright paths' of modern Law, which have been illuminated by the full illustrations and profound discussions of later, and more liberal and cultivated minds—give us a digested summary of the innovations, modifications and changes which have been introduced.

In a volume of nearly 600 pages which Mr Crabbe has published under the title of a History of the English Law, six pages only are allotted to the Reigns of the four last Kings. We believe we may safely assert that a greater advance in Jurisprudence by legislative and judicial labors has taken place during the short reign of Geo. IV. then was made under the auspices of all their Majesties from Alfred to the Edwards. Mr Crabbe might safely enough have left the three or four first lines of Kings to Mr Justice Blackstone, Sir Mathew Hale and Mr Reeves. Who cares to read a Chapter of 40 pages octavo upon the Saxon Laws, and the various learned disputes, therewith connected, about *feudal tenures, hundreds, tithings* and *wapentakes*?

As little instructive and useful is a great portion of the historical materials, between the earliest dates and the time of the falsely styled English Justinian. The march of the Science of Law like that of Civil Liberty was slow. The fault lay as much with the people as the Sovereign. Kings have generally been willing to give as a boon what they could no longer withhold as a right. The English people in the earliest times, we are inclined to think, made as great advance toward the confirmation of their liberties as they could bear, and enjoyed as much freedom as they knew how to use wisely.

It would seem to be going back far enough for illustration or useful research, if the legal historian, who writes for the present age, would begin where we fix the boundaries of human memory—or at the time, whereof, in the language of the Law, the memory of man runneth not to the contrary.

That would be giving up, at once, a little short of 1000 years of unsubstantial and shadowy lucubrations; and we should hardly then have approached the point of breaking day.

We do not believe the public would have been the loser if Mr Crabbe had jumped this period altogether. Not much, we think, is gained by way of confirmation of modern law, or on the score of legal learning, by going very far behind Sir Edward's text and commentary. What that great man neglected to collect or thought unworthy of a place in his immense repository of legal learning may as well be omitted by us. It would be some satisfaction to know where we started, if we may not where we are to end our career. The eye is dazzled by the indistinct and general glimmer. We would gladly fix on some visible point of concentration. We would bring the lights now scattered and drawn out in such a lengthened and interminable line, within the eye's range; and turn their combined illumination upon some reasonably limited period of time.

We should be rejoiced to feel assured that, in our own time, while we are walking in the ancient and settled ways of the Law, we are also yielding ourselves to the guidance of the 'gladsome light' of modern, and more liberal Jurisprudence.

ERROR. On page 108 of this day's paper, in case of *Hunloke vs. Gell*, in the 4th line, after 'to the' should be added '*power, disposed of the.*'

## RECENT ENGLISH PUBLICATIONS.

Principles of Conveyancing, designed for the use of Students. With an Introduction on the Study of that Branch of Law. By Charles Watkins, Esq., of the Middle Temple, Barrister at Law. The seventh edition, with the Author's last Corrections, and with very considerable Additions, and a copious Index. By Richard Preston, Esq., Barrister at Law.

GRAY AND BOWEN, No. 141, Washington Street, Boston, have recently published the following valuable works.

I. A DESCRIPTION OF TREMONT HOUSE; WITH ARCHITECTURAL ILLUSTRATIONS.—4to.

'Jam scires ab introitu primo—herculentum et amvenum videre et diversonium.' APULEIUS, M. A V.

This work is embellished with a copper-plate engraving, representing the front of the house, and thirty lithographic prints, exhibiting the details of the structure. Its object will be understood by the following extract from the preface.

'The present publication is intended to satisfy a curiosity, which frequent inquiries for a description of Tremont House were supposed to indicate.

'Its original plan was to furnish such particulars relative to this establishment as strangers might wish to possess, but it has been extended so as to comprehend many architectural details, which will probably be interesting to mechanics; as much of the ornamental work of Tremont House was copied or adopted from books, not commonly in their hands, and has not before been executed in this country.

II. AN EPITOME OF UNIVERSAL GEOGRAPHY; or, a Description of the various Countries of the Globe; with a view of their Political Condition at the present time. With sixty Maps. By NATHAN HALE.

III. A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By GEORGE CRABB, A. M., Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

IV. THE VESTAL—A TALE OF POMPEII. 1 Vol. 12mo.

'Oh Time, thou beautifier of the dead,
Adorner of the ruin.' CHILDE HAROLD.

V. AUTHORSHIP. A Tale. By a New Englander over Sea. 1 Vol. 12mo.

VI. AN ORATION; Delivered before the Phi Beta Kappa Society, Cambridge, Mass. August 26th, 1830. By the Rev. ORVILLE DEWEY.

VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 23.

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PICKERING'S REPORTS, Vol. 8th. This day published and for sale by HILLIARD, GRAY & CO. Oct. 23.

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This day received by GRAY & BOWEN, 141 Washington Street.

THE WESTMINSTER REVIEW, No XXV. for July 1830.

Contents: 1, The Ballot: 2, Carwell: 3, Government of Lower Canada: 4, Wilson's life of Daniel de Foe: 5, Greek Lexicons: 6, Physiology and Cultivation of Trees: 7, Game of Life: 8, Dobell's Siberia: 9, Bishop of London and Sabbath Breaking: 10, Three Courses and a Dessert: 11, Clarendon: 12, Moorsom's Nova Scotia: 13, Religious Disabilities: 14, Stamp Act and Synod of Somerset House: 15, Patronage of Art, and the President of the Royal Academy: 16, Distress of the Country: 17, Egyptian Notation: 18, Great Britain and France: Postscript to the Article on the Ballot.

The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis, relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist. Oct. 23.

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DANE'S ABRIDGMENT OF AMERICAN LAW, in 9 vols. with an appendix. A few complete sets for sale by HILLIARD, GRAY & Co. H., G. & Co. will also supply the ninth vol. and the appendix to those who are owners of the eight volumes, and the appendix separate to those who have the ninth. Oct. 23.

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ENGLISH LAW BOOKS. This day received and for sale by HILLIARD, GRAY & Co.

Browne's Chancery Practice, under the New Orders with the Sanction of the Court, in 2 vols. 8 vo.

Willoch on the Laws of the Medical Profession, 1 vol. 8 vo.

Finelly's Law aud Practice of Elections, 1 vol. 12 mo.

Crabbe's History of the English Law, 1 vol. 8 vo.

Oct. 23.

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PRINTING. The Printing House of I. R. BUTTS, corner of Washington and School Streets, is supplied with materials suitable for Book, Job, and every other description of Printing. Oct. 23.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Europe possess Dictionaries, which have kept pace with the advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is trusted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

It will be comprised in one large volume, 8vo. Oct. 23.

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HILLIARD, GRAY & CO. No 134 Washington Street, Boston, have in press a Trearise on Corporations, with an appendix of the Corporation acts of each state, by Joseph K. Angell, author of a Treatise on Water Courses, Tide Water, Limitations, &c. Oct. 23.

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LAW BOOKS.—HILLIARD, GRAY & Co. 134 Washington Street, have on hand a large Stock of *American and English Law Books*, comprising a complete assortment of the best editions of all works in general use. They also purchase and sell second hand Law Books—terms liberal.

H., G. & Co. supply any volumes that may be wanted of Massachusetts or Pickering's Reports.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep,3,50.—Calf, $4,00

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THE JURISPRUDENT

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, NOVEMBER 6, 1830. NO. XV.

## MEDICAL JURISPRUDENCE.

### INSANITY.

Continued.

James Hatfield was indicted and tried in Westminster Hall, in the year 1800, before a special commission, for having on the 15th of May then last 'maliciously and traitorously encompassed, imagined, and intended to put the king to death, by buying and procuring a certain quantity of gunpowder and leaden bullets, with which he loaded a pistol; and having so armed himself, repaired to Drury Lane Theatre, and there discharged the same at the person of the king.'

These facts were fully proved. But it appeared that he had some years before received several almost deadly wounds on the head in the field of battle; that since that time he had been liable to violent accesses of delirium, sometimes fancying himself God or Jesus Christ, and at others venting the most horrible blasphemies against the divine persons. That he had long entertained the opinion that the public and solemn sacrifice of his own life was necessary for the salvation of mankind, and occasionally imagined himself called upon to destroy others, even his own child, by divine injunctions.

Mr Erskine, who conducted the defence with more than his usual ability, endeavored to show that there was no intention on the prisoner's part of taking the King's life, but only of appearing to attempt it to insure his own condemnation. In this the learned advocate was, perhaps, not entirely successful; but he principally insisted that it must be considered an insane action at all events, as produced by an *imaginary belief* of a commission from God. It was, he contended, the unreal nature of the causes leading to the act, that so advantageously distinguished this case from those of Earl Ferrars, Arnold, the assassin of Lord Onslow, and others who, when they committed their several crimes, were actuated thereto by circumstances *really existing*, and could not therefore be esteemed the victims of any mental delusion. This was certainly an over-statement, at least as far as Earl Ferrars was concerned. For it does not at all appear, from the evidence given on his trial, that Johnson had really injured him, but only that having failed, in punishment for some *supposed* injuries, to expel the man from his farm, he then resolved on a more barbarous revenge. Nor is it quite evident that Hatfield, because he conceived his own public execution necessary for the preservation of the human race, must therefore justify to himself the murder of the King, as the proper means of insuring that event. But we must do the orator the justice of exhibiting his subtle distinction, as illustrated by himself. After alluding to the cases above mentioned, he continues:—'There was another instance of this description in the case of a most unhappy woman, who was tried in Essex for the murder of Mr Errington, who had seduced and abandoned her and the children she had borne him. It must be a consolation to those who prosecuted her that she was acquitted, as she is at this time in a most undoubted and deplorable state of insanity; but I confess, if I had been on the jury who tried her, I should have entertained great doubts and difficulties: for although the unhappy woman had before exhibited strong marks of insanity, arising from grief and disappointment, yet she acted upon *facts and circumstances* which had an existence, and which were calculated, upon the ordinary principles of human action to produce the most violent resentment. Mr Errington having cast her off and married another woman, or taken her under his protection, her jealousy was excited to such a pitch as occasionally to disorder her understanding; but when she went to Mr Errington's house where she shot, she went with the express purpose of shooting him. That fact was unquestionable; she went with resentment long rankling in her bosom, bottomed on an existing foundation; she did not act under a *delusion that he had deserted her*, when he had not, but took revenge upon him for an actual desertion.'*

We have heretofore stated our conviction that cases of dubious insanity must oftentimes occur, where no judge or jury can be certain of deciding rightly. In this opinion we are borne out by Beck, Male, Foderè, and many other distinguished names; and we may here add the authority of Erskine. Enumerating the various species of madness, he observes:—'Another class, branching out into almost infinite subdivisions, is where the delusions are not of frightful character, but infinitely various, and often extremely *circumscribed*; yet, where imagination *(within the bounds of the malady)* still holds the most uncontrollable dominion over reality and fact; and these are the cases which *frequently mock the wisdom of the wisest in judicial trials*, because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind, their conclusions are just and frequently profound, but the *premises from which they reason*, when within the range of the malady, are uniformly false—not false from any defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of attack.'

The trial of Bellingham for the murder of Mr Perceval,—Sir Vicary Gibbs, Attorney General, and Mr Garrow, being counsel for the crown, does not seem to have exhibited that indulgence towards the prisoner, which usually characterises the administration of our criminal law. Mr Alley, on the prisoner's behalf, contended for a postponement of the trial, to allow for procuring evidence of his insanity. He supported the claim by the affidavits of two persons, both declaring the assassin to be unsound of mind, and to have been so since his return from Russia, some two years before. One of these, on hearing of the deed, had hastened to London to give her testimony, influenced as it would seem by nothing else than her entire persuasion of Bellingham's infirmity. But neither had seen him within the last four months. It was therefore objected on the other side, that were he really insane, persons would have been found to come forward and aver it, who had seen and known him during his recent residence in London, and on this ground further delay was refused, and the prisoner, of course, executed. Now granting, as his advocates maintained, that Bellingham was insane only on one topic, namely his imprisonment in Russia, it does not appear at all necessary, that he should have betrayed his weakness to indifferent persons, who never perhaps happened to approach his weak point in conversation, during the four months that he had led a solitary life in London. Nor does it seem quite clear to us what terrible evil could have resulted from a trifling delay, sufficient for collecting witnesses from remote parts of England, although the Attorney General was pleased to remark, that it was 'clearly a contrivance to delay the administration of justice, and that these witnesses were purposely selected, to impose upon the Court a false belief; so that neither the justice of the present case, nor the general purposes of justice, could be answered; upon the contrary, they would be grossly violated, if their Lordships consented to the procrastination proposed.'*

It now becomes our task to consider those cases where mental infirmity has been made the subject of commissions of lunacy. Various, indeed, are the forms of distraction which the mind puts on, often quite harmless in their nature, and provoking in the looker-on a melancholy mirth, yet all liable to elicit strange accesses of violence, if the sufferer be crossed or contradicted in his peculiar fancy. There is no source of insanity more prolific, than an overweening self-esteem. Indeed, egotism enters largely into nearly every case of a mild description. Instances must be present to the mind of every reader, of individuals suffered to go at large in the world, whose excessive admiration of themselves stops little short of madness, and is at least a most complete and unconquerable delusion. Under the influence of this feeling maniacs frequently imagine that their corporeal as well as mental proportions are vastly dilated, that they cannot pass through doors, or be contained in rooms of moderate size. Zimmerman does, however, mention one solitary instance of a lunatic so overwhelmed by his ideal littleness, that he believed himself a barley-corn, and dreaded going out of doors, lest he should be picked up by a sparrow.† But superhuman power and grandeur make up the ordinary pageant of a madman's dream; he holds colloquies with kings and gods alone, and is a king or god himself. Yet on all subjects, not involving his personal importance, he is often thoroughly rational and composed. Lord Erskine, in his defence of Hatfield, gave a curious example of this fact. In the former part of that speech, he says, 'I examined for the greater part of a day, in this very place, (the King's Bench) an unfortunate gentleman who had indicted a most affectionate brother, together with the keeper of a madhouse at Hoxton, for having imprisoned him as a lunatic; while, according to his own evidence, he was in

* Erskine's Miscellaneous Speeches. See a different account of this case in Collinson on Lunacy, vol. i. p. 493.

* Collinson on Lunacy, vol. i. Addendum.

† Reid's Essay on Insanity.

his perfect senses. I was unfortunately, not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact; but not having the clue, he completely foiled me in every attempt to expose his infirmity. You may believe, that I left no means unemployed which long experience dictated, but without the smallest effect. The day was wasted, and the prosecutor, by the most affecting history of unmerited suffering, appeared to the judge and jury, and to a humane English audience, as the victim of the most wanton oppression; at last Dr Sims came into court, who had been prevented by business from an earlier attendance. From him I soon learned that the very man, whom I had been above an hour examining, and with every possible effort which counsel were so much in the habit of exerting, believed himself to be the *Lord and Saviour of mankind*, not merely *at the time of his confinement*, which was alone necessary for my defence, but *during the whole time he had been triumphing over every attempt to surprise him in the concealment of his disease.* I then affected to lament the indecency of my ignorant examination, when he expressed his forgiveness, and said, with the utmost gravity and emphasis, in the face of the whole court, "*I am the Christ!*" and so the cause ended.'

The subtlety of lunatics, in avoiding the exposure of their weakness, is further illustrated in the same speech, as follows. It is told by Erskine, in Lord Mansfield's own words:—'A man of the name of Wood had indicted Dr Monro for keeping him as a prisoner when he was sane. He underwent the most severe examination by the defendant's counsel, without exposing his complaint; but Dr Baillie having come upon the bench by me (Lord Mansfield,) and having desired me to ask him what was become of the Princess, with whom he had corresponded in cherry-juice, he showed in a moment what he was. He answered, that there was nothing at all in that, because having been (as everybody knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence, but by writing his letters in cherry-juice, and throwing them into the river which surrounded the tower, where the Princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry-juice, no river, no boat, but the whole was the inveterate fancy of a morbid imagination. I immediately,' continued Lord Mansfield, 'directed Dr Monro to be acquitted; but this man, Wood, being a merchant in Philpot-lane, and having been carried through the city on his way to the madhouse, indicted Dr Munro over again for the trespass and imprisonment in London, knowing that he had lost his cause by speaking of the Princess at Westminster; and such,' said Lord Mansfield, 'is the extraordinary subtlety and cunning of madmen, that when he was cross-examined on the trial in London, as he had successfully been before, in order to expose his madness, all the ingenuity of the bar, and all the authority of the court, failed to draw from him a single syllable upon that topic, which had put an end to the indictment before, although he had still the same indelible impression upon his mind, as he had signified to those who were near him; but conscious that the delusion had occasioned his defeat at Westminster, he obstinately persisted in holding it back.'

The main difficulty of inquiries in the nature of a commission of lunacy, is not so much to ascertain whether the party be of unsound mind, but whether the unsoundness be of such a nature as to render him incapable of managing his own affairs.—Without the jury find this, as Lord Eldon has very correctly laid down, they do not find enough to justify the lunatic's confinement. We have an evidence of the importance of this doctrine in some recent cases which have attracted the attention of the public. A dispassionate jury has just decided that Mr Davies was capable of administering his own concerns, although the witnesses brought forward upon the inquiry doubtless went far to shew that his general conduct was such as to warrant a suspicion of some occasional mental derangement. It was, however, proved at the same time, that he was not merely competent, but skilful in the conduct of his peculiar business; and on this ground, the jury, aided by the masterly argument of Mr Brougham, and the self-possession of the party himself, when subjected to a severe cross-examination, returned that verdict which declared him equal to the administration of his extensive business. On the other hand, a late example will occur to the recollection of our readers, where all attempts to demonstrate the general incapacity of an individual proved entirely unavailing, although it appeared that he was addicted to acts of extravagance, more especially in the purchase of worthless pictures, quite inconsistent with our conceptions of a rational mind. In the former case the inquisition failed, because no evidence was given of incapability for transacting the ordinary affairs of life; in the latter, because the proof of extravagance was rightly deemed insufficient to justify consigning the unhappy subject to the care of a keeper, and the miseries of a lunatic asylum.

[To be continued.]

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For the Jurisprudent.

Mr Editor—The opprobrium with which the practice of the Law has in all ages been viewed, has in every period of legal history been found not altogether unfounded. It has arisen in part from the inadequacy of the common law to meet the just administration of justice; from defective codes of written laws; from that fallacy of human reason which is a quality of Jurisprudence in general, which presupposes the fitness of general rules to apply to every supposable case; and partly to the improper and nefarious practice of its professors. No profession is indeed exempt from unworthy members; and when in a venal age corruption and self-interest taint the character of those, to whom are confided the sacred trusts of administering law and equity to a large community; when the instruments by which the rights and liberties of the citizen are promoted or abused, from their elevated situation possess an influence, beyond the control of the legislature, it becomes a reflecting people to resort to such methods of relief as may be suggested by the experience of other countries equally enlightened, who have availed themselves of the wisdom and experience of their statesmen and civilians. It has become almost a proverb, that the law in its practice is as much an art as a science, and the noviciate in its mysteries in the present age, when he views the loaded shelves of the tutor, may reasonably shudder at the sight of what he will have to encounter, if he does not despond—and should he lament the choice of a profession, of the least of the labors and hardships of which (the mastery and acquisition of a complete library) he could have had a superficial acquaintance, would not be censured. When, before a very learned Judge of the last century, in the hearing of a cause, the first volume of a work was cited, of which we have now the '*thirtieth*,' such was his surprise at the publication of a new work of reports, that with amazement he exclaimed, '*What, another new Book! What shall we do by and by!*' Can we imagine what would have been his apprehensions had he lived to view the libraries of lawyers of the present day?

It is pleasing to discern through the mist of that love of the English Jurisprudence, which modern critics have with aptness termed the relics of the barbarous ages, a translucent gleam, which promises much relief, not to the community at large only, but to the professors of the science. The late reports of the Commissioners upon the subject of Law Reform have exhibited how susceptible the present practice is of improvement; and with what an unsparing hand the intricate mazes of special pleading may be abolished, without prejudice to the rights of the government and the individual. Perhaps in no prior age could this improvement have been introduced with such effect and safety. It seems to be with peculiar fitness that the period has been chosen—like that of Lord Bacon when he refuted the metaphysics of the schools—when the development of great minds shall have discovered in what chaotic darkness we have been groping, and how easily the mist may be dissipated. As a discipline of the mind, next to the mathematics, the system of special pleading may be ranked and be admired from the depth of reasoning which its structure discovers. But, in sober earnest, we would inquire whether, by the rigid adherence to technical rules which it enforces, much injustice and injury has not been done, and whether its utility is not in a measure counterpoised by the abuse to which it is continually exposed: whether many suitors, who have lost their causes and their fortunes, upon a demurrer or special plea, can understand the reason of their loss, or feel any alleviation to their misfortune by being apprised that the merits of their case have been entirely out of the question?

The rules of evidence, in the present contemplated reform, will remain substantially unchanged, and we know not how they can be amended. But we cannot but greet the suggestions made by the English Commissioners as a singularly fortunate omen of a better, more simple and intelligible practice, and earnestly hope the introduction of the measures recommended in their report, will be protracted to no distant day. In those parts which from their local situation and the necessities of the case, the practice of Federal and State Courts have varied from the common law of England, we have anticipated them, and led the way; and it may be deemed no vanity to presume a hint has been taken from the success and convenience with which our deviations from their path have been attended. But as it regards this country, whose rulers are always willing to profit by the errors and mistakes of other nations, we do hope a similar undertaking will be commenced; and as soon as the experiment has been fairly made in Great Britain, some provision of a similar nature may be adopted. We have many men of eminence and skill, competent to the task, to whose wisdom and prudence the work, however responsible, may be confided, and when we perceive what advantages will result to the poor by the abridgment of unnecessary prolixity, and equally useless expense, the disputes between litigants may be conducted upon more equal justice, the utility and good effect which will attend innovation from old and established errors, will be acknowledged with candor.

Quereus.

## SKETCH OF THE PRESENT CHANCELLOR OF GREAT BRITAIN.

Who could have imagined, twenty years ago, that the son of a citizen of Boston, would fill the high and important office of Chancellor of England; or that one in whose veins was a thorough infusion of American and Colonial blood, should take precedence of all the Lords temporal and spiritual, with the exception of his Grace of Canterbury, and be in right of his office, keeper of the King's conscience—visiter of all the hospitals and colleges of the King's foundation—patron of all his Majesty's livings—guardian of all lunatics, infants and idiots, and Speaker of the House of Lords? Yes, so it is.

> 'There is a tide in the affairs of men,
> Which, taken at the flood, leads on to fortune,—
> A destiny that shapes our ways,
> Rough hew them as we will.'

Of the truth of these two remarks of our great poet, the history of the present chancellor affords pregnant illustration.

John Singleton Copley (Baron Lyndhurst) was born at Boston in America, in 1772. He was the son of John Copley, a painter, of that city; who was esteemed for his virtues, and distinguished by his talents in his profession. Mr Copley, the father of Lord Lyndhurst, married early in life. His lady was a Miss Clark, whose father was a principal merchant at Boston, and agent to the English East India Company for the sale of their teas. Mr Clark acted in this capacity at a time when circumstances rendered it an office critical and hazardous in the extreme. It is needless to advert to the causes of that war, which ended in the complete severment of the United States from the mother country. Suffice it, however, to say, that the exaction of the duties on tea was one of the principal causes of that event; and that the populace of the city of Boston were the first to show the example of seizing the chests arrived in English ships, and throwing them overboard, in order to avoid the payment of duty.

On this occasion the office held by the maternal grandfather of Lord Lyndhurst necessarily exposed him to much odium; and accordingly he with his son-in-law, Mr Copley, determined on quitting the United States, and coming to settle in England as an American Loyalist. Soon after the father of the present Chancellor settled in London, he became a Member of the Academy of Painters, and attracted considerable notice by several works of superior merit, and among others, the Death of Lord Chatham, and the Defence of Gibraltar. Mr Copley, however, soon discovered that portrait-painting, which recommends itself to the personal vanity and the household affections of all mankind, was likely to be a more lucrative avocation than the severer style of historical painting; and to the former he successfully dedicated himself, and gradually rose to fortune and reputation.

At the period of his father's settlement in England, young Copley had arrived at a sufficient age to be already initiated into the elemental branches of education. In the metropolis, however, he was sent to a classical school, at which he remained about seven years; whence, in the year 1793 or 1794, he was sent to Cambridge, and entered of Trinity College, the learned mother of Barrow, Newton, Bentley, and other eminent names. Mr Copley had two distinguished contemporaries at this period, at Trinity,—the one, the celebrated Porson—the other, Mr Farish, afterwards Professor of Chemistry at the University.

In his academical career he greatly distinguished himself, having been one of Smith's mathematical prize-men; and he obtained in the examination for the first degree, the high station of Senior Wrangler, the first having been assigned to Doctor Butler, the present very learned Master of Harrow. Mr Copley took the degree of A. B. in the year 1794. He was then in his 22d year. Having remained some further time at the University, and a vacancy having occurred, the high character of Mr Copley secured to him his election as a Fellow of Trinity, worth about £120 for the first year: the emoluments of Fellows gradually increase till the place is worth £500 or £600 annually. Declining, however, to comply with one of the conditions of his fellowship, namely, that he should take orders, Mr Copley surrendered the honor within the stated time, and, returning to London, entered himself on the books of the Temple, as a student at law. The writer of this sketch has the good fortune to be acquainted with two of Mr Copley's contemporaries at this period. One, Mr Wagget, a gentleman of great professional attainment, and Recorder of Cork; the other, Mr Richard Farrell, assistant barrister for the county of Clare. Both these gentlemen concur in stating, that, at this period, the present Chancellor was *ultra* liberal in his political opinions, but that he also applied himself to the study of his profession with a vigor and assiduity worthy all commendation.

In 1800, Mr Copley was called to the Bar, and adopted the Common Law branch of the profession. All his contemporaries agree in stating, that, in the early part of his professional life, he was a very industrious and diligent student. He commenced his labors, unostentatiously, in indifferent chambers in Brick Court, and obtained his first brief from Messrs Willet & Co. Mr Copley was afterwards befriended by Mr Murray, an eminent solicitor, and it must be recorded, to his credit, that the first act of his Chancellorship was to appoint Mr Murray's son his principal Secretary. The subject of this sketch never obtained much character as a special pleader; but he has always been allowed to be a man of varied and comprehensive knowledge in his profession, combined with general scholarship and good taste. Mr Copley chose the midland circuit; and on it, as well as at the Sessions, distanced most of his competitors, among the most formidable of whom was the present Mr Leigh Rough.

Thus having obtained a good share of business, without any, aid, save the exercise of his own talents—having no government connexions—and, at this period, being without the expectation of any such patronage, Mr Copley resolved on assuming the coif; and, in Trinity Term, 1813, he was called to the degree of Sergeant at Law. The motto on his rings was appropriate and significant,—*Studiis vigilare severis.*

Hitherto, (though in good reputation with the public and the solicitors, to the latter of whom, be it remarked, he rendered himself agreeable by his frank and cordial manners) Mr Copley remained unnoticed by his Majesty's Ministers: no great public occasion having presented itself, in which his talents were called into action. The opportunity, however, was not long wanting to bring the Chancellor under the notice of the Ministers; and, like several of his brethren, (among others, Lord Erskine, Sir Vicary Gibbs, and Mr Justice Best) Mr Copley was first known to the Government by his effort in favor of the highest order of criminals—those charged with high treason. Little, however, did the radicals of those days think that the very Wetherell and Copley, whose healths they were toasting at the period of the trial of Watson, Preston, and Co. would so soon after become, the one High-Chancellor, and the other Attorney-General. But as Ophelia says, 'we know what we are, though we know not what we may come to.' Be this as it may, Mr Copley, on the trial of Watson, performed his duty with so much dexterity and tact, though engaged for the prisoner, that Lord Liverpool expressed his satisfaction, and henceforward the Sergeant was marked as one to be promoted. The public and the profession, too, were not less visibly satisfied; and he, who, but a few weeks before the trial of Watson, received a fee of a guinea with thanks, was now sought for by all parties, and briefs began to pour in with a rapidity truly astonishing. Good fortune, like bad, always comes in a lump. At this period, the increasing deafness of Sir S. Shepherd rendered him quite incompetent to discharge the duties of Attorney-General. He was removed to the Scottish Bench, and Gifford, the Solicitor-General promoted in his room. Sergeant Copley was the new Solicitor-General,—a nomination which gave great pleasure to the Bar, but which, six months before, was wholly unexpected, as well by the public as by the gentleman who had the good fortune to obtain the appointment. Mr Copley now thought of changing his condition in life, and he married the niece of the late Attorney-General, Sir Samuel Shepherd. This lady's maiden name was Burnsford; she was the daughter of a factor of that name in Basinghall Street, and in March, 1814, had been united to Colonel Thomas. In the month of June, in the same year, however, Colonal Thomas was forced to join his regiment, and he was killed at the battle of Waterloo.

Sir John Copley was now (1819) introduced to Parliament for Ashburton, under the auspices of the Government, which soon had urgent occasion for his services in the affair of the late Queen. As counsel for the prosecution, Sir John evinced more talent and knowledge than the Attorney-General Gifford, whose speech was a complete failure: while he escaped the obloquy to which both Gifford and Sir John Leach had been exposed. The Government were so well pleased with his services, that they determined to make him Attorney-General,—an opportunity for which offered on Gifford's being made Chief Justice of the Common Pleas.

Mr Copley having obtained the office of Attorney-General, soon after offered himself for Cambridge, and, after an arduous struggle, he was returned, with Lord Palmerston, for that University. Gifford, who had been promoted to the Rolls, now suddenly died at Dover, and Sir John Copley succeeded him, with the prospect of the Seals full in view before him. Hitherto it had been imagined, that Sir John looked up to Mr Canning as his load-star, and that he was willing to stand or fall with that Minister. The event proved the reverse; while Master of the Rolls, he deemed it necessary to purge himself of all taint of Popery. The deed stung Mr Canning to the quick, but it secured to the aspirant the seals at which he had been grasping. Events known to our readers followed in rapid succession. Lord Eldon resigned, and Sir John Copley assumed the seals by the style and title of Baron Lyndhurst.

It remains but to give a general estimate of his Lordship's professional, senatorial, and judicial qualities. As an advocate, Mr Copley was distinguished by coolness, subtlety, and clear and

lucid expositions; nor was he deficient in nervousness and strength; though he oftener prevailed by the more insidious arts which an experienced practitioner generally has recourse to. His legal knowledge was sound and accurate; and he is, perhaps, best described by stating that when at the bar, he was a mean between Scarlett and Brougham—not reaching the forensic accomplishments of the one, and falling far short of the eloquence and general knowledge of the other. As a senator, Sir John Copley was infinitely superior either to Wetherell or Gifford; though he never made a speech in Parliament which will be remembered or spoken of beyond the occasion. All his efforts at the Bar or in Parliament were distinguished by clearness, but there was always a lack of feeling, without which it is impossible to be a great orator. As a Judge, it were, perhaps, unfair thus early to pronounce an opinion on Lord Lyndhurst's labors; but it may be observed, that he gives some tokens of promise in struggling to avoid those deep-rooted errors of his predecessor, by which John, Earl of Eldon so encircled himself, to the 'cureless ruin' of hundreds sent to a premature grave, and thousands yet unborn to the miserable wreck which Chancery has left them.

## ENGLISH CASES.

### WESTERN CIRCUIT.

Before Mr Baron Bolland and a Special Jury.

*Tucker vs. Tucker.*

This cause excited a great deal of local interest, and the Court was crowded to excess by persons anxious to witness the proceedings.

Mr Sergeant Wilde, Mr Gurney, and Mr Moody conducted the plaintiff's case.

The Attorney-General had a special retainer on the part of the defendant, and has, it is understood, already received no less a sum than 640 guineas for his professional services. The Learned Gentleman was assisted by Mr C. F. Williams, Mr Pollett, and Mr Crowder.

The object of this action was to try the validity of a deed of conveyance executed by a gentleman named Tucker, who died in the month of January last, having by such deed made over the whole of his property to his wife, the present defendant. The plaintiff was the relation and heir-at-law of the deceased, and the ground of action was, that the party, not being of sound mind at the period in question, was not competent to execute a legal instrument.

From the opening statement of the plaintiff's Counsel, supported by the evidence of nearly 20 witnesses, many of whom had lived as servants with the deceased, the following facts were elicited:—The deceased had practised as an attorney for a number of years, at a place called Copington, in this county, and some time before he retired from business he went to reside at Bridgewater. In the month of September, 1825, he experienced a shock of paralysis, which deprived him of the use of his left side, and affected his mind to such a degree, that he fell into a state of total imbecility. He had previously been a man of very acute intellect, and was remarkable for correctness of conduct, and great regularity in all his transactions. The effects of his illness was shown in various ways, all tending to show that his mind was diseased. He had no recollection whatever of several persons whom he had well known before. On getting into bed for the night, he would suddenly start up and say that it was time for him to go out and take a ride. He lost all control over his habits, and his person in consequence became quite offensive. Sometimes he would begin to say his prayers, and then burst forth into loud curses, in the very midst of them. Before the shock he had invariably shown the kindest affection for his wife, but from the time it occurred his manner towards her became entirely changed, being extremely irritable, and very often violent. So highly excited was his nervous system, that his wife, fearing that he might commit self-destruction, gave orders that all knives, scissors, forks, &c, should be carefully removed from his reach, and that he should never be left without some person to watch him. He was fed with a spoon, and treated exactly like a child. He was never allowed any money, except a few halfpence, and all his pecuniary affairs were managed by his wife's nephew, Mr Perceval Boyce, a young gentleman, who had since died. In proof of the fact that Mrs Tucker had considered him insane from the commencement of the attack, it was alleged that she had purposely engaged for his nurse a woman who had been in the habit of attending lunatic patients, and it appeared that that person had care of him for some time. Among the numberless extravagances imputed to him, and sworn to in evidence, it was stated by his barber that shortly after the deceased sat down to be shaved, he would jump up in a fit of violent irritation, and drag himself out of the house with the operation performed only on one side of his face, the lather still frothing on the other. It was lastly alleged that while in this state, in the month of May, 1828, he was made to subscribe the deed which was the subject of the present action, and which involved property to the amount of about 20,000*l.*

Two medical gentlemen, Dr M'Mullen and Dr Woodford, described the effects usually produced by paralysis, the latter stating that they were precisely similar to those adduced in evidence on the present occasion.

This summary contains all the principal facts of the plaintiff's case, which, from the great number of witnesses brought forward, and the length of the direct and cross-examinations, did not close till past six o'clock in the evening. It was then agreed by the Counsel on both sides, that the case for the defendant should be deferred till the following morning.

Saturday, Aug. 21.

At nine o'clock this morning the proceedings in the above cause were resumed, when

The Attorney-General proceeded to address the Jury at considerable length. After commenting on the evidence of the several witnesses who had appeared for the plaintiff, he contended that the deceased had at all times evinced his determination to leave his property to his wife. In 1823, when in perfect health, and in the full vigor of his faculties, he made a will in her favor, altering and revoking several previous wills to the same effect. The Learned Gentleman next went on to argue that bodily infirmity, however great, did not necessarily imply the absence of mind, and he should be enabled to satisfy the Jury that Mr Tucker, at the time this transaction took place, was possessed of mind and manners fully sufficient to render any act of his valid in law.

Mr Boyce, the brother-in-law of the deceased, proved to having, by his express desire, instructed Mr Philpotts (the Member for Gloucester) to draw up the deed in question. He was quite convinced that the deceased was of sound mind at the time he signed the deed.

This witness underwent a very long and severe cross-examination, but in the course of it there was nothing whatever disclosed which could impeach his direct testimonies.

Mr Toogood, a surgeon, who had attended Mr Tucker since his illness, stated that he was one of the two attesting witnesses to the deed, and that the deceased was perfectly cognisant of its import at the time he put his name to it. If he (witness) had not thought him so, he himself would never have attested the instrument. At a subsequent period, in 1829, when he had reason to believe that the intellect of the deceased was impaired, he refused to become a witness to another deed, which was brought to him for the purpose, and which the deceased was to execute.

Mr Chubb, the other attesting witness, gave similar testimony, and stated that he had lived for a considerable time in habits of intimacy with the deceased.

John Philpotts, Esq., M. P., deposed to having prepared the deed according to the instructions of Mr Boyce, and he (witness) was the trustee under it. He had repeatedly visited Mr Tucker in 1827 and 1828, and found him perfectly rational on every occasion. He had no more doubt that Mr Tucker was competent to manage his affairs, and dispose of his property at the time he executed this deed, than that he himself was so at the present moment.

Some other witnesses were called who disproved the evidence for the plaintiff.

Mr Sergeant Wilde occupied about three hours in his reply; and after Mr Baron Bolland had gone over a most voluminous mass of evidence, the Jury, at 11 o'clock at night, found a verdict for the defendant.

### LANCASTER ASSIZES.—AUGUST.

Before Mr Justice Bayley.

*Walmsley vs. Brown and Wife.*

This was an action of slander.

Mr Alderson regretted this cause had ever been brought into this Court, as there were other tribunals where justice might have been administered between the parties, but it was the act, not of the plaintiff, but of the defendants, who had forced him to it. His client was a man in very humble circumstances, being a journeyman shoemaker at Preston; the defendants, he understood, were opulent tradespeople in the same place. The injury complained of by this action was likely to carry the most serious consequences to the plaintiff, being nothing less than an imputation made upon his moral character by the defendant's wife, and made in a way the most calculated to give a sting to the infliction. A good name was of value to all men, but doubly so to those who had little else to boast of in the face of the world. It would be shown that upon a late occasion the plaintiff, with some half-dozen others, was standing in the defendant's shop, he and his wife being also present. The defendant's wife, without any provocation, exclaimed, in presence of all these persons, 'Thou'st robbed our Henry of 1*l.* 18*s.* and George Waring will prove it.' Now here was a distinct charge of having committed a felony, accompanied with an offer to prove it judiciously, in order to show that there could be no doubt of it. This pledge of proving a slanderous imputation had been always held as an aggravation of the offence, because it bespoke a seriousness and malignity which might not otherwise be understood by mere words. He hoped the Jury

would mark their sense of the injury by the damages which they gave.

Henry Walmsley, the plaintiff's brother, spoke to the slander charged in the declaration. The defendant's wife repeated it in the presence of several persons.

Cross-examined by Mr Pollock—Witness is a journeyman shoemaker, as is his brother. Cannot say that anybody thought the worse of the plaintiff since these words were uttered of him. The defendant is a pawnbroker in Bold-street, Preston. 'Our Henry,' meant the son of the defendant, who, three or four years ago, went to America. He was a sad wild young fellow, and had given his parents a deal of trouble. He had spent a deal of money in public-houses in Preston. Witness was a boon companion of this Henry's, as was his brother, the plaintiff. The expression 'Thou'st robbed our Henry' could not mean that the defendant had made the young man spend 1*l.* 18*s.* in a public-house. Witness was sure of that. Henry was about 26 or 27 years of age. His mother had never before accused the plaintiff of being the cause of her son's leaving the country. George Waring, who was to prove the truth of the accusation against the plaintiff, kept a 'jerry-shop' (gin-shop) at Preston.

Mr Alderson said he was prepared with more witnesses to prove the slander, if his Learned Friend required it.

Mr Pollock had no wish upon the subject.

Mr Alderson called upon the defendants to produce Geo. Waring, to prove the truth of the slander.

Mr Pollock then addressed the Jury for the defendant. He denounced the action as a most trumpery one, to put money in an attorney's pocket, but he hoped the Jury would disappoint these parties. The Jury must think this journeyman shoemaker exceedingly sensitive on the point of honor to take this serious mode of setting his character right. He (Mr P.) would venture to say that nobody who had heard the words could give to them a felonious meaning. He asked, when a young lady complained of her lover *robbing* her of her peace of mind, whether that could be intended as an imputation of felony?—(a laugh). The truth was, that the defendant's wife, feeling sore that the plaintiff had been, by encouraging her son in his dissipation, the cause of his leaving the country, meant to charge him with that conduct, and nothing more. In whatever way it was looked at, he contended that this was not a case for damages.

Mr Justice Bayley stated to the Jury that in his opinion the expression 'robbing' was too indefinite to be understood in law, as conveying a distinct charge of felony. Had it been 'thief' the case would be different. It would be, however, for the Jury to say whether there was any intention on the part of the defendant's wife to impute a felony to the plaintiff.

The Jury, after a little hesitation, found for the plaintiff—Damages, One Shilling.

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COURT OF COMMON PLEAS—APRIL.

Sittings at Guildhall, before Term, before the Chief Justice and a Special Jury.

*Soames and Another vs. Sugrue.*

Mr Sergeant Taddy (with whom were Mr Sergeant Stephen and Mr Alderson) stated the case. This action was brought against the defendant, who was a member of the St Patrick Insurance Company in Dublin, to recover the amount of a policy of insurance effected upon the ship Sir Godfrey Webster, on a voyage from London to Sidney or Van Diemen's Land, and thence to Singapore and Penang, in the East Indies. The plaintiffs, in the present instance, claimed for the total loss of the vessel, it having been absolutely necessary to abandon and sell it at the Mauritius, at which place it was obliged to put in, through distress, on the voyage homewards from Penang, in July, 1826. She was there surveyed by several persons, and it was found that the damage she had sustained was so extensive, that it would at least require 16,000 dollars (about 4,000*l.*) to be laid out for repairs; and the mate, who, in consequence of the death of the Captain, had become master of the vessel, wished to have an undertaking that the repairs should not exceed 16,000 dollars; but the persons to whom he applied declined doing so, upon the ground that, upon making a further examination of the vessel, more repairs might be requisite. The mate called in another surveyor, who, upon having the cargo taken out of the vessel, was of opinion that it would take nearly 10,000*l.* much more than the vessel was worth, and advised him to sell her. In consequence of this information, and knowing the difficulty of raising money on bottomry, and the enormous interest (25 per cent,) required at the Mauritius for money borrowed in that way, he deemed it prudent, and for the benefit of all parties, to sell the vessel. Under these circumstances the plaintiffs now claimed as for the total loss; and he (the Learned Sergeant) should prove these facts by several witnesses; and he had no doubt the Jury would find a verdict for his clients.

Several witnesses were then examined, who substantiated the above statement. It, however, appeared, from the cross-examination, that the three persons who examined the vessel in the first instance at the Mauritius, were of opinion that it might have been repaired for about 16,000 or 20,000 dollars, and that such repairs would have been sufficient to enable it to proceed with safety on the voyage back to London. It was also proved that, upon breaking up the vessel, the principal timbers in the bottom and other parts were found sound.—The mate admitted that he had made several interpolations in the log-book.

Mr Sergeant Wilde (with whom was Mr Turner) addressed the Jury for the defendant, and contended that there was no pretence for bringing this action. To maintain a claim like the present it must be satisfactorily proved that there was an extreme necessity for abandoning and selling the vessel;—mere expediency would not be enough. The very evidence for the plaintiffs showed that the vessel could have been repaired for about 4,000*l.*: it was insured on this policy for 3,000*l.*, and in another office for a similar sum. The freight was insured upon a valued policy for 5,000*l.*, making 11,000*l.* in the whole, and, as a considerable portion of the ship would have been renewed if repaired at the Mauritius, the owners would have to pay one-third of the expense. Instead of directing the necessary repairs to be done, the mate thought fit to abandon the vessel without any extreme necessity, and throw a total loss upon the underwriter. He should show, beyond a doubt, that the vessel could have been repaired for 4,000*l.* or 5,000*l.* and, having made out that fact, the Jury were bound to find in favor of the defendant.

The examinations of Alfred Ambrose and others, taken upon interrogatories in the Mauritius, were put in and read; and they fully bore out the statement of the Learned Sergeant, as to the possibility of the vessel being repaired at the Mauritius for about 4,000*l.* so as to render her fit for proceeding to London with the cargo.

Mr Sergeant Taddy having replied,

The Chief Justice summed up, and the Jury, after half an hour's consultation, found for the defendant.

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## RECENT ENGLISH DECISIONS.

### POLICY OF INSURANCE.

A policy of insurance stipulated that there should be a proportional return of premium 'for every uncommenced month if the ship should be sold or laid up:' Held, this meant a permanent laying up so as to put an end to the voyage.—*Hunter vs. Wright*, 1 Lloyd & Welsby, 138.

### PERJURY.

On an indictment for perjury, committed on the trial of a cause, the witness, to prove the perjury, stated from his recollection what the prisoner had sworn on the former trial; he had taken no note of the evidence given by the prisoner, and could not say with certainty that it was all the evidence the prisoner had given on the trial; but swore that it was all given on that point, and that the prisoner had said nothing to qualify it: Held, that this was sufficient evidence to go to the jury.—*Rex vs. Rowley*, 1 Ry. & M. C. C. 111.

### INDICTMENT.

An indictment may charge a prisoner in one court as principal in stealing, and in another, as receiver.—*Rex vs. Galloway*, 1 Ry. & M. 234.

An indictment under a statute should follow the words of the statute; thus if a statute make it criminal to do an act unlawfully and maliciously, it is not sufficient to state that it was done feloniously, voluntarily, and maliciously.—*Rex vs. Turner*, 1 Ry. & M. 239.

### PROMISSORY NOTE.

Parol evidence is not admissible to shew that a promissory note, purporting to be payable on demand, was, in fact, by agreement between the parties when it was made, not to be paid until a certain act was done by the payees.—*Mosley vs. Hanford*, 1 Lloyd & Welsby, 176.

If notes, in the hands of the maker, and which may be re-issued, cannot properly be decribed as valuable securities, they may be called goods and chattels.—*Rex vs. Vyse*, 1 Ryan & Moody, 218.

### RECEIVING STOLEN GOODS.

On a joint charge against two for receiving stolen goods, a joint act of receiving must be proved: it will not be sufficient to prove that one received in the other's absence, and afterwards delivered the goods to the latter.—*Rex vs. Messingham*, 1 Ryan & Moody, 257.

### SHEEP STEALING.

An indictment for stealing sheep is not supported by proof that lambs were stolen.—*Rex vs. Loom*, 1 Ryan & Moody, 160.

An indictment under the 7 & 8 G. 4. c. 29. s. 25. for stealing a sheep, is not supported by proof that a ewe was stolen by the prisoner, as the statute specifies both ewe and sheep.—*Rex vs. Puddifoot*, 1 Ryan & Moody, 247.

VARIANCE.

Declaration stated that defendant had told P. & Co. that the plaintiff had injured the sale of oranges sold by them, by circulating a report in the sale room, that *he* (the plaintiff) *then had* three or four vessels laden with oranges between Gravesend and London, by reason of which, P. and Co. has ceased to deal with the plaintiff. The language of the defendant was proved to have been —'The prices would not have been so unsatisfactory if the plaintiff had not before the sale, propagated a report that *there were* three or four cargoes coming up from Gravesend: Held, a fatal variance.—*Wood vs. Adam*, 6 Bing. 481.

WILL.

The testator devised to trustees and the survivor, or the executors or administrators of such, all his freehold messuages, stock or shares in the funds, money in hand, or debts due, and all shares or *property* whereof he was possessed or entitled to, in trust for his wife and children; to be divided on their attaining the age of twentyone. By a codicil, added afterwards, he directed his copyhold estate to be transferred to his wife, until the expiration of the leases, and after that time, or as soon as convenient, or within one year, to be sold for the benefit of his children as directed in the will: Held, that the copyholds did not pass to the trustees; and that the wife's interest determined with the leases.—*Chapman vs. Prickett*, 6. Bing. 602.

## EQUITY.

[Including 3 Russ. Part 3; 4 Russ. Part 1.; and 2 Bligh. Part 4.]

APPOINTMENT.

Devise (so far as was material to the question) of 'all the manors, messuages, lands, tenements, and hereditaments, whereof she (testatrix) had power to dispose.' The question was, whether this devise operated as an appointment of the moneys to arise from the sale of previously settled estates. Held, that it was merely a question of intention, and that the Court could not infer that by a disposition of all lands of which she had power to dispose, she meant to execute a power of appointment, not as to lands, but as to moneys to arise from the sale of lands. The Court said, the question would have been very different if she had devised the settled lands by name. It might then have been argued, that by the devise of the land she meant to describe her interest in the land.—*Adams vs. Austen*, 3 Russell, 461.

A lady had power to appoint by will a certain leasehold estate, and certain sums of three per cent stock, which were standing in the name of the Accountant General of the Court of Chancery. She was entitled to both for her life, and the stock had been transferred to the Accountant General. After bequeathing certain legacies, she 'gave all the residue of her stock to A. B., and all other property she possessed at the time of her decease, except 50*l.* of her bank stock, which she gave thereout to her executors.' It was proved, that she had no bank stock, nor any other, except the stock in Court, over which she had a power of appointment. Held, that the will was a good execution of the testatrix's power as to the three per cent stock in Court; that her pecuniary legacies were payable out of it, and that the will was also a good execution of her power as to the leasehold estate.—*Walker vs. Mackie*, 4 Russell, 76.

[The reporter, in his marginal note, lays it down, that 'a will is deemed a good execution of a power, if it dispose of the subject of the power, although it does not refer to the power.' We submit, however, that this proposition is much too general, and broader than is waranted, either by the circumstances of the case, by the language of the Court, or by former authorities. The case of Farmer v. Bradford, 3 Russell, 354. and 3 Law Magazine, 550., which, if the principle be understood, will be seen not to conflict with the present case, suffices to upset it.]

ATTESTATION.

The question in the cause was, whether the will was attested according to the statute of frauds, and that question depended on this, whether the subscribing witnesses signed their names in the presence of the testator. The peculiar circumstances which the reporter has left to be gathered from the several judgments of the Court, it would be useless to state: the following general propositions, contained in the judgment, are alone of any value. *Per Curiam*, 'Generally speaking, where a will is attested in an adjoining room, if there be a particular part of the room, in which the testator might have seen the attestation, and if there be an absence of all evidence, or if there be doubtful evidence, as to the particular part of the room in which the attestation actually took place, it would be reasonable to presume that it did take place where it ought to have taken place; because it would be reasonable to presume that the professional person present knew the law as to the attestation of wills, and would take care to observe the proper forms. In the absence of all direct evidence, the presumption would be that the witness, ignorant that the part of the room was material, would write upon the writing table where it must be inferred that the writing materials were to be found; and where, it is probable, the candles would be placed.—*Winchelsea vs. Wauchope*, 3 Russell, 441.

## RECENT AMERICAN DECISIONS.

CONTRACT.

12. The want of a counterpart to such a contract does not render it invalid. *Phelps vs. Townsend.* 8 *Pick.* 392.

13. A covenant by an heir expectant, that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenanter. *Fitch vs. Fitch.* 480.

14. A owing B a note, gave several new notes to B altogether being of smaller amount than the old note, and payable at future days. At the same time they entered into a written agreement, that if the new notes were paid 'when due,' the old note should be given up to A to be cancelled, but if any of the new notes were not paid, the old note should be in force; and B in such case agreed, that if he should see fit to enforce the old note, he would enter upon it such sums as A should have paid on the new note, and return the other new notes to A. A paid the first of the new notes, but the second not being paid on the day when it became due, B. had a writ made out on the old note against A and afterward endorsed on the old note the amount which A had paid, and then delivered the writ to the officer, who served it:—

*Held, first*, That payment of the new notes, on the days when they became due, was necessary to entitle A to the benefit of the agreement:

*Secondly*, That A having failed to preform this part of the agreement, B had a right to sue on the old note:

*Thirdly*, That the endorsing of the first payment on the old note, and the returning of the new notes, was not a condition precedent, in order to entitle B to sue on the old note:

But, *fourthly, it seems*, that if the performance of these acts had constituted a condition precedent, they were done seasonably. *Tufts vs. Kidder.* 537.

CHANCERY.

1. A and B were partners. A died. B, who settled the affairs of the partnership, took a part of the stock to himself, and gave notes to the executors of the other partners, and made several payments to them, and paid all the notes but one, on which the surviving executor brought a suit against B. B then brought a bill in equity against the executor, praying for an account of the partnership business, stating various particulars in the accounts with A, by which, he B, was injured, and that if the accounts were fairly settled, nothing would be due to the executor on the note, but a balance would be due to B from the executor, and praying an injunction against the suit at law. The defendant demurred to so much of the bill as did not relate to the partnership dealings and the defendant's capacity as executor, and as to the residue of the bill, pleaded the statute of limitation of four years. The Court sustained the demurrer, and *held* that the payments to the executors did not show any ground for equitable interference unconnected with the partnership transactions, and that the suit in equity as to them was barred by the statute. *Burdilt vs. Grew.* 108.

CONVEYANCE.

1. A grantee, not having been in actual possession of the granted premises otherwise than by leasing them to his grantor and receiving rent from him, executed to a purchaser for a valuable consideration, a deed of conveyance, by 'quitclaim and release' in the form in common use in Massachusetts, which was duly recorded in the registry of deeds. *Held*, that this was a sufficient conveyance to pass the estate, though the release had not a previous interest in or possession of the estate. *Russell vs. Coffin.* 143.

2. Where a grant was made of a right to erect and maintain a dam from the grantee's land on one side of a stream, to the grantor's land on the other, at about the distance of sixty rods below certain mills of the grantor, and a dam was built more than sixty rods below, and afterwards, without any objection on the part of the grantor, was removed twenty rods higher up the stream, but was still below the sixty rods, such removal was presumed to be within the intent of the parties to the conveyance. *Boynton vs. Rees.* 329.

3. *Held*, also, that the grant was not invalid because no consideration was mentioned in the deed; and that to avoid it as a voluntary conveyance fraudulent as against subsequent purchasers, the party objecting to it must prove that no consideration was given. *Ibid.*

4. The erection of the dam and the occupation of it six months in the year by the grantee, it being occupied the other six by a third person, were held not to be conclusive evidence of notice of the grant, as against a subsequent purchaser of the grantor's land. *Ibid.*

THE JURISPRUDENT.

BOSTON, SATURDAY, NOVEMBER 6, 1830.

## SUPREME JUDICIAL COURT.

MARCH TERM—1830.

*John Dodge Ex'r. vs. Thomas H. Perkins.*

We have examined a Pamphlet lately issued from the press in this City, and very *freely* and industriously circulated, containing various matters of fact, law, inference and argument relating to the above named action. The report of the case as published, appears in the name of the Plaintiff.

Most parties are satisfied to get out of the law when they get through with their cases; and are quite willing to leave the business of reporting them to those who are appointed for that purpose. But it is otherwise in this case. The Plaintiff seems quite dissatisfied that the defendant should get off by merely paying what the Court thought, under the particular circumstances of the case, he should pay. Having made a successful thrust at his purse, he thinks it his duty to make another at his reputation.

It is a little remarkable that while he was willing to take the opinion of the Court upon the former, he should choose another forum for judgment upon the latter. It is much the easiest way, oftentimes to argue a case where there is nobody to meet the argument. It is not difficult to give *facts*, where there are no means of contradiction. It is very easy to flourish the sword when the enemy has retired from the field, and the smoke has cleared away so as to give assurance that there is no adversary within gun-shot.

We know but little of the merits of the controversy in the above case. We have not examined it for the purpose of making up an opinion in reference to that matter. The case was very well argued, and we think ably decided. We would avail ourselves of the law which the case contains, and leave the Plaintiff to 'give *facts* not *arguments*, *truth* not *eloquence*.' We like the opinion in this case. Indeed we always feel a pleasure in the perusal of the opinions given by Judge Putnam. They are generally highly elaborate and expressed in pertinent *legal* language. He is peculiarly fortunate in his illustrations and appropriate phraseology. The Court, in the opinion expressed by Judge Putnam, in terms, negatived all charges of fraud or 'intentional misappropriation' of the funds in question, and we can but remark that the Plaintiff would have acted much more wisely to have rested satisfied with the persuasion 'that neither wealth or influence can stay the march of justice in our free land'—and left the defendant to 'his conscience,' and the 'American and European markets; to a correct value of his goods and mercantile faith. We do not believe that the Plaintiff in his *double* or single capacity can affect the quality or touch the value of either. It is beyond his caliber to crack the glass of such a man's honor or faith.

Either the Plaintiff felt less inclined to press the matter of fraud when it could have been met, or his Counsel betrayed their trust; for in the outset they disclaim all such pretence, and so argue the case. The reason for such a disclaimer must have been the want of proof, the danger of that allegation to the issue. Being abandoned by Counsel and Court or never suggested, with what fairness can the plaintiff, who it seems goes for 'conscience and duty' altogether, now come before the public with a Pamphlet of some 100 pages to prove *dishonesty*, and attempt to affect the defendant's reputation? A charge which the Plaintiff could not sustain, and which his respectable counsel would not make, cannot take a feather's weight from the well established reputation of one of our first merchants and most valuable and honorable citizens.

We proceed, however, to give an extract from the opinion of the Court.

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Judge Putnam delivered the opinion of the Court. The questions arising in this case, are, first, whether the defendant is liable to pay interest from the time when he received the money, to the time when the plaintiff, as executor of Unite Dodge, deceased, demanded payment. And if so, then, secondly, upon what amount the interest shall be calculated.

The action is upon an implied assumpsit, and the judgment sounds wholly in damages for the non-performance of the contract or undertaking. If the interest is not included, in the contract, it cannot be given. If it is included, then it should make up a part of the judgment.

This rule applies as well to implied as to express contracts, and to verbal as well as to written promises. Where there is an express promise in writing to pay interest, the amount of the damages becomes a mere matter of calculation. But whether there has been an implied promise to pay interest often depends upon the usages of trade and dealings between the parties, and other circumstances which explain the duty undertaken to be performed. And if upon the whole matter the defendant has not performed it, interest is to be assessed as damages for the breach. If it were not so, the remedy would be incomplete. Those usages of trade and other facts and circumstances, and the dealings between the parties, are proper subjects for the consideration of the jury. But when they are agreed by the parties or found by the jury, the law arising from them is to be declared by the court.

If, for example, one should promise in writing to pay money to another on a certain day, and fail to do so, interest would be added to the amount of damages, notwithstanding the writing did not express it. It would be added as a compensation for the non-performance of the contract. If there were a verbal contract to the same effect, the same rule of damages should be followed. The case of Robinson *v.* Bland, 2 Burr. 1086, is a leading one upon this point. It was before the revolutionary war, and was determined by Lord Mansfield and his able associates, upon sound principles. It was for money lent in France, for the security of which, a bill of exchange was drawn payable at a short sight in England. The bill of exchange however was avoided, because it was given for money lent at the time and place of play. The contract, raised by law, to pay for the money lent, was held to be good, although the security was void. Upon the facts found, the court were to determine whether interest should be payable; and they held that it was to be *inferred* from the facts proved, that the money was to be paid in England at a certain time, and that interest should be added as part of the damages, up to the time of the judgment.

There the borrower, Sir John Bland, died, and there was no express promise concerning interest. The money was not paid. Lord Mansfield said, 'although this be nominally an action for damages, and damages be nominally recovered on it, yet it is really and effectually brought for a specific performance of the contract. For where money is made payable by an agreement between parties, *and a time given for the payment of it*, this is a contract to pay the money at the given time, and to pay interest for it from the given day, in case of failure of payment at that day.' Judge Wilmot in a very able opinion, said, (p. 1083,) the damage was the whole interest due upon the money lent, from the time of its being payable, up to the time of signing the judgment. Interest was added to the principal sum accordingly, and the judgment was for the aggregate sum, as damages for the breach of the contract.

If the money is not paid at the stipulated day, the debtor is in fault. He detains the money of his creditor. So if the money is payable upon demand, interest is allowable after a demand, by writ or otherwise. The law supposes the party to be in fault, if he does not pay upon demand.

The great inquiry is, whether the party has done all that the law required of him in the particular case; whether acting on his own account, or as agent, executor, administrator, guardian, or trustee for others. If he has, he is not accountable for interest; if he has not, he is accountable for it, as a compensation for the non-performance of his contract.

There are cases where the law requires the party to pay over the money which he has acquired, immediately, without waiting for any demand or request of payment; as where he has obtained it by fraud. The promise which the law implies, extends as well to the interest as to the principal sum so wrongfully acquired and detained. In Wood *v.* Robbins, 11 Mass. R. 506, the party was originally and continually in fault.

The same rule applies where the party received the money lawfully for a particular purpose, and misapplied it; as in Fowler *v.* Shearer, 7 Mass. R. 14, where the defendant, (who was an attorney,) should have endorsed it on a note which he held for collection, but did not, and in consequence of his neglect, the promiser was obliged to pay the whole of the note. It was held, that the attorney was accountable for interest as well as principal, and Chief Justice Parsons thought that the interest should commence from the time of payment. That was an action for money had and received.

The same rule is recognized in 1 Sch. and Lefr. 134, where the vendee retained part of the purchase money to pay off incumbrances, but did not. It was determined that it should carry interest, because there was a misappropriation.

The same rule should apply where a party has acted as agent to render a reasonable account, but has omitted to do so for an unreasonable time. Interest should be calculated from the time of the breach of his undertaking. Crawford *v.* Willing, 1 Dallas, 349, note.

If the party were a stakeholder, without fault, he would not be chargeable, notwithstanding the money were in his hands several years. Lee *v.* Munn, 8 Taunt. 45. S. P. in Williams *v.* Storrs, 6 Johns. Ch. R. 353. 'But if (said the Chancellor, the agent had received the money, and neglected for a long time to inform his principal of the fact and wilfully suffered him to remain in ignorance, that his debtor had paid to the agent, there would be equity in requiring the agent to pay interest for here would be a default and breach of duty.'

[To be concluded next week.]

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VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention.

Oct 23.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law.

Oct. 23.

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PICKERING'S REPORTS, Vol. 8th. This day published and for sale by HILLIARD, GRAY & CO.

Oct. 23.

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This day received by GRAY & BOWEN, 141 Washington Street.

THE WESTMINSTER REVIEW, No XXV. for July 1830.

Contents: 1, The Ballot: 2, Carwell: 3, Government of Lower Canada: 4, Wilson's life of Daniel de Foe: 5, Greek Lexicons: 6, Physiology and Cultivation of Trees: 7, Game of Life: 8, Dobell's Siberia: 9, Bishop of London and Sabbath Breaking: 10, Three Courses and a Dessert: 11, Clarendon: 12, Moorsom's Nova Scotia: 13, Religious Disabilities: 14, Stamp Act and Synod of Somerset House: 15, Patronage of Art, and the President of the Royal Academy: 16, Distress of the Country: 17, Egyptian Notation: 18, Great Britain and France: Postscript to the Article on the Ballot.

The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis, relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist.

Oct. 23.

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DANE'S ABRIDGMENT OF AMERICAN LAW, in 9 vols. with an appendix. A few complete sets for sale by HILLIARD, GRAY & Co. H., G. & Co. will also supply the ninth vol. and the appendix to those who are owners of the eight volumes, and the appendix separate to those who have the ninth.

Oct. 23.

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ENGLISH LAW BOOKS. This day received and for sale by HILLIARD, GRAY & Co.

Browne's Chancery Practice, under the New Orders with the Sanction of the Court, in 2 vols. 8 vo.

Willoch on the Laws of the Medical Profession, 1 vol. 8 vo.

Finelly's Law aud Practice of Elections, 1 vol. 12 mo.

Crabbe's History of the English Law, 1 vol. 8 vo.

Oct. 23.

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PRINTING. The Printing House of I. R. BUTTS, corner of Washington and School Streets, is supplied with materials suitable for Book, Job, and every other description of Printing.

Oct. 23.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Euro possess Dictionaries, which have kept pace with t advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is trusted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

It will be comprised in one large volume, 8vo.

Oct. 23.

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HILLIARD, GRAY & CO. No 134 Washington Street, Boston, have in press a Trearise on Corporations, with an appendix of the Corporation acts of each state, by Joseph K. Angell, author of a Treatise on Water Courses, Tide Water, Limitations, &c.

Oct. 23.

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LAW BOOKS.—HILLIARD, GRAY & Co. 134 Washington Street, have on hand a large Stock of *American and English Law Books*, comprising a complete assortment of the best editions of all works in general use. They also purchase and sell second hand Law Books—terms liberal.

H., G. & Co. supply any volumes that may be wanted of Massachusetts or Pickering's Reports.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire: and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1.25.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep,3,50.—Calf, $4,00

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THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

BY GRAY AND BOWEN.

Printed by Isaac R. Butts, No. 25 School Street.

# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, NOVEMBER 13, 1830. NO. XVI.

## MEDICAL JURISPRUDENCE.

### INSANITY.

Concluded.

Numerous, indeed, are the instances of delusion on one subject, which imply no incompetency for properly discharging the duties of an efficient member of society. We will mention two or three. Haslam, in his able work on madness, records a curious case of a well-educated man of middle age, otherwise sensible and well conducted. 'He always stopped his ears closely with wool, and in addition to a flannel night-cap, usually slept with his head in a tin saucepan. Being asked the reason why he so fortified his head, he replied, 'to prevent the intrusion of the sprites.' He was apprehensive that his head would become the receptacle of these imaginary formations; that they would penetrate into the interior of his brain, become acquainted with his hidden thoughts and intellectual observations, and then depart and communicate to others the ideas they had thus derived. 'In this manner,' said he, 'I have been defrauded of discoveries, that would have entitled me to opulence and distinction, and have lived to see others reap honors and emoluments for speculations which were the offspring of my own brain.'

In a very singular pamphlet, entitled 'The Records of Mœstus,' written by a clergyman of the North of England, we find mention of a young student at College, 'who became so deeply hypochondriac, as to proclaim himself dead, and order the college bells to be tolled on occasion of his death; in this he was indulged, but the man employed to execute the task appeared to the student to perform it so imperfectly, that he arose from the bed in a fury of passion to toll the bell for his own departure. When he had finished he retired to bed in a state of profound perspiration, and is at this moment alive and well.'

More painful, but equally illustrative of the existence of monomania, unattended by impropriety or extravagance of conduct, is the case of a young clergyman, who, two days previously to the appointed period of his marriage, was employed in snipe shooting with a friend. Accidentally he received part of the charge of a gun in his forehead. He instantly fell, and did not recover for some days, so as to be deemed out of danger; but at the end of this period it was perceived that he was deranged. The interesting event that was to have taken place, became the leading object of his thought, and all his ideas seemed to stop at this. 'And his conversation was literally confined to the business of the wedding; out of this circle he never deviated, but dwelt on everything relating to it with minuteness; never retreating nor advancing one step farther for half a century, being ideally still a young, active, expecting and happy bridegroom, chiding the tardiness of time, although it brought him, at the age of eighty, gently to the grave.'*

The fact would seem to be, that the mind like the body, is composed of parts, and, therefore, liable to become impaired as to one portion of its powers, while others continue in full vigor. We do not feel any great alarm in broaching this heterodox and material opinion, although Dr Haslam thus remarks on it in his 'Letter to the Lord Chancellor on Unsoundness of Mind and Imbecility of Intellect.'

'Respecting the human intellect, two very opposite opinions prevail among physiologists and metaphysicians. One party strenuously contending, that the phenomena of mind result from the peculiar organization of the brain, although they confess themselves to be as entirely ignorant how the parts of the brain accomplish these purposes, as how the liver secretes bile, how the muscles contract, or how any other living purpose is effected. The other maintains, that we become intelligent beings through the medium of a purer emanation, which they denominate spirit, diffused over or united with the corporeal structure. The former of these suppositions is held by many grave and pious persons to be incompatible with the doctrines of the Christian religion, and if I am not mistaken, your lordship, on a late occasion, after having perused a work attempting to establish such principles, *did incline by rational doubts* to suspect, that these opinions were directed against the truth of scripture.' It is rather singular how his lordship, or any other grave and pious person, should fail to perceive, that the one and the other party equally recognise the existence of an informing soul or spirit divine and incorporeal, but that the former suppose this purer emanation to make the brain its instrument or agent, in which they are borne out by a thousand analogies, while the latter recognising no material agency whatever by which their ethereal principle may condescend to act, are involved in the blasphemous necessity of supposing, that in cases of mental derangement the soul itself becomes insane.

This letter of Dr Haslam's by no means satisfies the expectations to be formed from its high-sounding title. It contains little or no information to guide us in our difficulties, but seems, indeed, only as a covert attack on a dictum of Lord Eldon's in the Portsmouth case, in which the learned earl declared, 'that unsoundness of mind was some such state as was to be contradistinguished from idiotcy, and as was to be contradistinguished from lunacy, and yet such as made him a proper object of a commission in the nature of a commission to inquire of idiotcy, or a commission to inquire of lunacy.' Some mistaken persons may be inclined to join the Dr in his sneer at the clearness and philosophy of this laborious definition, which, indeed, makes an effort to distinguish between things now admitted to be absolutely identical. Dr Haslam strives also to be humorous upon his lordship's declaration, that 'to call a man a lunatic is to attribute to him at times an *extremely* sound mind.' 'How many,' he exclaims, 'would cheerfully consent to become lunatics, if thereby, in lieu of their ordinarily small understandings, they became entitled to intervals of vigorous and powerful intellect.'

Such being the puerile lucubrations of our most learned judges on this subject, it is not surprising, that after the perusal of a great variety of cases, we have been unable to extract one single general rule or principle. Commissions of lunacy are for the most part cruel, but entertaining mockeries. A crowd of doctors are examined to display their learning or their ignorance, and a host of lawyers employed to exhibit their wit, ingenuity, and impertinence. For this display, the unhappy subject has the privilege of paying, and in general it happens, that the inquiry is decided upon facts that might have been got at without the aid of lawyers or physicians. The favorable opportunity of quizzing and brow-beating the medical faculty is seldom neglected by the bar. To what a ridiculous extent this is sometimes carried, Dr Burrows bears the following testimony.

'Under an order of Lord Chancellor Eldon, I was employed to examine into the state of mind of Thomas Hibbert, Esq. As he was represented to possess an income of 25,000*l.* per annum, I thought it right to ascertain his knowledge of arithmetic, judging that he could not be competent to manage his own affairs, if ignorant of its first elements. Accordingly, I gave him several simple sums in addition, division, and subtraction, to work. When I was examined in court, I exhibited the paper on which these several sums were set, and Mr Hibbert's manner of executing them. The defendant's counsel, in summing up the evidence which had been given, inquired, at the same time, pointing to me, who sat in a very conspicuous place in court, what credit was due to a witness' testimony who showed so much ignorance, that he could not spell correctly what he had placed before the defendant, whose competency he pretended to examine? He then referred to the paper which I had produced, stating that the word which ought to be written *subtraction*, was spelt *substraction*. A violent laugh was raised at my expense.' Dr Burrows also states that this occurrence did him temporarily much professional injury!!

The grounds on which it is permitted to invalidate written instruments, such as wills or bonds, were always greatly circumscribed, and have been gradually narrowed by successive decisions of our courts, ecclesiastical and civil. The case of Cartwright v. Cartwright goes to a great length on this subject. It was decided by Sir William Wynn, in the Prerogative Court of Canterbury, Hilary Term, 1793, and is to be found fully reported in the second volume of Phillimore's Ecclesiastical Reports, where the editor remarks, in a note, on its high authority, and the frequent reference made to it in the Court of Probate. It was a dispute on the validity of a will, under the following circumstances. Mrs Cartwright, a maiden lady, being decidedly insane, was placed under the care of a nurse, and attended by Dr Battie. As her delirium was attended by occasional acts of violence, her hands were kept constantly tied. She often demanded her liberty, and called for pen and paper that she might make her will; but her physicians refused, on the ground that she was not in a fit state to execute such an instrument. On one occasion, however, he did untie her hands—whether on account of the symptoms having become more favorable or not, did not appear in evidence—and he allowed materials for writing to

* Beck's Elements of Medical Jurisprudence, p 233.

be given her. She then desired the nurse and another attendant to leave the room, as she was going to make her will, which they did, watching her, however, from the door. From thence they observed her writing and tearing several papers in a furious manner, and otherwise conducting herself with great violence and distraction of manner. She at length summoned them, and desired a candle to be brought for sealing: this also was allowed her. Her derangement continued from this moment until the time of her death. Sir William Wynn decided that this will was valid, as executed during a lucid interval. His principal reasons were, that it bequeathed her property to her brother's female children, who were exactly those among her nearest relatives for whom she had manifested, when sane, the greatest affection. The will was written without blot or mistake, in a remarkably fair hand. The violent actions and gestures observed by the attendants, he explained by supposing that they arose from unsuccessful efforts to express her intentions in writing to her own satisfaction. He observed, that when she had once completed the instrument correctly, she became composed, and required a candle in order to seal it. In this proper—indeed perfect—expression of her intention with regard to her property, she was quite unaided by any one. 'Unquestionably,' says the learned judge, 'there must be a complete and absolute proof that the party who had so formed it, did it without any assistance. If the fact be so, that she has done as rational an act as can be without the assistance of any other person, what then is more to be proved? I don't know, unless the gentlemen could prove by any authority or law, what the length of the lucid interval is to be, whether an hour, a day, or a month.' The broad principle to be drawn from this decision is, that no written instrument can be nullified by proof of the maker's insanity, which does not bear on the face of it, either some impropriety in the design or some incorrectness in the execution. This doctrine is borne out by the following curious case, which occurred at Nisi Prius in the King's Bench, 1809.

It was an action on an annuity bond brought by a Miss Faulder against the executors and heir of Thomas Clerk Jervoice: the defence, lunacy of the obligor. The young lady had been the mistress of Mr Jervoice from the age of eighteen, cohabiting with him for twelve years, and conducting herself throughout with singular propriety, and paying every possible attention to his welfare. When he executed the bond in her favor, he did it with peculiar caution, and the preparers of the instruments and the attesting witnesses bore strong testimony to his competency for the act. The bond bore date 1808.

The following facts were adduced in evidence by the defendants. The lunatic, on the death of his grandmother in the year 1802, became possessed of an estate in Hampshire, whither he immediately repaired, and while the corpse was yet unburied, pulled down the chimneys and levelled the walls of the mansion, himself living in a marquee, sleeping in a stable or a summer house, and cooking his victuals with his own hands under a tree in a favorite vessel, which he called his *conjuror*. The carriage of his grandmother was painted black, by his directions, and exposed for sale under the name of Black Jack. Upon the death of his father, he came into the possession of the family estate and residence, situated at West Bromwich in Staffordshire, whither he repaired, and made a bonfire of all the furniture, himself superintending the conflagration. It was his practice to ride about the country on a jackass, dressed in a white hat, blue trowsers, red morocco slippers, with a flannel shirt next his skin, and over that a white linen shirt, without either coat or waistcoat, wearing sometimes a waggoner's frock. His usual places of residence were tents, stable yards, or coach houses, where he cooked his victuals, and even shaved himself, in his beloved *conjuror*, occasionally sleeping on the boards of a parlor, or the stones of a hall. Much of his time was spent in travelling, his carriage being always filled with pots, pans, silver plates, old china, a bunch of large keys, picklocks to the number of one hundred and fifty, and his inseparable *conjuror*. A carriage which he once made use of was unpainted, until a sudden freak induced him to order three female domestics to paint it on a Sunday, and then he rode out in it, the paint being wet. Fisherwomen were frequently called to him as they were passing by, whose fish he purchased, and whom he employed in mending the lining of his carriages with the petticoats of his maid servants. His female domestics, particularly a woman of the name of Elizabeth Savage, whom he picked up at Birmingham, were the companions of his journeys; and he would frequently stop at night on the high roads making tea and cooking his victuals; on one occasion he performed the process of cooking at midnight on Bagshot Heath, with numerous candles burning round him, to the no small surprise and entertainment of travellers. Staircases became the objects of his aversion, for he thought them unsightly things; and caused the staircase of his house at Egham to be taken down, substituting a ladder in its stead: passages were moreover cut through the ceilings, through which his servants were sometimes obliged to raise themselves into their chambers by ropes and pullies; himself occasionally sleeping on the boards of the ground floor. To his own chamber (when he made use of one) he clambered by means of a chest of drawers filled with large nails drawn out progressively like steps, from the top of which he ascended by ropes. In one of his houses a staircase turning on castors was erected, to serve as a crane, for the purpose of raising his carriage into his chamber windows. Windows were frequently converted into doors, and the doors blocked up. At length he conceived an aversion to the presence of servants; and to obviate their attendance caused the door leading to his chamber from below to be cut in two so as to form a bar, over which his domestics were never allowed to pass; but they placed his victuals on a table in the inside, connected by a rope and pulleys with that on which he was sitting, and thus were his victuals conveyed to him.

The Rev. Holwell Car deposed, that he visited Mr Jervoice about the time of his granting the annuity, and thought him at that time incompetent to a legal disposition of his property. He was confined in a madhouse on the 2d of January, 1809, where he continued to the day of his death.

Lord Ellenborough observed to the jury, that although the inquisition which found Mr Jervoice a lunatic during the period when the instruments in question were executed, was evidence of his insanity, yet that such evidence was presumptive only, not conclusive; and if they should be of opinion, that when he granted the annuity, he had such possession of his intellects as rendered him perfectly aware what he was doing, and in making such a disposition of his property, had followed the dictates of his mind, when fully possessed of reason, their verdict should be in favor of the annuity; provided on the contrary they believed him to have been, during the whole period covered by the inquisition, in a state of decided insanity without any lucid interval, the defendants were entitled to a verdict.

A verdict was returned in favor of the plaintiff.

*Law Magazine.*

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## UNCERTAINTY OF THE LAW.

A man falls into a dispute with his neighbor, touching an account, or any of the other matters of interest or feeling which men from the beginning of the world have been prone to dispute about. The parties discuss the question with each other, and pass through all the gradations of temper—from amiable civility to angry hostility—which are usual in oral polemics. They part in most inflaming wrath, and the claimant, before he has digested the venom of his spleen, runs to his counsel, tells his story in his own way, forgets those facts which are against him,—relates the rest with that sort of exaggeration which is natural to a party,—undertakes to prove the whole case as he has stated it,—and asks for legal redress. After such an examination of the statement (necessarily a most imperfect and inadequate examination,) as the counsel can make on such an occasion, a suit is accordingly instituted,—the trial comes on,—the plaintiff's witnesses are heard; they reduce in a great degree the coloring which the party himself had given; the defendant's witnesses prove many new facts, which totally change the complexion of the case,—it is decided in favor of the defendant, and the plaintiff ever after complains of—THE UNCERTAINTY OF THE LAW.

The fault, it is evident, was in himself. If he had told the truth in the first instance, he might have saved his money, time and temper. We recollect to have heard of a juggler who had the faculty of enlarging his chest, so as to make a difference of twelve or fourteen inches in the circumference of the upper part of his body—and who astonished and alarmed an eminent tailor, by being measured for a coat in his contracted form, and expanding himself when it came to be tried on. The party who misleads his advocate, acts like the juggler. The suit which would have exactly answered his purpose, as his case appeared when it was laid before counsel, pinches him most uncomfortably in the region of the pockets, when a posterior mass of facts comes to be added at the trial. The difference is, that the juggler understood his own practical joke, and did not complain of the clumsiness of the tailor, or the uncertainty of his art.

It certainly sometimes happens that a party wilfully misrepresents to his counsel the facts upon which his claim or defence is grounded; but the case more frequently occurs of which we have above sketched an instance, where the misrepretation is not exactly wilful, but such as arises from natural bias and prejudice, when a man forgets the true duties of his legal adviser, considers him rather in the light of a judge, than an advocate—and labors to give him such a statement as will convince him that the client is right, rather than one which may enable him to give correct and judicious advice. The party deceives himself first, and then his lawyer.

From what principles of human nature does this arise? From very obvious ones, which we do not now stop to explain. The phenomenon is not of

rare occurrence; it is to be met with in the various scenes of life. How often does it happen that the greatest difficulty which the physician has to encounter, is that of obtaining from the patient a candid statement of his symptoms?

At the present day every man has a fling at the uncertainty of the law. Yet upon investigation it would appear that in at least nine cases out of ten, the uncertainty complained of, is not in the LAW, but in the FACTS to which it is to be applied. The law has sins enough of its own to answer for;—defects sufficiently abundant—contradictions—doubts—even absurdities, which ought to be removed or amended,—but, with all these we repeat that, in proportion to the number of disputes which arise between man and man, there are very few cases, in which, if the facts were clearly ascertained, any respectable member of the profession could not without hesitation say what would be the law.

The event of LITIGATION is indeed almost always uncertain: the LAW rarely so. Nor could any plan be devised for destroying this quality of litigation. If the most minute, distinct, and intelligible rule were laid down for every variety of possible circumstances, (which, by the by, never has been or can be done,) there would remain sources of uncertainty almost as fruitful as those which now exist. For after all, what would be the rule of law proper to be applied in any case, would depend entirely upon the *facts*, and those facts must be proved by human testimony and to the satisfaction of a human tribunal; the testimony and the tribunal being both human, therefore both fallible;—the *former* liable to incorrectness or incompleteness occasioned by intentional falsehood, imperceptible bias, or defect of memory—the *latter* (throwing out of view wilful error as of rare occurrence,) equally liable to misdecision from prejudice, misapprehension or defect of judgment.

These are faults not of this or that particular system, but of human nature. They will be entirely cured, whenever mankind shall be rendered perfect in honesty, memory, apprehension and judgment, but not till then. Meanwhile, can human wisdom afford no alleviation of the evils actually arising from this source? Yes—a great deal, by so shaping the law of evidence, as to facilitate as much as possible, the investigation and discovery of the truth. The law cannot compel a liar to tell the truth, nor a weak man to tell it correctly, but it may provide such a mode of extracting the testimony as shall be best suited for the detection of the first, and the correction of the second, and it may at all events take care that the natural and necessary difficulties of the inquiry, shall not be increased by arbitrary and absurd rules for the exclusion of any light which might have been useful. This is a vast and most interesting subject,—one which we have merely hinted at now, but intend to consider at large hereafter. It is in this branch of the law, if in any, that reform, *radical* reform, is wanted.

In addition to this, the mode pointed out by law for the selection of those who are to decide upon the evidence when produced, should be such as may afford the greatest attainable security that they shall be men of integrity, competent learning, sagacity, and intellectual vigor.

By regulations of this kind, thus much may be effected, that the injurious consequences of the inherent and incurable vices of all human judicature shall not be unnecessarily aggravated; but when all is done, there will remain quite enough to establish the maxims, that the event of LITIGATION must always be UNCERTAIN, and HUMAN JUSTICE always imperfect.—*Journal of Law.*

## LEGAL EDUCATION.

With the ignorant and the prejudiced, and even with many not included in either of these classes, the profession of the law labors under an odium arising from the supposed fondness of lawyers for disputation, and an excessive habit of talking inherent in their dispositions. We admit the justness of the charge as applicable to some. It cannot be otherwise than that a study, the aim of which is to bring forth the powers of the mind into action, that action consisting for the most part in *speaking*, should have the effect alluded to, upon the uneducated and the thoughtless—upon those whose taste has not been corrected by a classical education, and whose judgment has not been disciplined by meditation, and habits of close analysis. Advocates of this description must necessarily give vent to their crude ideas in loose and tedious harangues; and when nature has blessed, or, probably, most would say, cursed such with lively imaginations and great volubility of tongue, the effects, under which such numbers have suffered, have entailed a reproach on the whole profession. The reproach is unjust.—There will, necessarily, be like diversities in the characters of lawyers, as of other men; some will he modest, others impudent; some learned, some ignorant; some refined, others again, coarse; some eloquent and interesting, others, dry and tedious. The study and practice of the law, more than of any other science, has the effect of sharpening the intellect from the frequency of nice discrimination—and the mind is more expanded, not only on account of the broad principles of morality, that lie at the bottom of the rules regulating the conduct of man, and upon which the law is based, but also through the necessity of an acquaintance with the circle of arts and sciences, and of the characters of men: a knowledge of all which should combine to constitute the lawyer, in our idea of the term. If then the fondness for disputation and talkativeness, we have seen charged against the profession, mean a habit of close discrimination, nice, but not unmeaning distinctions and precision, to any, even the greatest extent in the use of language, we would very willingly plead guilty to the charge, and offer not one word in our defence.

But still more is charged against us; as if the advocate were raised in some measure above the law—exempt from the perplexities and anxieties so harassing to his clients, and had nothing to do but reap the harvest sown amid the dissensions, the bickerings, the misfortunes, the crimes and the tears of their fellow creatures. 'Wo unto you also, ye lawyers, for ye load men with burthens grievous to be borne, and ye yourselves touch not the burthen witn one of your fingers.' They charge the lawyer with the effects of their own follies—their own mistakes—their own guilt. The truth is, an honest practitioner is a great and positive good. We may appeal for the truth of what we are about to say, to the candor and generosity of numbers. How many heated tempers have been cooled by the calm advice of an advocate? How many, prompted by their passions, to wreak their vengeance upon an enemy, in open defiance of the peace of society, or foolishly to jeopard their little property in suits to gratify their pride or temper, have been induced to smooth the one, and lay aside the other, by the prudent suggestions of their adviser? Without lawyers the strong hand would usurp the place of the cool head; and the bad humors of mankind, which are now dissipated in suits, would exhibit themselves in a more tangible and pernicious shape.

Judge Brackenbridge remarked, that in the nature of things, the profession could not but be respectable; and as a proof of it, added, it was perhaps too much coveted: many embarking therein against their better genius. If they do this from any expectation of sudden or great wealth, disappointment will be the result. We doubt whether the mere thirst for money will ever make a great lawyer—there must exist an innate love of the science, which will alone prompt the student to the toil and patient industry, that will finally bestow on him, together with the honors of his vocation, that extensive and enduring practice, the sure source of riches. The feelings, then, which hurry so many to the legal ranks, must arise from a consciousness of the respectability and the influence which a knowledge of the law gives its professors. It is, however, radically erroneous, to make any young man a lawyer, who has not a previous liberal education. The feeling, nevertheless, is natural and correct, and requires only to be properly regulated. Something analogous to the case of the ignorant man, who seeing the advantages possessed by his educated neighbor, proposed to give his own son a quarter's schooling in Latin.

In our country, a government of laws, that profession which devotes itself to the study of the constitution and laws, must have great weight. Every member of the community feels, that he may be called upon at times to require the assistance of an advocate. Questions arising from the almost infinite variety of engagements between man and man, present themselves in so entangled a shape, that it requires a legal mind to unravel them. This feeling of dependance, if we may so call it, applies with equal force to the sister profession of medicine—and in each, superior information and judgment may be developed, to the great benefit of the applicant. The idea, we may add, of the lawyer and the orator, are in a great degree associated in this country: as was the case with the nations of antiquity. In England it may be different, from obvious reasons; though we doubt in its full extent, the propriety of Burke's remark concerning that respectable body, the lawyers of his own nation; there are too many shining examples to the contrary. Here, however, the image of the great lawyer is associated with that of the eloquent man, and to the honor of the profession, we think, correctly so. It, moreover, opens a road to the highest dignities of the state; to political distinction—to temporal fame and grandeur. All these considerations—the celebrated names that have adorned the science, from those of the great Greek and Roman advocates, down through the long, illustrious catalogue of British jurists, to those who flourish in our own times, and on our own soil, have cast an halo over the name of lawyer, which extends itself to the meanest of the profession. It should be the duty then of all interested in the success of the bar, to see that this lustre be in nowise dimmed, and to inculcate what appears to us the precept properly deducible from what we have said. That every student should bring with him to the active exercise of his professional duties, a mind thoroughly educated in the languages—sciences—and generally, all literature—to these let him add industry

and close attention to the reasons and distinctions of the science—integrity of course, he must possess; for that, however, he must look to something else than a mere course of legal studies—then let him not speak until he has thoroughly studied and understood his subject; if he have, he will *talk well*, which can surely be no reproach to any one, whether he be or be not a lawyer.—*Ib.*

## ENGLISH CASES.

### LONDONDERRY ASSIZES—AUG.

The King *vs.* Bartholomew Kennedy, David Dickson, William Boyd, John M'Neil, Jonathan Mullin, Daniel M'Peake, William Magill, Robert Woods, Alexander M'Naght, James Scott, and William Orr.

This was a case which excited much interest, as the Government had sent the Attorney-General down to attend the prosecution—a circumstance very unusual, and the Court was crowded to excess to witness the proceedings.

About 11 o'clock, *Bartholomew Kennedy, Jonathan Mullin*, and others, were arraigned for having assembled in arms, with Orange flags and decorations, on the 12th of July, and with having committed sundry aggressions on the houses, property, and persons, of divers Roman Catholics, mentioned in the indictment.

Mr Sheil, as Counsel for the traversers, moved the Court for a postponement of the trial until next Assizes. He commenced his observations by stating that he did not complain, on the part of his clients, of the brevity of the period which had intervened between the date of the alleged offence and the present time. His clients, he said, were perfectly prepared to establish their innocence of the crimes imputed to them, by unimpeachable witnesses. Under other circumstances they would much prefer proceeding at once to trial—indeed it was their interest so to do, for they would thus be saved the serious inconveniences attendant upon a new appearance, to answer the same charge. On these and many similar topics the Learned Counsel dwelt with happy force of illustration. He then remarked that publications of the most inflammatory and unjustifiable nature, affecting the characters of his clients and touching on the transactions for which they were to be tried, had issued from the daily press—publications in which not merely was the guilt of the prisoners at the bar assumed as incontrovertible, but their conduct on the day in question stigmatised with all the virulence of vindictive calumny—themselves pointed out as objects of universal execration, and punishment the most severe called for and anticipated. This violation of every principle of justice (said Mr Sheil) took place when the Judge who was to try the case was in the adjoining county, and the Jury whose province was to decide on it about to be impannelled, under all the impressions such assertions were obviously intended to create. His Lordship would soon have an opportunity of seeing from what quarter these observations emanated, and would, he trusted, agree with him that they constituted sufficient ground for the postponement requested, in which he was happy to say the Attorney-General and the Crown Lawyers, with the love of justice which characterised them, fully concurred. Mr Sheil then handed to the Bench the speech of Mr George Dawson to the constituency of Dublin, assembled at Morrison's to receive his final determination on the invitation they had subscribed to him to offer himself as a Representative for that city.

His Lordship read the document, observing that he entirely coincided in the observations made by Mr Sheil—that publications such as these were calculated not only to poison justice at its very spring, but absolutely to prohibit the possibility of administering it. He knew it was a recognised, and he much wished it had been a better respected, principle, that persons accused of any crime should be tried by a Jury devoid of previous impressions; that printers were culpable in a high degree for giving currency to such expressions as those now complained of; that at the last Assizes at Enniskillen a case of much importance had been postponed on similar grounds, and he made some observations on the imprudence of such expressions being used in any public meetings on charges which were likely to come before Courts of Judicature. His Lordship highly complimented the Attorney-General and Crown Lawyers of the North West Bar, for the good feeling they had manifested; and after a most interesting and instructive series of constitutional observations, concluded by granting the motion, and admitted the prisoners to bail.

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### VICE-CHANCELLOR'S COURT—APRIL.

*Wilding vs. Bolding.*

His Honor has been occupied for several days in the hearing of this cause, which is one of much importance, and displaying circumstances of a novel description. The principal question is, as to the next of kin of a Mr John Laurence, of Norfolk, in Virginia, merchant, who died in 1814, intestate. A very considerable sum of money (nearly 20,000*l.*) has been obtained out of Court under very 'extraordinary' circumstances, by parties representing themselves as next of kin of the intestate, and the present proceedings originate on a petition, to have the money replaced back into Court, to abide the result of the petitioner's claim, as being the next of kin and only legal heir to the deceased's estate.

Mr Bickersteth, Mr Knight, and Mr Smith have been heard at considerable length on behalf of the petitioner, and numerous affidavits have been read in support of the pedigree.

The Solicitor-General and other Counsel are to be heard on the behalf of the respondents, and the cause is likely to occupy several days yet.

His Honor has intimated his intention of taking no other business until the above cause is disposed of.

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### ROLLS COURT.

*Wilson vs. Halliley.*

In this case his Honor gave judgment. It was a case of construction of a will. The testator, after having directed the disposition of his personal estate, bequeathed a sum of 5,850*l.* to certain of his relatives, with remainder to their issue; and this sum he ordered to be raised by the sale of the rents and profits of his real estate. The question in the case was, whether the words 'sale of the rents and profits,' &c, were to be construed into an immediate mortgage of the estates in question? or, whether the 5,850*l.* should be raised by the application to that purpose of the *annual* rents and profits.

His Honor was of opinion that this was a case of intention alone, and to be decided by a careful consideration of the context of the will. Had the doubtful words stood alone, the intention of the testator must have been that the sum bequeathed should be immediately raised, as otherwise his objects might be defeated. But he afterwards directed that, in case any of the legatees should die before the sum should be raised, the bequest should descend to the issue lawfully begotten. Here he manifestly contemplated, not an immediate sale, but the necessity of a certain time elapsing before the legacy could be vested. Again, he authorised the trustees to lease out the estate; also, to defray the expenses of his nephew's education out of the rents and profits. He also left to his nephew the land which the latter held of him, subject to the application of its rents and profits to the purposes aforesaid; a similar bequest he made to another relative, on the same condition. These directions, especially the latter, afforded undoubted evidence that the real intention of the testator was, on the whole, different from what appeared on the simple construction of the bequest of the 5,850*l.* That sum should, therefore, be raised on the annual rents and profits of the estate alluded to.

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*Bradshaw vs. Tasker, &c.*

This was a bill filed to obtain the direction of the Court as to the will of Johnson Bradshaw, who died, leaving a very considerable property. There were two difficulties in the case. First, whether a bequest of the testator, for the purpose of educating Roman Catholic children, should be applied according to his direction; or whether, uninfluenced by the late Act of Parliament, it should fall, and go over to the King? The second question was, whether the two of the executors should lend to a third a sum of 5,000*l.* on his bond, and with common interest, according to a power intrusted to them by the testator? On this point they wished to be guided by the opinion of the Court.

The former point was reserved for future discussion, when all the proper parties should be before the Court. On the latter, his Honor was of opinion that it would be advisable to direct an inquiry before the Master, whether the executor in question, Mr Thomas Darwin, was in such circumstances as would render the loan advisable.

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### COURT OF COMMON PLEAS.

Sittings in Banco at Westminster Hall.

*Harmer vs. Mitton.*

This was an action tried before the Chief Justice at the late Sittings at Guildhall, and was brought to recover the sum of 60*l.* for the keep of a race-horse called Figaro. It was stated at the trial that the horse was bred by the plaintiff, and was kept for some time by him after it was bought by the defendant. In order to prove the purchase of the horse by the defendant, a letter, in his handwriting, was read, in which he acknowledged having bought the horse; and it also appeared that there was an agreement that the plaintiff was to keep it in his possession until paid for.

Mr Sergeant Wilde moved, on behalf of the defendant, for leave to enter a non-suit, on the grounds that there had been no proof upon the trial of any actual contract of sale or purchase between the parties. There had been no parting with the horse, no tender to the defendant; and it was proved that the plaintiff had a lien on the horse, and, consequently, it remained his property until paid for. Besides, the evidence relied on at

the trial would not have been sufficient to support a claim for the price of the horse. The Learned Sergeant then cited several cases, which he considered decisive on this subject.

The Court granted a rule to show cause, the Chief Justice observing that it struck him as strange upon the trial that the plaintiff had not proceeded for the price of the horse.

*Hickman vs. Wakley.*

Mr Sergeant Wilde moved for a rule to show cause why the verdict found for the plaintiff in this case should not be set aside, and a new trial granted, on the grounds that it was given contrary to evidence. The action was brought upon a bill of exchange for 104*l.* accepted by Mr Wakley, the proprietor of the *Lancet*, in consideration of a quantity of paper to be supplied by the plaintiff for the use of that publication. After the acceptance of the bill in question had been proved, the case, on the part of the defendant, showed that the bill was given in anticipation of paper to be delivered for the use of the *Lancet;* that only three reams had been received by the defendant, who refused to take any more, finding that the paper was of an inferior quality, and quite unfit for the use of the *Lancet*, and, if used, would have tended to injure the sale of that work. The plaintiff was made aware of that circumstance, but he insisted on furnishing the rest of the paper of the same quality. The case, on the part of the defendant, was proved by three witnesses. The Jury, however, thought to find for the plaintiff, but he (Mr Sergeant Wilde) had no hesitation in saying that the verdict was contrary to all evidence in the case, and that a new trial ought to be granted; indeed it appeared to him that the Jury did not well understand what they were considering.

The Court granted a rule Nisi.

## RECENT ENGLISH DECISIONS.

### AWARD.

In a suit, instituted to enforce the payment of legacies against the real and personal estate of the testator, an order was made, referring all matters in difference between the parties to the determination of two arbitrators: the arbitrators afterwards made their award, ordering the executors to pay a certain sum to the complainants, in full satisfaction of all demands against the executors and the testator; but giving liberty to certain of the defendants, who, under the will, took interests in the real estate of the testator, to prosecute their claims, either at law or in equity, in like manner as if the order of reference had never been made. Held, that the intention of the order of reference was, that the rights of all the parties should be adjusted; and, therefore, as the award was not final, it must be set aside.—*Turner vs. Turner*, 3 Russell, 494.

### BARON AND FEME.

Under articles, made previous to marriage, a married woman had a separate property, with a power of appointment over it, by deed *or other writing*, &c. She joined her husband in a promissory note for 130*l.* advanced by him to the husband. Other sums were subsequently advanced, as to which the wife did not join in any security. Held, that her act was an equitable appointment under the settlement to be satisfied from the rents and profits of that property, and not by sale or mortgage. The Court would not view it as a security.—*Field vs. Sowle*, 4 Russell, 112.

If a feme covert insist upon the increase of undue influence by the husband she must prove it; it is not for the plaintiff to prove a negative.—S. C.

### BOND.

In equity, a creditor, who has been restrained by injunction from proceeding at law while the debt was under the penalty, has a right, if there is no neglect or default on his part, to principal and interest, beyond the penalty of the bond.—*Grant vs. Grant*, 3 Russell, 607.

### CONVERSION.

A testatrix devised her real and personal estate to trustees to sell, and directed that the proceeds of her real estate should be taken as part of her personal estate, and that out of the moneys to arise by such sale, and out of all other her personal estate, several legacies should be paid; and she gave the residue to A for life, with remainder over. Held, that the real estate was absolutely converted into personality; that certain lapsed legacies belonged to the residuary legatee; and that the year's income of the fund, out of which the legacies had been paid, (the payment having been delayed a year after the testator's death,) formed part of the residue.—*Amphlett vs. Parke*, 4 Russell, 75.

### CONSENT OF COUNSEL.

A party is bound by the consent of his counsel given in Court, though they had no instructions to consent; if, at the time, they were in possession of all the facts of the case, the knowledge of which was essential to the proper exercise of their discretion.

*Quære*, how far a party is bound by the negligence of his solicitor in not immediately objecting to such an order, when neither the party nor his solicitor was present, and no instruction to consent had been given by either?—*Furnival vs. Boyle*, 4 Russell, 142.

### DEVISE.

The interest of the property of a testator, after the death of his wife, was to go to his two daughters, J. and E., and 200*l.* yearly was to come out of the share of E. for his grandson, when he attained 21. As to the principal, his daughters were to have power to dispose of it by will among their children or grand-children, 'except that proportion given to E., from which the interest was to arise to his grandson, viz. 4000*l.*, which sum should be his grandson's property.' Held, that the 4000*l.* vested in the grandson, although it was not payable until his mother's death.—*Livesay vs. Livesay*, 3 Russell, 542.

[This decision reversed an order of the Master of the Rolls, as to this particular point. See Law Magazine, vol. 3. p. 552. tit. Devise, 14.]

A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees to pay his son's debts, and named the son of his son his residuary devisee and legatee. Held, that the true construction of the father's codicil was, that he intended only the payment of such portion of the debts of the son, as his son's estate would be insufficient to pay.—*Walker vs. Lodge*, 3 Russell, 459.

### DONATIO MORTIS CAUSA.

*Quære*, whether a *donatio mortis causâ* is avoided by the making of a will or codicil subsequently?

Whether it can be coupled with a condition, or made subject to a trust?

Whether, where a *donatio mortis causâ* of a mortgage debt was alleged by the party claiming it as donee, to have been coupled with a remainder over; a gift of the same remainder over, by a codicil subsequently made, is to be considered as a satisfaction?—*Hambrooke vs. Simmons*, 4 Russell, 25.

### EVIDENCE.

Private entries in the books of a corporation, which are under their own control and to which none but the corporation have access, cannot be made use of to establish rights of the corporation against third parties. Where, therefore, the question was to whom the nomination of a curate belonged—to the vicar, or to the corporation—entries in their books were not received in evidence to establish the right of the corporation as against the vicar.—*The Attorney-General vs. The Corporation of Warwick*, 4 Russell, 222.

### EXECUTOR.

An executor or trustee is not to be allowed, without question, whatever sum he thinks fit to pay his solicitor; and the master, without regularly taxing the bill, will moderate it by a deduction of such charges as upon the face of them are irregular or excessive.—*Johnson vs. Telford*, 3 Russell, 477.

Where an executor, although acting *bonâ fide* and under a conviction that there was a sufficiency of assets to pay all the debts, allowed specific legatees to retain the articles bequeathed to them, he was held liable for those articles, should there be a deficiency of assets; and, that being uncertain, an account was directed of the value of the specific legacies, received by the legatees, by consent of the executor, with interest to be computed at four per cent.—*Spode vs. Smith*, 3 Russell, 511.

Where a testatrix appointed A. B. 'her executor, to see her will put in force;' A. B, was held to be a trustee for the next of kin.—*Braddon vs. Farrand*, 4 Russell, 87.

An agent, named executor, is not entitled to charge commission, for business done subsequently to the testator's death.—*Sheriff vs. Axe*, 4 Russell, 33.

### FRAUDULENT CONVEYANCE.

Devise of lands to A for life, with a power of limiting them by way of a jointure to his wife. A, previously to and in consideration of his marriage, demises these lands to trustees for a term of ninetynine years, in trust to secure the payment of a yearly sum to his wife, as pin-money, during the coverture; and he limited a jointure to her after his death. The same parties on the same day executed another instrument, by which A covenanted not to sell or encumber the lands comprised in the term; and it was declared, that if he should at any time do so or attempt to do so, the trustees of the term should receive the rents and profits, and apply them as they might think fit, for the maintenance and support of A or his wife, children or issue. Held, that this covenant and proviso were fraudulent and void, as against a subsequent encumbrancer of A's life estate.—*Phipps vs. Lord Ennismore*, 4 Russell, 131.

INSURANCE.

The agent of the Albion Insurance Company had an office in Glasgow, at which J. P. and others the owners of a steam vessel, effected an insurance, receiving from the company's agent a contract, importing generally that a policy, corresponding with the memorandum, would be prepared at the office in London, and delivered to the assured, or their order, 'on the third Monday in the ensuing month, or on any subsequent day.' The policy that was sent down and which was never shown to or demanded by the assured, contained a clause that it 'should be suspended, and remain out of force, during the time the steam-boat might be at sea.' At the end of the year the policy was renewed through the agent at Glasgow, who delivered to the assured a memorandum, signed by the company's secretary in London, signifying that the above policy had been renewed, but no notice of the exception was ever communicated to the assured. The vessel was shortly afterwards destroyed by fire on her passage from Liverpool to Dublin. Held, that the memorandum was the contract of the parties, which had not been fulfilled by the company, who were therefore liable for damages; that the act 6 G. 1. c. 18, so far as it declares all policies executed by six persons, other than the London Insurance and Royal Exchange Assurances, to be absolutely void, does not extend to Scotland: that a contract so entered into was a Scotch, and not an English contract.—*Pattison*, appellant; *Mills*, respondent, 2 Bligh, 519.

## RECENT AMERICAN DECISIONS.

CORPORATION.

1. A corporation may be bound by an implied promise. *Smith vs. First Congregational Meeting-house in Lowell.* 8 *Pick.* 178

2. An act, incorporating individuals for a particular purpose, does not vest in the corporation, land previously owned by them as tenants in common and previously used for the same purpose. *Leffingwell vs. Elliott.* 455.

3. Parol evidence is not admissible to show that a deed given by one of such tenants in common, of his share in the stock of the corporation, was intended to pass his share of the land. *Ibid.*

COSTS.

1. An original writ was endorsed by the plaintiff's attorney thus, 'A. B. by his attorney, C. D.' *Held*, that C. D. was liable as indorser of the writ, for costs. *Chapman vs. Phillips.* 25.

2. In order to entitle a trustee, under *St.* 1794, *c.* 65, § 4, to costs, it is not necessary that the answer made by him at the first term should be sworn to in court. *Ibid.*

3. Where a person summoned as trustee is discharged, and recovers judgment for costs against the plaintiff, the endorser of the writ is not liable for such costs, his liability only extending to costs recovered by the defendant. *Ibid.*

COVENANT.

1. The defendant, in 1799, conveyed to the plaintiff land in New York, with covenants of warranty and freedom from incumbrances. A judgment had been recovered in 1786 against the defendant's grantor, which constituted a lien on the land, and in 1801, upon a *scire facias* to revive the judgment, an execution was issued, by virtue of which the land was sold by the sheriff and a deed given by him to the purchaser. *Held*, that as the plaintiff's title was entirely defeated, there was a breach of the covenant against incumbrances, and that the damages were the amount of the consideration and interest. *Jenkins vs. Hopkins.* 346.

2. The testimony of witnesses, that they were in possession of the land claiming title under a grantee of such purchaser, without proof of a conveyance by deed from such grantee, was held not to be sufficient evidence of an actual eviction under a paramount title, to authorize the plaintiff to recover on the covenant of warranty. *Ibid.*

3. If a grantee of land with warranty, being evicted by a paramount title, extinguishes such title for a nominal consideration, he can recover upon the warranty the amount of such consideration only, together with a reasonable compensation for any trouble and expenses to which he may have been put in procuring the extinguishment. *Leffingwell vs. Elliott.* 455.

4. Land granted by A to T with covenants against all incumbrances and of general warranty, was nevertheless subject to a mortgage to C, on which C subsequently recovered the conditional judgment and obtained possession of the land. While the land continued in T's possession, he mortgaged it for a smaller amount than C's mortgage. After C had thus obtained possession, T brought an action against A for a breach of the above covenants, in which it was *held*:—

1. That the covenant against incumbrances was broken when the deed was executed, but that T could only recover nominal damages, as he had not paid anything to remove the incumbrance:

2. That the covenant of warranty was broken; that T, by his mortgage, had assigned this covenant, to the extent of the sum due on this mortgage, to the mortgagee; that the damages recoverable in this action, were the amount of C's judgment and costs, deducting the amount of the mortgage which T had made himself; and that if before judgment T paid off the mortgage made by himself, he could recover in this action the whole amount due to C. *Tufts vs. Adams.* 547.

DEBT.

1. Counts on a special contract under seal, and a *quantum meruit* for labor done and materials found, may be joined in an action of debt. *Smith vs. First Congregational Meeting-house in Lowell.* 178.

2. An action of debt or assumpsit may be maintained upon an implied promise, for labor done and materials found under a special contract which has not been performed on the part of the plaintiff. *Ibid.*

EVIDENCE.

1. Where in an action of covenant upon an indenture, whereby the defendant agreed to furnish money for the purpose of carrying on the general business of brokerage, embracing, as time and opportunity shall give, the vending of lottery tickets, the defendant, after oyer, pleaded that the object and intent of the indenture was the buying and selling of lottery tickets, against the form of the statute, and issue was taken thereon, it was *held*, that evidence to prove that the plaintiff did, subsequently to the contract, buy and sell lottery tickets, was pertinent to the issue and properly admitted. *Williams vs. Woodman.* 78.

2. *Held*, that after a verdict for the defendant on such issue, the plaintiff could not object that the plea attempted to put in issue before a jury the construction of a sealed contract, but that such objection should have been taken by demurrer. *Ibid.*

3. One of two witnesses to a deed deposed that he did not recollect witnessing it, but knew the attestation to be in his hand-writing, and that the other subscribing witness had a short time previously, but long after the commencement of the suit in which the deposition was taken, left the commonwealth, after advertising his intention so to do, and that though the deponent did not recollect having seen him write his name, he had often received letters from him, and thought the signature in question was his hand-writing. *Held*, that this was sufficient proof of the execution of the deed for the purpose of reading it in evidence. *Russell vs. Coffin.* 143.

4. Where a witness on the stand, upon cross-examination, contradicted a deposition he had previously given in the same case, the party calling him was not permitted to call other witnesses in support of his general character for truth. *Ibid.*

5. The general rule, that a party cannot give evidence of his declarations in his own favor, applies to declarations made by the plaintiff in an action which is defended, pursuant to the statute, by creditors of the defendant. *Carter vs. Gregory.* 165.

6. A note was made by a failing debtor, on which the payee immediately made an attachment of the debtor's property. Part of the alleged consideration of the note was an acceptance made by the payee, of an order drawn on him by the debtor in favor of another creditor. A subsequent attaching creditor being admitted, under the statute, to defend, it was *held*, that the plaintiff could not introduce evidence of his own declarations made on the day when the note was given, to show that the acceptance was made before the attachment. *Ibid.*

7. Where in assumpsit on a policy of insurance on a ship, the declaration alleged that the ship, by force and arms, and in a hostile manner, was captured, seized and taken by certain armed soldiers and thereby wholly lost, and the plaintiff proved by witnesses, that she was seen in the possession of armed soldiers in a foreign country, and that she never returned home, it was *held*, that he had made out, *primâ facie*, a loss, and that he was not bound to read in evidence the record of a trial and decree of condemnation, which he had in court, and which he offered to the defendant to be used by him if he thought proper. *Dorr vs. Pope.* 232.

8. In an action by the assignee of a mortgage to recover possession of the mortgaged premises, against a disseisor, the affidavit of his assignor is not admissible in evidence to prove the loss of the mortgage deed, for the assignor might be a witness in the case. *Poignard vs. Smith.* 272.

9. In such an action, if diligent search and inquiry are made for the mortgage deed, by the demandant, and it cannot be found, he may give a copy from the registry in evidence. *Ibid.*

10. If the mortgage deed appear from the registry copy to be an indenture interchangeably signed and sealed, and the part belonging to the mortgagee is proved to be lost, in order to make the copy admissible, due diligence must be shown to ascertain whether any counterpart exists, and if it does, to obtain it to be used in the trial. *Ibid.*

THE JURISPRUDENT.

BOSTON, SATURDAY, NOVEMBER 13, 1830.

## SUPREME JUDICIAL COURT.

MARCH TERM—1830.

*John Dodge Ex'r. vs. Thomas H. Perkins.*

Continued from page 119.

A factor is in duty bound to account to his principal in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient. He would be held, according to the course of business, to give his principal information of his progress in the transaction, and if he should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract, and subject him to an action. Clark v. Moody, 17 Mass. R. 149; Lady Ormond v. Hutchinson, 13 Vesey, 53; Earl Hardwicke v. Vernon, 14 Vesey, 504.

It is the settled law of New York, that interest is to be allowed for money received or advanced for the use of another 'after a default of payment.' Campbell v. Mesier, 6 Johns. Ch. R. 24.

So if the agent had engaged to invest the money, but had omitted to do so, he is to answer for interest from the time he should have invested. Brown v. Southouse, 3 Bro. C. C. 107; The People v. Gasherie, 9 Johns. R. 71.

There are some late English cases, which would seem to be contrary to the rule requiring interest after non-payment at a day certain.

Thus in Gordon v. Swan, 12 East, 419, which was for the price of goods sold and delivered, payable on a certain day. Lord Ellenborough said that 'the giving of interest should be confined to bills of exchange and such like instruments.' No reasons are given, and it is not easy to see why the same rule of damages should not be applied in that case, as in the case of any other contract for money to be paid, at a certain day.

In Higgins v. Sargent, 2 B. & C. 348, the restriction of interest to mercantile securities was recognised, and C. J. Abbot stated the rule to be established, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances.

Now I have no objection to this general rule, but I very much doubt the application of it according to the case of Higgins v. Sargent. That was upon a policy upon the life of one Burton, payable in six months after proof of his death.

It is difficult to perceive a good reason why interest should not have been given after the money ought to have been paid according to the promise.

*That*, we have seen, was the principle adopted by Lord Mansfield and his associates, where the promise was raised by *implication of law*. *A fortiori* would it seem to apply to an undertaking in writing. Lord Thurlow in Bedham v. Riley, 1 Bro. C. C. 239, and 2 Bro. C. C. 2, after noticing many cases, comes to the conclusion, that 'undoubtedly all contracts to pay, give a right to interest from the time when the principal ought to be paid.'

We have no statute regulating this subject, and none is necessary. Upon the principles of the common law, we think it clear that interest is to be allowed. Where the law by implication makes it the duty of the party to pay over the money to the owner without any previous demand on his part.

Thus where it was obtained and held by fraud, interest should be calculated from the time when it was received. So where there has been a default of payment according to agreement expressed or implied to pay on a day certain, or after demand, or after a reasonable time.

The nature and extent of the undertaking must depend upon the facts proved in each particular case. But when it is ascertained at what time the money should have been paid, the law raises a promise to pay damages for the detention after the breach of the contract. For it is the essence of every assumpsit or undertaking, that it is to be performed specially, or that damages shall be paid for the non-performance.

—

Mr Gardiner, in favor of setting aside the verdict, contended, upon the grounds set forth in the motion for setting aside the verdict, so far as interest was concerned, that, 1st. No interest could be charged to an agent before a demand was made for payment; more especially here, where there was no motive to transact the business on the part of J. & T. H. Perkins, except the friendly feelings which had existed between Unite Dodge, deceased, and James Perkins, of the house of J. & T. H. Perkins, who also had deceased. James Perkins, as also the house of J. & T. H. Perkins, were merely the friendly agents of Unite Dodge, whose brother John Dodge, now represented him, and acted not as commission merchants, and entirely without the payment of commission, on the part of Unite Dodge. He assumed that in such case, on the very threshhold, no interest could be charged upon money paid into the hands of an agent, unless a legal demand for that money had first been made from that agent. On this head, it was true, that the great mass of European authorities had not been in strict unison, but the difference of opinion on this head, might result from a too casual examination into the principles involved. But he concluded, that the subject of liabilities in this case, might be divided into two great classes, viz:

First—where interest seemed to be incident to the debt; and second, as damages in the nature of a penalty, is the case of non-payment, after a demand had been made. There was no principle in the common law which sanctioned the payment of interest, neither was there in the statute law; but the principle of payment of interest grew out of a contract or contracts in the use of trade, and even there, interest was not recoverable until after demand and refusal to pay. Interest was never implied from a breach of contract to repay. He here cited as authorities, 1 Bosanquet and Puller, 306; 2 Campbell, 406; 15 East, 223. It was otherwise in some cases in this Commonwealth, because of the usage of trade. He here cited, 12 M. R., 21. There interest was allowed after demand, but the principles of interest were not discussed. Also, 1 Peck 121, interest was allowed after request. He cited a case of lawyer and client, where no interest was allowed, and the length of time which the money remained in the lawyer's hands, was of no consequence. Interest could not be recovered until a demand, and a refusal to pay. 8 Taunton, 45; 3 Pickering, 261. An auctioneer had sold an estate and deposited the money; when the title was disputed successfully, he was decreed to refund the money, but without interest. Again, where an administrator had paid the whole of the debt of an intestate, who, afterwards it was found, had died insolvent, and he called upon the creditor to refund the money which he had received above his proportionate share of the estate, he was decreed to refund the principal, but without interest before demand. 1 Campbell, 50; 2 Campbell, 427; 4 Brown's Chancery Reports, 321, &c, wherein the uses of trade as to money, were concerned. 1 Pickering, 314. All this class of cases went upon the ground of contract. There was another class which went on the ground as ex delictu, on the part of him who retained the money. 5 Bosanquet and Puller, 205. (Day's edition.) If the money is demanded, in the form of contract, the interest sounds in the nature of damages, and the court will permit interest, if there is a wrongful detention of money contrary to the contract. 3 Bingham, 353. First, interest is to be paid if the nature of the contract stated it. Second, where it was wrongfully detained after demand. 3 Cowel, 436; 5 Cowel, 387. One of these cases was where there was an agent of a manufacturing company who had mingled the money of the house with his own. In this case, the subject of interest was thoroughly sifted. He cited the opinion of Judge Spencer, also 5 Cowel, 609. If he was a trustee of the company, and had mixed the funds entrusted to him with his own trading capital, so that the one could not be distinguished from the other, so as to lock it up from the use of the company, then he was liable for interest. But if, on the other hand, this capital was not in constant use by the trustee, and he had never taken the key of these funds into his own hands, and subjected them to a profitable or prejudicial gain or loss by trade, or otherwise, he was not liable for interest for money which had been of no use to him. Interest in any case against an agent, was only given as damages. (4 M. R.) In the case 7 M. R., interest was given as damages for malpractise in not endorsing money paid upon an execution—that was an action for moneys had and received. So in 9 Johns. People v. Gasherie, where interest was given on the principal, for fraud on the part of the payer. 11 M. R., 504—also where fraud and imposition was practised upon the Plaintiff, who was non compos—so 13 M. R. 218—17 M. R., 560, (money won at play.) 1 Pickering, 211, (money obtained under color of law.)

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The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis, relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist. Oct. 23.

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Oct. 23.

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'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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While many of the nations of Continental Euro possess Dictionaries, which have kept pace with t advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, NOVEMBER 20, 1830. NO. XVII.

## MEDICAL JURISPRUDENCE

### LEGITIMACY.

This article will be devoted to the very important questions arising from disputed legitimacy; and before concluding this series of papers, a brief survey will be taken of some topics which, though not absolutely medico-legal in their nature, may yet more properly be classed under this than any other head. Without professing to make additions to the numerous facts collected by the very learned and laborious writers, from whom our materials have been borrowed, we have sometimes presumed to dispute the inferences they have drawn; and before we have done with the present subject we may be found chargeable with a graver heresy by those who implicitly reverence all the decisions of our highest legal tribunal. Meanwhile, we trust, a short history of the English law of legitimacy will not prove unamusing or uninstructive to the reader.

The nature and number of circumstances, admitted to prove the offspring of a married woman illegitimate, have varied in all ages and countries. In all, however, the demonstration of absolute and incurable impotence has of course been held sufficient to bastardize the children, as it has to nullify the marriage. In most recorded cases on this point, as the complainants were not acknowledged mothers, (for then they would have been self-stigmatized with adultery,) no question of legitimacy was involved. As, however, it is one which has sometimes arisen out of such cases, and may again arise, it becomes necessary to consider what facts have been, or ought to be, recognised as proofs of this corporeal imbecility. The best writers seem to be agreed, that there is no known cause of impotence without remedy, excepting mal-formation or defect in the generative organs. The unpleasant detail of all the forms of this calamity is only necessary in a medical treatise; but it may be mentioned, as worthy of remark that very material deformity may exist without privation of the generative power. We find, in ancient times, that the non-appearence of *testes* was held a complete *evidence* of inability, which, upon the principle that two negatives make an affirmative, seems logically as well as physically true. Pope Sextus V. wrote to his nuncio in Spain, in 1587, to forbid the marriage of all who were thus destitute; and Philip II. executed the order, which, Mahon tells us, affected many in that kingdom. The parliament of Paris, a century later, forbade marriage where they were not visibly apparent. Yet experience has shewn that this deficiency may be merely external; and it has been even known to occur with individuals particularly distinguished for libertinism. It should seem, then, that good medical evidence, at least, was indispensable to establish charges of this kind; yet, to the disgrace of France, until the close of the seventeenth century, any profligate woman might there obtain a legal divorce, unless the accused came off triumphant from the ordeal of a public congress. In this country, on the contrary, there appears in earlier times to have been a leaning in favor of the husband's ability. Dr George Abbot, Archbishop of Canterbury, in a narrative we shall presently consider, relates the case of one Bury, which was tried in 1561. This man was cited by his wife for impotence, before the Ecclesiastical Court. The physicians deposed that he had but one testicle, and that not larger than a bean. The want of access was proved also. On these grounds the Court very reasonably gave sentence of divorce. But Bury, who seems to have been a bold man, married again, and his second wife produced a son. After some years, the question of the offspring's legitimacy was agitated, and the Court decided thereupon, that the second marriage was utterly void, because the judgment was a false one which had declared Bury impotent. We have no record how the Judges were so absolutely satisfied of the second wife's fidelity: but it happens rather curiously, that the luckless son was illegitimate, according to either decision on the husband's powers.

Much attention was attracted to the question of impotence throughout England, in the famous case of the Countess of Essex. She, as our readers will remember, had fixed her affections on Viscount Rochester, afterwards Earl of Somerset, the guilty favorite of James I., and the proceedings were instituted to deliver her from the thraldom of a detested husband. As legal authorities, they are quite valueless; the nature of the commission of inquiry—the admission of the Countess' malicious assertions as evidence—the known fact of her having employed every art to provoke her husband's hatred and disgust—her pretended proof of virginity, when she is suspected in the personal examination to have substituted a young person of her own stature and size—the form of the charge itself, which was not one of general inability but of *impotentia versus hanc* alone—and the court influence employed to awe and bias the commissioners—all combine to stamp this transaction as equally anomalous and infamous. There is much, however, that is curious and amusing in the account* of the Archbishop before mentioned, who was a chief commissioner in the inquiry. He tells, pretty plainly, what the feeling of his colleagues was in the outset of the matter. 'Sir Thomas Parry, in all his speeches, privately murmured against this nullity, until he came to Windsor; where, the day that the King heard us, the Lord Chamberlain, in my presence, spake privately with him and Sir Julius Cæsar about this matter; and, from that time forward, Mr Chancellor of the Dutchy was altered. My Lord of Ely also, for a great while, was in dislike of the separation (as I have credibly heard he opened himself to Sir Henry Savile,) until such time as the King spake with him, and then his judgment was reformed.' Abbott himself, however, was not quite so tractable; sore were the struggles between his conscience and his interest, and severe the slights and reproofs which he experienced from his gracious sovereign for such unparalleled contumacy. In this strait he sought to steer a middle course, and 'wrote a letter to the King, praying humbly that he might be freed from the trouble of this cause, or, at least, give no sentence in it until he were a married man, and so might better understand the business.' But the poor prelate was not suffered to escape on the ground of celibacy; and James, who was before reported 'to have schooled the Archbishop in two letters, as he was never schooled in all his life,' condescended to argue calmly with him in two or three interviews. One specimen of the sapient monarch's mode of ratiocination is extracted. 'When the King was risen from the chair, he fell to inveighing against these marryings of young couples before they be acquainted with one another. He told us the inconvenience of it; how he knew, in Scotland, a father, who married his only child to a man against her will. That she withstood it, yet her father forced her to marry him. That being gone home with her husband, after a few days she ran away from him. That her father jerked her, and sent her home again. That, not long after, she poisoned her husband, and was burnt for it while the King was in Scotland. After his Majesty's going out I followed, and told him, I evidently perceived that it was in the Earl of Essex, *vitium animi, non corporis*. His Majesty swore he thought so. There passed some other speech from the King to me, touching his own lying with the Queen the first night he married her.' The result of this trial may be easily inferred from the circumstances. The Archbishop was as litttle disposed to prove a martyr as a traitor to his cause, and the thing was settled quietly, with a silent vote on his part.

The earliest authorities in civil law allowed other matters besides impotence of the husband, as adequate proof of bastardy. The Digest expressly particularizes the circumstance of non-access by the husband. The civilians seem all to have agreed in admitting other facts, besides impotence and non-access, to contradict the presumption of legitimacy, but they agreed no farther. Some argued, that the question should depend upon a balance of probabilities, as whether the wife had more frequent converse with her husband or her paramour; some were for making the avowal of the adulterer an absolute proof, and others deemed the concealment of the child the surest evidence of his base origin. The canon law seems positively inclined to prefer the presumption of bastardy, and to lay the burthen of proof upon the party claiming to be legitimate. The old English law, as laid down by Bracton, and copied from him in Fleta, recognised three valid objections to legitimacy; impotence, non-access, and all conclusive presumptions deduced from physical or moral causes. To show the lengths to which the last were carried, it is only necessary to state, that a refusal by the husband to recognise the child was held sufficient, so that it was in the power of any unnatural father to disinherit his offspring, and avoid the trouble and expense of rearing it. In all Bracton's cases, indeed, this arbitrary recognition appears to have been a *sine quâ non*, but its contrary is to be distinguished from repudiation, the rejection of a once acknowledged child, which was at no time evidence. These statements are confirmed by Britton. But no sooner had the common law struggled into

* State Trials, vol. x. Appx. i.

respectability, and thrown off the bondage of canonists and civilians, than a system entirely different grew up; and from the time of Edward III. until Lord Hale attained the Bench, one simple and inviolable rule prevailed, that every child, born in wedlock, was legitimate, unless the husband was impotent, or beyond the four seas at the epoch of conception.* That great Judge resolved to purify the law from its manifest absurdity, and was the first to admit evidence of the non-access on the part of the husband, without the foolish condition of *ultra marine* absence. This occurred in the case of Dickens v. Collins, of which, unluckily, no report exists; but it is quoted in that of the parishes of St George and St Margaret, 1 Salk. 123, a decision on the same point a few years later. But this was the whole amount of innovation. Neither Lord Hale or his successors ever thought of admitting evidence that did not demonstrate the absolute impossibility of access, as where the husband was in a different country, or entirely disabled by disease during the period of conception. Thus, in Lomax v. Holmden and Another, 11 Strange, 940, which was a trial in ejectment, where the question was, whether the lessor of the plaintiff was son and heir of Caleb Lomax, deceased, the defendants gave in evidence the inability of the ancestor, from a bad habit of body; but their proofs going only to improbability and not impossibility, there was a verdict against them. The disavowal of the offspring by the husband was of no avail, nor was the wife allowed to prove his non-access, although she might the access of another man. As late as 1807, Lord Ellenborough said: 'If we may resort to all impediments arising from natural causes, we may adopt other causes equally conclusive to shew the *absolute physical impossibility* of the husband being the father. I will not say the *improbability* of his being such; for, upon the ground of improbability, *however strong*, I will not venture to proceed.'

How strictly such a rule was acted upon by one of our most acute judges, the following case, decided by Sir William Wynne, will shew. It was a cause in the Prerogative Court of Canterbury, in 1792, for the administration of the effects of John Newport, Esq. The intestate was the only son of Ann, the wife of Ralph Smyth, and was born when his mother had left her husband for some years, to live with Lord Bradford as his mistress. He was educated by that nobleman as his son, inherited from him a splendid fortune, and assumed his family name by act of parliament.

The separation between Mr and Mrs Smyth was of an amicable nature; he appeared rather to promote her intercourse with Lord Bradford, and allowed her a small annuity. For the payment of this they had occasionally brief interviews, but there was no proof of any such having taken place, for some time previous to the birth of her child.

Mr Newport, on his return from abroad, became insane (the disease was hereditary in Lord Bradford's family,) and he was placed under the care of some members of it. Suits in Chancery were instituted respecting his property, and Mr Smyth, as his mother's husband, was made party to them; but although the latter gentleman would have derived great pecuniary advantages from claiming the lunatic as his son, he studiously avoided all declarations to that effect; and both acted himself, and allowed the Court to act, as if no doubt could be entertained of Mr Newport's illegitimacy.

The lunatic survived his mother and her husband, and died possessed of property which had accumulated to an immense amount. It was claimed by the grand-nephew of the deceased Mr Smyth.

Sir William Wynne decided that the legitimacy of Mr Newport was established, and, consequently in favor of the claimant. His reasons were, that the circumstance of the husband and wife both residing in London, for some time previous to the birth of the child, was proved in evidence. It was also proved that they occasionally met, though not the times of meeting; that she visited him at his lodgings in Holborn to receive her annuity, and on those occasions remained alone with him in his room, which was a bed-room, for half an hour at a time. It seemed probable that he occasionally dined with her, at a house of Lord Bradford's at Hammersmith. Thus possibility of access was established. The learned Judge thus delivered his opinion as to legal question:—

'The law of England on this subject, as now settled, I take to be this:—that if such proof can be given, of whatever kind, as shall satisfy legally the mind of the Court that the husband had no access to the wife at the time when the child must have been begotten, the child is a bastard, though born of a married woman in the lifetime of her husband; but if the husband and wife were so circumstanced that access must be presumed between them, as if they lived in the same town or place, and cannot be proved by persons who have watched them never to have come together; if direct evidence can be proved that they had access to each other; in such a case I take it the son is legitimate, *notwithstanding any circumstantial evidence that may be given to the contrary.*'

It was the pleasure of the House of Lords, in 1813, to disturb, for the first time, this consistent and intelligible rule; and by throwing open the door to circumstantial evidence, to risk, hereafter, as we apprehend, no small confusion and injustice. The Banbury Peerage case, very important in itself, becomes still more so from the novel principle it introduces; and our best thanks are due to Mr Le Marchant for the accurate and complete account he has compiled of it in the appendix to his valuable 'Report of the Proceedings in the House of Lords on the claim to the Barony of Gardner.' To that volume we are indeed previously indebted in this article, and we gladly seize the opportunity of speaking of it as a model of diligence in collecting, and skill in condensing information. From it the entire details of the following proceedings will be taken.

William, Viscount Wallingford and Baron Knollys, was created Earl of Banbury by letters patent, dated 18th August, 1627. Precedency being therein granted to him over some earls of older creation, the following spring a committee of privileges proceeded in the Lords to take the matter into consideration, but were stopped by a message from the king, shewing good reason for the grant, and requesting, that as the Earl was *old and childless*, he might be permitted to enjoy it, upon promise that the king would never thereafter occasion the like dispute. Upon this an order of the House was passed, expressing among other things, that their Lordships were contented, but particularly providing that the said earl should hold such precedency for his life only, and that it should not go to his heirs. Lord Banbury was at this time eightyone years of age, and died in 1632. An inquisition held within a year after found that he died at Caversham, *without heirs male of his body*, and that his estates descended to his nieces, as his heirs at law. Another inquisition was held eight years afterwards, which found that he had died in London; and that Edward, who on his death became Earl of Banbury, was his son and heir. This Edward was the first child of Lady Banbury, and born in 1627, after the grant of the Earl's patent, but long before the king's message regarding it. Long before this time an adulterous commerce had been understood to subsist between Lady Banbury and Lord Vaux. She lived, however, with Lord Banbury until his death. In 1630 Nicholas, her second son, was born at the house of Lord Vaux, where she and her husband were residing. During his lifetime, and long afterwards, both children bore the name of Vaux. Lord Banbury was possessed of two considerable estates, Caversham and Rotherfield Greys. The former, if he had issue male, was settled on his eldest son; but in 1630 he levied a fine of it, and conveyed the fee absolutely to Lady Banbury. He also covenanted, by another deed, to levy a fine of Rotherfield Greys to his nephew and *heir male*, Sir Robert Knollys. By his will he left his widow residuary legatee, and *did not notice any issue.* Immediately after his death Lady Banbury proved the will, and the same day married Lord Vaux.

Edward, the eldest born, died under age. From an indenture, dated the 19th of August, 1646, it appears, that by that time Nicholas had assumed the name and title of Lord Banbury. In 1660 he took his seat as a peer, and the same year the question of his legitimacy was for the first time agitated. Witnesses were examined before the Committee of Privileges, when undeniable access on the part of the husband being proved, and the attorney-general confessing the law clear, they reported Nicholas to be in the eye of the law Earl of Banbury, and recommended an advice to the king to issue a writ of summons to him. But the feeling of the House was against the law of the land; and on the 9th of December, 1661, a bill was brought in to 'declare Nicholas, Earl of Banbury, illegitimate:' stating also, 'that the children had always gone by the name of Vaux, and that many years after the finding of the office of inquisition, that the Earl died without issue, the Countess did first *produce* the said Edward, and declare him Earl of Banbury, and after his death did *produce* the said Nicholas.' The bill was not proceeded with.

So strong continued the aversion of the House to entertain what they knew to be a legal claim, that on no one of six several petitions presented by Nicholas or his descendants, would they ever come to a decision, excepting that of 1692, when they resolved that Charles Knollys, the petitioner, had no right to the earldom. This, however, was under peculiar circumstances. The claimant had that year been indicted by the name of Charles Knollys for the murder of his brother-in-law, Philip Lawson, and thereupon he prayed to be tried by his peers, as Earl of Banbury. The House of Lords rejecting the prayer, after long discussion, he pleaded misnomer in abatement, when brought up to the bar of the King's Bench, in Hilary term, 1693. The attorney-general's replication insisted on the resolutions of the House dismissing the petition: to this there was a demurrer and joinder therein. The Court of King's Bench, Lord Holt being Chief, quashed the indictment. We may collect, from the learned Lord's elaborate judgment that the principal ground of decision was the informality of the petition, which should have been

* For cases on the dictum of Hale, see Pendrill v. Pendrill, Strange, 925. Rex v. Reading, Cas. Temp. Lord Hardwicke, 82. Rex v. Luffe, 8 East, 208. See also, Rex v. Rook, Say. Rep. 61. and Rex v. Inhab. of Bedell, Andr. 8.

first addressed to the king, and by him referred to the lords, which not having taken place, the resolutions of the House thereon were not conclusive on the defendant as a legal judgment. For this proceeding of the judges, the lords called them to account; but Lord Holt being intractable, and refusing to give his reasons, unless the record were removed before the peers by error, after much deliberation among the indignant lords upon the course to be pursued, nothing was ultimately done.

In the year 1806, William Knollys, the lineal descendant of Nicholas, made the eigth and last attempt to establish the legitimacy of his ancestor. The petition was discussed at great length before the Committee of Privileges, in the years 1808, 1809, 1810, and 1811: and in 1813 a resolution of the House decided that the petitioner had not made out his claim. We must now consider the arguments employed.

Sir Samuel Romilly, who was counsel for the claimant, considered the evidence against the legitimacy of Nicholas, as reducing itself to the following heads:—

1. The advanced age of the Earl.
2. That he was childless in 1628.
3. That he never knew he had such a son.
4. That there was no evidence of the baptism of Nicholas, and that he was treated as the child of Lord Vaux.
5. That the *inquisitio post mortem* found the Earl to have died without issue.
6. That Rotherfield Greys did not descend to Nicholas.

On the first head he argued, that many older men had become fathers, and quoted the authority of Dr Gregory for the fact, that many men of eighty not uncommonly begot children.

On the second he contended, that although Edward was born before the message of the king declaring the Earl childless, yet, that at the time of granting the patent, and most probably of the Earls representation to the King upon the subject, the birth had not taken place. Many motives might induce the earl to conceal the fact, if a weak or unprincipled man. At any rate the illegitimacy of Edward did not affect the legitimacy of Nicholas.

As to the third, concealment of the child, if proved, is of less weight than the express declaration of the mother, and yet the law considers the latter no evidence.

As to the fourth, the baptismal registers of that period have not been preserved. There is no evidence that Nicholas went by the name of Vaux, until the era of the deed in 1646. The troubles of the time made it unsafe, during his infancy, to assume the title of Banbury.

As to the fifth, the inquisitions were exparte proceedings, and might in many ways be quashed or defeated.

Lastly, it is very doubtful whether a legitimate son of Lord Banbury could have recovered Rotherfield Greys from the heirs of Sir Robert Knollys. The construction of the statute is that on which the question depends, and is not without difficulty.

It will be seen, that although some of these arguments are not without weight and ingenuity, they must be esteemed of much less importance than the fact, that, neither impotence nor want of access being proved, Nicholas was the legitimate son of the Earl, according to the uniform decisions of our courts for upwards of four centuries. We are fortunately possessed of the opinions of the Judges on this subject. Upon the observation of Lord Ellenborough, that 'it was desirable to have the opinion of the judges whether any circumstances could rebut the presumption of access,' and that then 'a question would arise, whether the circumstances of this case constituted such circumstances;' several important queries were submitted to them. Among the most material of their answers were the following.

[To be continued next week.]

## ENGLISH CASES.

### COURT OF COMMON PLEAS—MAY.

Sittings in Banco at Westminster Hall.

*Stracey and Another vs. the Bank of England.*

Mr Sergeant Spankie, on behalf of the plaintiffs, stated that the action upon which he had to address the Court was brought by Sir Edward Stracey and his brother, Joseph Henry Stracey, against the Bank of England, for refusing to transfer the sum of 605*l.* which stood in their names as trustees, in the books of the Governor and Company of the Bank of England. At the trial a short time since, the Jury found a special verdict to the effect, that in 1808 Sir Edward Stracey and his brothers were the holders of 605*l.* in Long Annuities. That in 1820 this Stock was transferred, and carried to the credit of Mr Gilford Burrington, upon a power of attorney, purporting to be signed by Sir Edward Stracey and the other plaintiff; that said power of attorney was not really signed by them, but that the signatures were forged by Henry Fauntleroy, without the leave of Sir Edward Stracey, or his brother, who had no knowledge of that transfer; that Joseph Henry Stracey was a partner in the house of Marsh and Co., bankers of Berners-street, and that Fauntleroy, who was also a partner, managed the greater part of the business of the house; that he kept the house book, and made many false entries therein, which did not agree with the pass-book; that after the transfer of the above sum in Long Annuities, he (Fauntleroy) made entries, in his own hand, in the books, of the dividends on that stock being still received, the Jury also found that Fauntleroy employed a broker, named Simpson, to sell 605*l.* Long Annuities, for 10,000*l.* without the knowledge of his partners; and that there was no entry of that transfer in their house book. Upon the death of Mrs Stracey, for whom these dividends were received by the plaintiffs, they applied to the Bank to have the stock transferred, but they met with a refusal, and were informed that the 605*l.* Long Annuities had been transferred as above described. Under those circumstances they were compelled to apply to a Court of Justice for redress. He (the Learned Sergeant) should contend that the stock, of which the plaintiffs were possessed, having been taken away from them by a forged power of attorney, such transfer was null and void, and they were entitled to stand in the same situation in which they originally were. It would be evident, from the best authorities, that the nature of stock or annuities was a mere right to receive a perpetual annuity, and that it had no resemblance to what were called chattels movable. Annuities were arranged by Blackstone under the head of incorporal property, and, as such, were incapable of dispossession or disseisin.

The Chief Justice—Will that authority apply to this case? The annuities in question were only created for a given time—until 1860.

Mr Sergeant Spankie thought the cases would apply. The annuities might be granted for life or a given period. The Act which he cited used the precaution of stating that annuities might be considered as personal property; but the holders could not be dispossessed of them by illegal and improper means, such as forged powers of attorney; and, on this ground, he had no difficulty in saying that the Bank of England was answerable for those annuities. It might be said that his clients ought to have trusted to the generosity of the Bank of England, and that it had given the plaintiff, Sir Edward Stracey, a sum equivalent to the dividends on the annuities, on condition of his proving under the commission against Marsh and Co.; but he well knew what the generosity of the Bank amounted to; and that they always availed themselves of any defence they could set up. The defence which they lately brought forward in the Court of King's Bench, would be a proof of his assertion.

Mr Justice Park—That was as shabby a defence as could be taken by such a great body.

Mr Sergeant Spankie—That was rather *infra dig.*—(laughter.) The Learned Sergeant, in continuation, observed that his clients should not place themselves within the generosity of the Bank, believing that their generosity was not so sterling as their notes—(a laugh.) The Bank of England were only the agents of Government for paying the dividends, and for which they received a handsome emolument annually; they were nothing more than the servants of servants; and he was convinced that if the Government was aware of the conduct of the Bank in this transaction, it would give them a severe reprimand. The Bank ought not, by their tortuous act, to deprive the plaintiffs of their property—he should say they could not—and that the Government were their (the plaintiffs') debtors, and that the Bank was accountable to the Government as agents. He now came to the second ground which the Bank relied upon for resisting the plaintiffs' claim—namely, in consequence of something which they alleged had taken place between them and Sir Edward Stracey, by which they contended that all his right to the stock was gone, because he omitted performing a certain condition; they told him to go and prove under the commission against Marsh and Co.'s estate, and, at the same time, gave him, not the dividends upon the stock, but something that amounted to the same sum. He agreed to do what the Bank had no right to require, but he made this agreemont, *salvo jure*, and reserving, without prejudice to himself, the right of urging his claim to have the stock replaced. The Bank did not give him a competent satisfaction, and merely gave him a sum equivalent to his own dividend—in fine, they wished to bribe and bubble him with his own money. It was clearly laid down in 'Comyn's Digest,' that an accord, to be good, must be in full satisfaction of all demands, and effectual. The Learned Sergeant here referred to an action in Trover, tried some centuries back. The cause of action in that case was a silk waistcoat, of the value of 20*s.* No less than eight Counsel were engaged in the cause; the Solicitor-General and the King's Sergeant held briefs on the occasion, and they and their learned juniors addressed the Court alternately.—(A laugh.)

Mr Justice Gaselee observed that in those days the speeches of eight Counsel did not occupy as much time as that of one at the present day; and, besides, the Judges at that period used to rise at 11 o'clock.

Mr Sergeant Spankie—I wonder how they were able to go to bed or rise at all—(laughter.)

The Learned Sergeant, in conclusion, contended that there was no uncertainty as to the plaintiffs' rights, and that the Bank had no authority to insist on their proving under the commission against Marsh and Co.; there was no settled agreement to that effect, and even if there were, it could yet be done, and the Bank might bring an action against Sir Edward Stracey, to compel him to do so—this was, therefore, no bar to the present claim. It was also urged on the part of the Bank, that the 10,000*l.* arising from the sale of the 605*l.* Long Annuities, was lodged with Messrs Martin and Co., bankers to Marsh and Co., and to the credit of the latter, and that J. H. Stracey having something to do with that establishment had received an equivalent from his partners; but it was proved that they knew nothing of this stock having been transferred, and the money got by chance into their funds. Besides, the 10,000*l.* paid into the hands of Martin and Co., was not actually the plaintiff's property, but was the money of Burrington, the person to whom the Stock was transferred. Fauntleroy had no right to pledge to his partners, who were ignorant of the whole transaction; and the money raised was got upon his own (Fauntleroy's) credit, or upon his own crime. Upon the whole of the circumstances there was nothing which ought to operate as a bar to the plaintiffs' claim.

Mr Sergeant Taddy addressed the Court on behalf of the Bank of England, and contended that none of the cases cited by his Learned Friend would apply in the present instance. The argument that Stock was on incorporeal property, and that the plaintiff ought to be considered as still in possession of the Annuities, could not be maintained, as there was no just comparison between Stock and real property. The possession of Stock meant nothing more than the right of receiving the dividends. The declaration in this case attributed no negligence to the Bank, when a transfer took place, a credit to the amount of Stock was entered on the leger of the Bank of England; but the Bank had nothing more to do with the transfer, the party himself, or his attorney or agent, did it, and the amount was put to the credit of the party to whom the Stock was transferred. It appeared that Joseph Henry Stracey, one of the partners in the house of Marsh and Co., had received at the Bank the dividends on the Stock in question from 1817 to 1820, and from the time they were transferred to Burrington, he (Joseph Stracey) ceased to receive the dividends, it was rather strange that Mr Stracey, who was in the habit of receiving them for nearly four years up to that period, should on a sudden discontinue doing so; did this show any guilty knowledge?

Mr Justice Park—If the Jury had not negatived that question, there might be some suspicion; but they acquitted all the partners of having had any guilty knowledge of what was done by that unfortunate man, Fauntleroy.

Mr Sergeant Taddy in continuation, observed, that the circumstance of the 10,000*l.* arising from the sale of the Stock having been paid into the house of Martin and Co., who were the bankers to Stracey and Co., was one of strong presumption, and that at all events there could be no doubt but that sum went into their funds, and was entered into the pass-book. It was also clear that Mr J. Stracey had been guilty of gross negligence. The Bank was willing to replace his Stock on a certain condition—namely, Sir Edward Stracey's proving under the commission, and assigning over the proof to them, and not having complied with that agreement, Sir Edward Stracey, shut himself out from all right to maintain this action, and it would be a breach of good faith in him to do so. He should not follow the example of his Learned Friend in using harsh expressions against any of the parties in this case, but he should submit that the Bank were fully justified in the course they had adopted, and that the plaintiffs had not shown sufficient grounds for the redress they sought.

Mr Sergeant Spankie having replied,

The Chief Justice said the Court would take time to consider the case.

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### COURT OF KING'S BENCH—MAY.

Sittings in Banco.

*The King vs. Baldwin and others.*

In this case Mr Campbell obtained, during the last Term, a rule Nisi, calling upon the defendants to show cause why a criminal information should not be filed against them for the publication of an article in the Library of Useful Knowledge, published by the defendants. The article was contained in a treatise on brewing, and was headed 'Burton Ale.' In this article it was stated that Burton ale could not be made of malt and hops and water alone without the addition of certain ingredients which were considered deleterious.—The Burton ale brewers, thinking the article injurious to their trade applied for the rule.

Mr Brougham, on the part of Messrs Baldwin and Cradock, addressed the Court, saying that the most diligent inquiry had been made into the truth of the statements which had been put forward in the work published by his clients; and he was bound to state that the brewers themselves afforded every opportunity for inquiry, and appeared anxious for the strictest investigation and had given several samples of their beverage to be analyzed. They had even thrown open their brewhouses to a general examination. The result of the strict inquiry which had been made was that the statement made by the learned writer of the article on brewing was founded on error. That gentleman, who was himself a practical brewer, and had twenty years' experience in the tradc, had given it as his opinion in the article in question, that he could not brew Burton ale from malt, hops aud pure water, without the admixture of some saline ingredients. During the inquiry which had taken place, it was discovered that the springs in the neighborhood of Burton ran over a saline rock, which had the effect of giving the water a natural impregnation. This circumstance explained the error into which the writer had fallen. It was the intention of his clients to make this statement in the future republication of the work in question. With this understanding, it had been agreed between himself and the Counsel for the brewers that the rule should be discharged. Mr Campbell said that, under those circumstances, he had no objection to allow the rule to be discharged; but he thought it right to state that he had the affidavits of all the brewers of Burton, declaring most distinctly that they used no other ingredient in the manufacture of their ale, except malt, hops, and pure water. He had a similar affidavit from the gentleman who had analysed the several samples of Burton ale.

Mr Brougham said his clients also admitted that the water used was fine and pure, as were the other ingredients, and that consequently the ale was equally pure.

Lord Tenterden—Now the lovers of Burton ale may drink that beverage with perfect safety. —Rule discharged.

The Court broke up at one o'clock, and Lord Tenterden returned in a few minutes to hear some Common Jury cases.

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## RECENT ENGLISH DECISIONS.

### INJUNCTION.

A plaintiff cannot move *ex parte* for an injunction, after he has served the defendant with *subpœnas*, and the defendant has appeared.—*Perry vs. Weller*, 3 Russell, 519.

An obligor in a bond obtained the common injunction to restrain the obligor from proceeding in an action brought in his name by an assignee of the bond. Held, that the answer of the obligee could not be read in opposition to a motion to dissolve the injunction made by the assignee.—*Montague vs. Hill*, 4 Russell, 128.

### INTERPLEADER.

A testator bequeathed 500*l.* to trustees, upon trust to invest the same on government or other good security, and pay the interest to his wife for life, and after her decease to distribute the principal in manner mentioned. The executors and trustees agreed that the interest on a bond for 500*l.* due to the testator, should be appropriated to the payment of the legacy; and the obligor, in pursuance of such arrangement, and with the consent of the executors and trustees, paid the interest to the legatee for some years. Afterwards, the surviving trustee gave notice to the debtor not to pay the money to the executors, who then commenced an action on the bond: the debtor having filed a bill of interpleader, a demurrer by the executors for want of equity was overruled.—*Wright vs. Ward*, 4 Russell, 215.

### ISSUE.

The Court is not in the habit of binding the inheritance by the result of a single trial of an issue, *devisavit vel non.*—*Winchilsea vs. Wanchope*, and *Tod vs. Winchilsea*, 3 Russell, 441.

The assistance of a jury being only one of the means by which the conscience of the Court is to be informed, it is the duty of the Court, before it comes to a decision, to consider all the evidence judicially before it. If, therefore, it thinks the jury have come to a wrong conclusion upon the evidence before them, a new trial will be ordered. —*Ibid.*

A third issue *devisavit vel non* was directed, after two juries had found in favor of the will.—*Ibid.*

### LEASE FOR LIVES.

The assignee of a lease for lives, which contained a covenant for renewal, on the falling of each life, provided application were made within six months, having omitted, upon the death of one of the *cestuis que vie*, to apply for a renewal within the six months, filed his bill on the ground that he neither knew that the person was a life named in the lease, nor that he was dead, until after the expiration of the six months. The bill was dismissed with costs, because he had not used due diligence in ascertaining the facts, nor acted with ordinary prudence.—*Harris vs. Bryant*, 4 Russell, 90.

### LIEN.

Agreement for the sale of lands, with a stipulation that the amount of the consideration money should be secured by the bond of the purchaser to the vendor, with interest at four per cent, and should remain so secured during the latter's life on the regular payment of such interest. The conveyance which was afterwards executed expressed that the purchase money had been paid, and the vendor's receipt was endorsed upon it; but in fact only a part of it had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal, with interest, within twelve months after the vendor's death, and of interest in the mean time. Held, that under the circumstances the vendor retained a lien upon the premises sold, for that portion of the purchase money which was secured by the bond. The Lord Chancellor said, 'In general, where a bill, note, or bond is given for the whole or any part of the purchase money, the vendor does not lose his lien for so much of it, as remains unpaid. The circumstance, that in these cases the money is secured to be paid at a future day, does not affect the lien. I do not think it affected by the fact of the period of payment being dependent on the vendor's life.' Note, in the report the Chancellor is made to say, 'In the present instance the bond was taken as a security for the payment of part of the purchase money twelve months after the death of *the purchaser*, with interest at the rate of four per cent, in the mean time.' For *purchaser* we must read *vendor*.—*Winter vs. Lord Anson*, 3 Russell, 488.

There is no distinction between copyholds and freeholds, as to the doctrine of a vendor's lien for his purchase money.—*S. C.*

### LUNATIC.

Under a commission of lunacy, the jury found, 'That the party was not a lunatic, but that partly from paralysis, and partly from old age, his memory was so much impaired as to render him incompetent to the management of his affairs, and, consequently of unsound mind, and that he had been so for the term of two years last past.' The Lord Chancellor held, that where a jury state their premises and draw their conclusion and that conclusion does not necessarily follow from the premises which they state, it was not to be taken as a finding by itself: in this case he was not satisfied that the consequence followed necessarily from the premises, and, therefore, he could not allow the verdict to stand; and he ordered a new commission to issue.—*In re Holmes*, 4 Russell, 182.

[On the inquisition under the second commission the jury found that the party was of unsound mind.]

The Court will protect the property of a supposed lunatic, in the interval between the petition and verdict; but it will, at the same time, take care that those who act on his behalf shall have ample funds for resisting the commission.—*S. C.*

### PARTNER.

A, B & C carried on business as bankers for a term which would expire on the 18th of February, 1807, under articles, by which A should have the power, in the event of his death during the copartnership, of disposing of his share in favor of his wife and children. S, a customer of the bank, and two sureties, covenanted that they, or one of them, would pay to A B & C, or the survivors of them, all sums of money, then due, or which, at any time thereafter before and until the 19th of February, 1807, should become due from S to the bankers, and survivors or survivor of them. A died, having bequeathed his share in the business to his executor in trust for his children. The business was carried on under the same firm, and the executors interfered and participated in the profits. At A's death, the balance due from S, was 14,000*l*.—and he afterwards, in the course of his dealings, paid in more than 14,000*l*. but drew out sums exceeding the amount so paid in; these subsequent dealings were contained in the same account current with the preceding dealings. S afterwards became bankrupt, being in debt to the bank 19,000*l*.: Held, that the partnership which existed after the death of A was a new partnership, and that the guarantee did not apply to sums advanced to S by them. That the balance due at A's death by S must be considered as discharged by the subsequent payments from him to the bank. —*Pemberton vs. Oakes*, 4 Russell, 154.

### LEGACY DUTY.

When a legacy is not paid at the time appointed for payment by the will, the duty is payable, not merely upon the capital sum bequeathed, but on the aggregate amount of principal and interest received by the legatee.—*Thomas vs. Montgomery*, 3 Russell, 502.

## RECENT AMERICAN DECISIONS.

### EVIDENCE.

11. Evidence of acts done and declarations made by the claimants of land, after a possession by one of them for thirty years, is admissible to show that such possession was not adverse. *Church vs. Burghardt.* 8 *Pick.* 327.

12. Where a witness, who had assisted in erecting and maintaining a mill-dam, and had used it long enough to create the presumption of a grant of an easement in the stream, stated that his right was derived from a written agreement, it was *held*, that his testimony of the terms of the agreement was inadmissible, without evidence of the loss of the instrument, to prove the title to the easement. *Boynton vs. Rees.* 329.

13. The testimony of a juror who tried the cause, is admissible upon the hearing of a petition for a review. *Ferrill vs. Simpson.* 359.

14. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Donelson vs. Taylor.* 390.

15. Whether the loss of a paper is sufficiently proved to let in secondary evidence of its contents, is a question for the court. *Ibid.*

16. If the testimony of a witness is inadmissible to prove such loss, by reason of his being interested in the suit, and his being interested is known to the party against whom he is called to testify, he must be objected to before he is sworn and examined, or the objection will be too late. *Ibid.*

17. The return of an officer that he has attached certain property, is not of itself sufficient evidence of an attachment in fact, in a suit against him by another officer claiming to have attached the same property. *Merrill vs. Sawyer.* 397.

18. Where a deputy-sheriff returned on a writ, that on the day specified he had attached hay in the defendant's barn, his declaration on the same day, while he was at work on a fence near the barn, that he had attached the hay and was then watching it, was *held* inadmissible to prove the attachment, it not being a part of the *res gestæ*. *Ibid.*

19. In an action brought by the town of W, against the town of O, for expenses incurred in the support of a pauper, on the question whether the pauper derived a settlement in O from his grandfather through his father, it was *held*, that copies of a deed, executed by the grandfather in 1754, in which he was described as being of O, and of his last will, made in 1758, in which he was described as 'now resident in O,' were admissible evidence to prove that the grandfather gained a settlement in O, under *Prov. St.* 12 & 13 Will. 3, *c.* 10. *Ward vs. Oxford.* 476.

20. *Held*, also, that evidence proving that the grandfather, for a long time before 1754, had a settlement in the town of S, and that afterward, for years previous to 1784, the father of the pauper was supported as a pauper by S, was admissible to rebut the presumption arising from the description of the grandfather in the deed and will. *Ibid.*

21. Where on a trial a witness is examined respecting a matter which is irrelevant to the issue, by both parties without objection, one of the parties cannot afterward object to the witness' further examination with regard to the same subject. *Young vs. Mason.* 551.

22. In order to establish, on a trial, a title to personal property by purchase, it is not necessary for the purchaser to offer his bill of parcels in evidence; but he may prove his purchase by parol evidence. *Blood vs. Harrington.* 552.

23. If the other party wish to have the bill of parcels produced on the trial, he should give notice beforehand to the party who has it in his possession. *Ibid.*

### HUSBAND AND WIFE.

1. An ante-nuptial contract by which the wife is to hold her earnings to her separate use, is fraudulent as it respects previous or subsequent creditors of the husband. *Keith vs. Woombell.* 211.

2. Whether a settlement upon a wife after marriage, without any previous contract or consideration, by a person free from debt, is valid against creditors, *quære*; but at any rate the intention to make such a settlement must be clearly proved. *Ibid.*

3. Husband and wife give their joint promissory notes and take from the promisee a bond, that if they, or either of them, pay all taxes on certain land, he will, upon payment of the notes, convey the land, at the request of the wife, to her or her appointee. The husband is an ignorant man, and incapable, by reason of alienage, of holding real estate. *Held*, that an intention to make a settlement on the wife was not clearly proved; and she was decreed to deliver the bond over to the husband's assignee. *Ibid.*

### INSURANCE.

1. Insurance was made on a ship 'at and from Boston to all ports and places on the globe, and until her return to Boston, not exceeding two years.' She sailed from the coast of Brazil for Boston, and on arriving in Boston bay, below the harbor, was ordered by the owner to put into Salem, the two years not having yet expired. She accordingly put into that port, for the purpose

of being repaired. *Held*, that the risk did not terminate on her arrival at Salem. *Ellery vs. New England Ins. Co.* 14.

2. The destination of the vessel to Boston did not, in such case, limit the risk insured, thereafter, to that voyage, but the owner might, at any time before her arrival at Boston, alter her destination, and the risk would still continue. *Ibid*

3. Putting into Salem in such case was not a deviation. *Ibid.*

4. Under such a policy, visiting the same port more than once is not a deviation. *Ibid.*

5. A damage done to a ship by the violence of the wind during an attempt to haul her upon a marine rail-way to be repaired, and while she is partly on land, is covered by a policy of insurance against loss by the perils of the seas and 'all other losses to which assurers are liable,' this being a loss *ejusdem generis* with those specified. *Ibid.*

6. Where a new and a safe mode of repairing ships has come into use since the making of insurance on a ship, the assured may avail himself of it without prejudice to the policy. *Ibid.*

## APPOINTMENTS, &c.

On the 10th inst. at Salem, Ellis Gray Loring, of Boston, and Moses Parsons Parish, of Newburyport, were admitted to practise as Counsellors in the Supreme Court.

*By the President.*—Matthew Harvey, of New Hampshire, to be Judge of the United States, for the District of New Hampshire, in place of John S. Sherburne, deceased.

John M. Gourgas, Jr, of Quincy was admitted an attorney of the Supreme Judicial Court, at its late session in Dedham.

In the Vermont Legislature Oct. 28, 1830—the Governor and Counsel appeared, and both Houses went into joint committee, his Excellency the Governor in the Chair, and proceeded to ballot for Judges of the Supreme Court, and the following persons were declared duly elected.

Hon. TITUS HUTCHINSON, *Chief Justice.* Hon. Charles K. Williams, Hon. Stephen Royce, Jr, Hon. Ephraim Paddock, and Hon. John C. Thompson, *Associate Judges.*—*Vt. Patriot.*

Samuel M. Harrington, Esq. has been appointed Chief Justice of the Supreme Court of this State, vice the Hon. Kensy Johns, appointed Chancellor. George B. Rodney, Esq. who had been previously, appointed, having declined.

We have understood, though we cannot vouch for the fact, that Henry Stout, Esq. has been appointed Secretary of State, in place of Judge Harrington.—*Delaware Journal.*

Thomas B. Monroe has received the appointment of Attorney of the U. States for the District of Kentucky, in place of Col. John Speed Smith, resigned.—Col. Monroe has a respectable standing at the bar, and his appointment is well received here, and generally admitted to be the best the President could make while confined in the selection to his friends and supporters.—*Frankfort Com.*

John J. Marshall has been appointed by the Governor of Kentucky, Reporter to the Court of Appeals, in the place of Col. Thomas B. Monroe, resigned.

*By the acting Governor of Louisiana.*—George Eustis, Esq. Attorney General of the State, *vice* Alonzo Murphy, resigned.

THE JURISPRUDENT.

BOSTON, SATURDAY, NOVEMBER 20, 1830

## SUPREME COURT.

### TRIAL OF JOS. JENKINS KNAPP, JR.

The Supreme Judicial Court of this Commonwealth met in Salem on Tuesday, 9th inst. Present, Judges PUTNAM, WILDE and MORTON. Chief Justice SHAW having been retained as Counsel for Selman, (one of the persons originally charged with a participation in the murder of Mr WHITE, and who was afterwards discharged, no bill having been found against him by the Grand Jury) and having consulted with the Counsel for the other prisoners in relation to their defence, deemed it improper to preside at the trials in relation to that murder, expected to be the first business of this term, and has not taken his seat.

Mr Attorney General MORTON moved, that JOSEPH JENKINS KNAPP, Jun. indicted as an accessory in the murder of JOSEPH WHITE, should be brought to the bar, and arraigned on the indictment. The prisoner was soon after brought in, when the indictment was read by the Clerk. The Counsel for the prisoner objected to his being required to answer any other counts of the indictment than those which charged him as an accessory, with John F. Knapp as principal—there being other counts which alledged 'Richard Crowninshield' and 'a person unknown' to be principals. The Court decided that the prisoner was only bound to answer so far as he is charged as accessory to J. F. Knapp. He pleaded *not Guilty.*

The Clerk then proceeded to impannel the Jury.

In the afternoon, the Court met at a quarter before 3.

The *Attorney General* moved for leave to challenge one of the Jurors sworn before dinner as a talis-man, for cause, and argued that it might be done, not only before swearing the juror, but at any period during the trial.

Mr *Dexter* contended that a juror could not be challenged, after being sworn, and quoted authorities.

*The Court* was of opinion that it could not interfere. At common law a juror must be challenged, whether on the part of the government or the prisoner, before he is sworn, or not at all.

Mr *Gardiner* then inquired of the Court, who was to conduct the cause on the part of government. It had been stated to the prisoner, he said, that the learned gentleman (Mr *Webster*,) engaged on the former trial to assist the prosecuting officers of the government, now appeared on behalf of a private prosecutor. If it were so, the fact ought to be understood. And although personally it was a subject of pride and pleasure, to be engaged either with or against that gentleman, yet, in behalf of his client, he felt bound to ask, by whom he was to be prosecuted.

Mr *Dexter* was sorry to be obliged to object to the appearance of that distinguished gentleman in any place where he himself thought it proper to appear. But this was introducing a new principle of jurisprudence, and subjecting every person brought to the bar, to a danger not contemplated by the law. No case could be cited, he believed, where a private prosecutor had been allowed to employ and pay counsel, to assist in the conviction of a prisoner. By the statute of 1807, repealed in 1809, and revived again in 1811, it is made the duty of the Attorney General, and in his absence, of the Solicitor, and in his absence, of the County Attorney, to attend in behalf of the Commonwealth, and have the entire control of their cases. It is also enacted that no prosecuting officer shall receive any reward or fee from any individual for the performance of his duty. He prayed the judgment of the Court, therefore to decide whether the proper prosecuting officers should perform this duty, or whether the prosecution should be managed by private counsel.

The *Attorney General* said the gentleman was mistaken. Nothing was more common than for the prosecuting officers to obtain the aid of additional counsel. It had been practised even in this country. He had not thought it necessary to ask leave of the Court again to obtain the aid of the gentleman who assisted on the former trials, because he supposed the permission then given, extended to all the trials for the murder of Mr White.

Mr *Dexter* allowed that aid had been granted to the government, when either the Attorney or Solicitor General was absent or sick, but in no other cases, and then the assistant counsel had been paid by the Government, not hired by a private prosecutor.

*Attorney General*—In England, private counsel is always allowed to assist in the prosecution.

*Dexter*—But in England, neither the Attorney nor Solicitor General takes part officially, except in cases of high treason.

Mr *Webster* thought it incumbent on him to say, that he came merely and solely at the request of the Attorney General. No other inducement had had the least influence on him.

*The Court* reserved the decision of the question to Wednesday morning, with the understanding that till then Mr Webster should take no part in the case.

Mr *Dexter* then stated, that he understood that in all cases where the supœnas of the government were issued, the law allowed witnesses for prisoners, in capital trials, to be paid by government, as well as those for prosecution. It had been refused to witnesses on the trial of John Francis Knapp, but if conformable to law, he requested that prisoner's witnesses in that case might be paid by the state.

*The Court* said, the prisoner was entitled to it. If a prisoner apply to government for a summons which is served, the person upon whom it is served comes at the request of the government, and they of course pay him.

The indictment was then read with the usual forms, after which the opening plea for the prosecution was commenced by the Attorney General. He said, the prisoner was charged as an accessory before the fact, and that it was incumbent on the government to show that he had hired, counselled, and procured John Francis Knapp to commit the murder of Capt. White. He read the law applicable to the case, and then stated that a part of the evidence would consist of the free and voluntary disclosures of the prisoner, received by Rev. Mr Colman, under authority from him to promise a pledge, that any individual, except Richard Crowninshield, jr, who would make a full and free confession, should not be prosecuted. That pledge has been redeemed. The prisoner had the opportunity to avoid the prosecution by testifying first before the Grand Jury, and then in Court, but he declined, and his protection is fairly forfeited. He then cited authorities to support the doctrine that if an accomplice confess, and is called as a wit-

ness, and afterwards testify fraudulently, or deny his confessions, the government is redeemed from the pledge of protection, and he is to be tried by his confessions. He then called Mr Colman.

Rev. *Henry Colman* sworn. Had received a writing from the Attorney General [which was here read by the Attorney General, promising to receive as State's evidence, either of the prisoners then in confinement, except Richard Crowninshield.]

Mr *Colman* inquired if he was at liberty to read a memorandum made at the time, certifying the circumstances under which the confession was obtained.

The *Court* said that he might refresh his memory by reference to memorandum, but could not read it.

Mr *Colman*—The confession was given without any promise, solicitation, bribe, or threat, whatever, that I know of, except the written authority of the Attorney General [referred to above.] I first heard of Joseph J. Knapp, jr, in connexion with the murder of Mr White, on the morning of May 27. Did not visit prisoner on that day. On Friday consulted several gentlemen belonging to the Committee of Vigilance, viz. Messrs Phillip Chase, Dr Barstow, Wm. Fettyplace, and I think, also, John White Treadwell, in regard to visiting prisoner. Obtained their consent to visit him, and then went down to the house of J. J. Knapp, sen. where I saw several members of the family. With their knowledge, approbation and desire went to the prison. They had informed me, prisoner was to be arraigned before the Justice at 10 o'clock. I waited till nearly 11 before Justice Savage came. After prisoner had been arraigned and committed, I went into goal and saw him. Told him I was very sorry to see him in that situation, and that, if I could render him any service which was proper for me to perform I was at his command. Knapp asked me, if I thought they could prove it. I told him I did not know anything about it, other than that certain gentlemen in whom I had confidence, had told me that the evidence against him was conclusive. Asked him who Palmer was. He said he did know. I told him I did not know what could be done, but if anything could be obtained for him, if he saw fit to rely on my honor and make any disclosures to me, he might be sure they should never be divulged, —I would die first,—until I had obtained the ecurity of the government.

[Here Mr Dexter objected to the admission of subsequent confessions, and Mr Colman referred the Court to his testimony on a former trial, showing that he had labored under the erroneous impression, that a clergyman was not obliged to testify in Court to matters confided to him in his professional character.] I charged him, if innocent, by no means, in any way to involve himself—he must be the judge of that. He asked me again, repeatedly, if I thought they could prove it. I told him I did not know. During the whole interview we were sitting near together, upon his bed, and on looking up I saw a crevice in the wall nearly over our heads, from which the saw dust appeared to have fallen. Joseph Knapp told me that George Crowninshield had let down a pencil and paper through that crevice. K. appeared anxious not to be overheard. When going away, he asked me if I would see his wife, and return again. I left the prison, and went to his father's house, where I saw the same persons I had seen before. I returned to the prison about 3 o'clock on the same day. Much the same conversation passed as in the morning, with the addition that, the gentlemen referred to in the morning (Messrs Chase, &c.) as giving their opinion that the evidence against him was decisive, had authorized me to give their names. He asked what I thought. Told him I did not know, but that he would find it difficult to account for those letters, [referring to two put into the post office.] He asked if I thought they would bring up Palmer. I understood that he asked it at the request of one of the prisoners above. I gave my belief that they would. I told him I was nearly exhausted with grief and anxiety, and must leave him; I could do no more; would offer him no bribe nor persuasion; he must act for himself, on his own responsibility; my conscience was discharged. After sitting a few moments in silence, without anything being said, I got up to leave him. He then asked me to see his father and brother, and come with them to the prison. I told him I would, and made an appointment with the gaoler to let me in at 5 o'clock. Conversations occurred with members of the family, which inclined me to stay away, but seeing a chaise pass down toward the gaol, in which were Mrs Beckford and Mrs Knapp, I followed it down with the intention of dissuading them from the attempt to visit the prisoner. While talking with them, Joseph Beckford came out, and told me prisoner wanted to see me. Mr Brown, the gaoler, soon followed with a similar message. I accordingly went in. I should have mentioned before, that in our second interview, I told him that an application had gone on to admit Palmer as state's evidence, and that an answer would go through town at night. If any thing were done for him, then, it must be done that day. At the same visit I also stated that I had inquired of counsel whether if a person confess, and if it did not commit the accomplices, it would avail to the safety of the individual—and I gave him the opinion of Mr Merrill, that it would, provided it was done in good faith. The prisoner then beckoned me to go into a corner of his cell, and in a low voice made a disclosure [which not being in evidence, was not detailed.] I told him I would do all in my power to obtain for him the privilege of being admitted as witness. After I left his cell, I went to Frank's, and then went to see some members of the Committee of Vigilance.

*Gardiner*—Did you tell Knapp that Mr Merrill said, he thought a pledge for his safety could be obtained from the government? *Colman*—No. *Attorney General*—Was there an endorsement upon a copy of the paper obtained from me on this subject? *Colman*—Yes. I made one; stating that if there was any prevarication, equivocation, &c, the pledge should be null.

Mr *Gardiner* here made some remarks respecting the admission of Knapp's confession, as testimony against himself. The ground which government go upon here is, that because he has broken his contract (to turn State's evidence) his confession becomes admissible testimony. We call upon government to show its authority for this doctrine. The note in Blackstone, referred to by the Attorney General in his opening, cannot be considered such. The question is as to the circumstances attending the confession. It does not appear that in the case referred to any promises were made to induce confession. According to the quotation from Starkie, 'the convict, by breach of condition, forfeits all claim to favor, and his confession becomes evidence against himself.' This case is merely stated *without authority* by Starkie, but cannot be found reported anywhere, as it would be if it were an authority worthy of respect. I doubt whether any such decision has ever been made. A refusal to testify does not render that probable which was before incredible.

Mr *Dexter* wished to call the attention of the Court particularly to one or two expressions of the witness, calculated to exert an improper influence upon the mind of the prisoner. In the first place he says, 'if you will disclose to me, if I die for it, I will not divulge it, if I cannot get safety for you.' Again, prisoner was told, that an application had gone on from Palmer, to which an answer would be returned that night. Thus driving him up to a limited time, and operating strongly upon the two strongest passions of our nature, fear and hope.

At about 7 o'clock, the Court was adjourned to 9 on Wednesday morning.

The decision of the Court, with regard to the admission of Mr Webster, was then read by Judge Putnam, as follows:—

The Court have considered the application of the Attorney General for the admission of Mr Webster to assist him in the management of this Cause.

The Counsel in behalf of the prisoner object and contend that the stat. of 1807 ch. 18, revised by stat. 1811, c. 10. respecting the offices and duties of the Attorney General, Solicitor General, and County Attorneys—makes it their duty exclusively to conduct the prosecutions on the part of the Commonwealth.

We have examined that statute and are of opinion that it was not intended to prohibit the appointment of the Counsellors of this Court in aid of the Law officers whenever the circumstances of the case should require the Court in the exercise of a sound discretion to make such appointments.

It is one of the incidental powers of the Court, and has heretofore been exercised in cases within our own recollection. In cases where civil rights are in controversy and the form of proceeding is by indictment or information, the Court do not perceive any objection that the party in interest should employ Counsel in aid of the law officers.

The same reasons would not apply to cases involving public considerations only. In such cases the statute supposes that the prosecution shall be conducted by the law officers for their salaries, and without any other compensation whatsoever.

In the present case the learned gentleman avows that he is induced to aid the Attorney General merely at his request, and without any other consideration. So that this case presents the question whether a Counsellor may, at the request of the Attorney General, be admitted to aid him in the prosecution, without any pecuniary consideration being paid to him, or any other consideration which may be supposed to influence, excepting a disinterested regard for public good. And we all think that under these circumstances the application should be granted.

[To be concluded next week.]

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*Important to Lawyers.*—The Court of King's Bench lately decided in England that where an Attorney accepts a retainer for managing a case, he is bound to carry it to trial, even though his client may not furnish him with sufficient funds at the time.

GRAY AND BOWEN, No. 141, Washington Street, Boston, have recently published the following valuable works.

I. A DESCRIPTION OF TREMONT HOUSE; WITH ARCHITECTURAL ILLUSTRATIONS.—4to.

'Jam scires ab introitu primo—herculentum et amvenum videre et diversonium.' APULEIUS, M. A V.

This work is embellished with a copper-plate engraving, representing the front of the house, and thirty lithographic prints, exhibiting the details of the structure. Its object will be understood by the following extract from the preface.

'The present publication is intended to satisfy a curiosity, which frequent inquiries for a description of Tremont House were supposed to indicate.

'Its original plan was to furnish such particulars relative to this establishment as strangers might wish to possess, but it has been extended so as to comprehend many architectural details, which will probably be interesting to mechanics; as much of the ornamental work of Tremont House was copied or adopted from books, not commonly in their hands, and has not before been executed in this country.

II. AN EPITOME OF UNIVERSAL GEOGRAPHY; or, a Description of the various Countries of the Globe; with a view of their Political Condition at the present time. With sixty Maps. By NATHAN HALE.

III. A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By GEORGE CRABB, A. M., Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

IV. THE VESTAL — A TALE OF POMPEII. 1 Vol. 12mo.

'Oh Time, thou beautifier of the dead,
Adorner of the ruin.' CHILDE HAROLD.

V. AUTHORSHIP. A Tale. By a New Englander over Sea. 1 Vol. 12mo.

VI. AN ORATION; Delivered before the Phi Beta Kappa Society, Cambridge, Mass. August 26th, 1830. By the Rev. ORVILLE DEWEY.

VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 23.

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PICKERING'S REPORTS, Vol. 8th. This day published and for sale by HILLIARD, GRAY & CO. Oct. 23.

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This day received by GRAY & BOWEN, 141 Washington Street.

THE WESTMINSTER REVIEW, No XXV. for July 1830.

Contents: 1, The Ballot: 2, Carwell: 3, Government of Lower Canada: 4, Wilson's life of Daniel de Foe: 5, Greek Lexicons: 6, Physiology and Cultivation of Trees: 7, Game of Life: 8, Dobell's Siberia: 9, Bishop of London and Sabbath Breaking: 10, Three Courses and a Dessert: 11, Clarendon: 12, Moorsom's Nova Scotia: 13, Religious Disabilities: 14, Stamp Act and Synod of Somerset House: 15, Patronage of Art, and the President of the Royal Academy: 16, Distress of the Country: 17, Egyptian Notation: 18, Great Britain and France: Postscript to the Article on the Ballot.

The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis, relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist. Oct. 23.

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DANE'S ABRIDGMENT OF AMERICAN LAW, in 9 vols. with an appendix. A few complete sets for sale by HILLIARD, GRAY & Co. H., G. & Co. will also supply the ninth vol. and the appendix to those who are owners of the eight volumes, and the appendix separate to those who have the ninth. Oct. 23.

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ENGLISH LAW BOOKS. This day received and for sale by HILLIARD, GRAY & Co.

Browne's Chancery Practice, under the New Orders with the Sanction of the Court, in 2 vols. 8 vo.

Willoch on the Laws of the Medical Profession, 1 vol. 8 vo.

Finelly's Law and Practice of Elections, 1 vol. 12 mo.

Crabbe's History of the English Law, 1 vol. 8 vo.

Oct. 23.

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PRINTING. The Printing House of I. R. BUTTS, corner of Washington and School Streets, is supplied with materials suitable for Book, Job, and every other description of Printing. Oct. 23.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Euro possess Dictionaries, which have kept pace with t advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

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THE JURISPRUDENT

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# THE JURISPRUDENT.

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## MEDICAL JURISPRUDENCE.

### LEGITIMACY.

Continued.

'That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances indicating a contrary presumption.

'That in every case where a child is born in lawful wedlock, the husband not being separated from the wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature be the father of such child.

'That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time when by such intercourse the husband could by the laws of nature be the father of such child.'

Now as there was in the present case no evidence to shew that Lord Banbury was incapable of begetting children, and as there was evidence of his living and even sleeping with the Countess, it appears to us that these decisions of the judges leave little room for doubt upon *the law* of this highly interesting question.

The peers who most distinguish themselves in the delivery of their opinions were Lords Redesdale, Ellenborough, Erskine and Eldon. The first of these seems to have commenced rather in the style of an advocate than a judge. His lordship observed, 'This is a question not simply between the crown and the claimant; *it affects every earl whose patent is of a subsequent date* to the patent of William, Earl of Banbury. It is a question which has been frequently agitated within these walls, and one hundred and seventy years have elapsed since the cause of discussion arose. Your lordships are called upon to try a fact which could not be established when the memory of it was fresh, and when, the parties most competent and most interested to prove it being alive, the house was best qualified to give the subject a judicial termination. It must be observed that *this delay cannot be imputed to the house*, for no obstacles have ever been interposed from that quarter to the prosecution of his claim.' The facts stand thus: Of seven previous petitions presented by the ancestors of the present claimant, one was decided by the committee in their favor, but the house delayed, and at last refused to act thereupon; one was rejected under very unfavorable circumstances; one they declined entering into; the other four they entertained, yet never came to a decision upon them. Is, then, no delay in the matter to be imputed to the house? Or rather did they not constantly take refuge in delay from their conviction, that the law of the land was one way, and the facts of the case another. Furthermore, although the immaculate honor of the peers places them above all suspicion of bias from improper motives, there appears me particular necessity for reminding a judge the moment previous to his arbitrement, on which side his interest lies. Lord Redesdale then proceeded to take the question in detail, and demonstrated, with much skill and care, the undeniable truth, that, on the facts of the case, there existed a very strong presumption against the legitimacy of Nicholas. He affirmed that the uninterrupted course of decision in favor of legitimacy, which we have discussed above, was founded not on the law of England, but on a certain law laid down by Lord Coke. 'I have,' said his Lordship, 'a great respect for the memory of Lord Coke; but I am ready to accede to an assertion made by some of his contemporaries, that he was too fond of making the law, instead of declaring the law, and of telling untruths to support his own opinions.' He concluded by stating, that, in his own opinion, lapse of time alone was a sufficient ground for rejecting this tardy claim. On this point we cannot do better than quote the words of the Edinburgh Review.

'Is it necessary, in answer to this, to state the self-evident proposition, that questions of peerage stand upon a totally different footing from any other description of right? In all cases of property which depend upon legal conveyances and titles, statutes of limitation have been wisely enacted, upon the principle, that every man is presumed to enjoy what is his own; and that whoever has, for a great length of time, neglected to clothe his rights with possession, may be presumed either never to have had such rights, or to have released them for a valuable consideration; and also that it is unjust to disturb those who have been for a series of years in undisputed possession. But, in cases of peerage, there can be neither alienation or surrender; and although there may be omission to claim the right, that omission can never have the effect of transferring the title to another. The successful claimant, therefore, entails on no one the cost or inconvenience of defending a vested interest—he drives no one from his possessions—he interferes with no one in the exercise of a right, save inasmuch as, by establishing an older peerage, he acquires precedence over the representative of a more recent one; and it is this trifling consideration that would urge the legislature to preclude the heir of an ancient title from claiming the honors derived from his ancestors; thus assuming the power of extinguishing a right which the crown itself is not able to destroy.'*

Lords Ellenborough and Eldon concurred in opinion with Lord Redesdale. The substance of of the arguments of all three may be thus briefly stated. This is a question of presumption. The presumption of legitimacy arising from the fact of marriage may be rebutted by circumstances inducing a contrary presumption. Impotence is such a circumstance. So also is any other case or combination of circumstances, proving that the husband could not be the father of the child. It is agreed that neither impotence nor want of access is proved in the present instance. There is, therefore, no physical impossibility of Lord Banbury's being the father. But, in the absence of such evidence, the question may be decided on the ground of a *moral* impossibility. The conduct of the parties in this case establishes such a moral impossibility.

Granting the last assertion to be true, it is impossible to reconcile this argument with the uniform decisions of courts, or with the dicta of the judges above quoted. It is equally impossible to reconcile it with the declaration of Lord Ellenborough himself, just six years previous, that such proof of non-access was necessary, as shows the *absolute physical impossibility* of the husband being the father. It is also worthy of remark that this able and learned lawyer could produce only one case in support of his new opinion, that of Foxcroft from the times of Edward the First, when the civil and canon law governed the courts.

Lord Erskine was the principal vindicator of the rights of General Knollys. Although his speech had not, like those of his opponents, the advantage of being corrected by himself, it yet stands pre-eminent for eloquence, and, as we think, for argument. His first care was to overthrow the distinction that had been taken by Lord Redesdale and others, between a legitimacy in law, and a legitimacy in fact.

'It appears,' said he, 'of the first importance that the law by which this case is to be decided, should be accurately laid down. The facts of the case are only of importance with reference to the law, and any conclusion that may be drawn from them, which is not applicable to the law, is equally idle and irrelevant. If a former committee endeavored, in their resolutions on this claim, to distinguish the law from the fact, they cannot be too severely censured, as nothing could be more opposed to justice than such a distinction. Legitimacy on law and legitimacy in fact cannot be at variance; they are in every respect identical, and the apparent ground of distinction between them originates in an erroneous notion of the idea they purpose to convey. Legitimacy is the creature of law, and the term has no other meaning than that which is affixed to it by law. It is the designation of a particular *status*, the qualities of which have been enumerated and defined by law, as best adapted to preserve the order and security of society. When a question of legitimacy arises, and the claimant has proved the facts which constitute his legal title, whatever suspicions may exist to the contrary, the verdict must be given in his favor. These facts may be very far from convincing the judge that the claimant was actually begotten by his ostensible father: yet the judge has no alternative, for the claimant has fulfilled the conditions prescribed by the law. The province of the judge has been circumscribed by the lawgiver, and it would be a breach of his

* Edinburgh Review for March, 1829, p. 216.

duty were he to extend his inquiry beyond the limits within which the question is confined.'

Lord Erskine then proceeded to review the cases on this subject, and to shew that they all concurred in supporting his view. He then went on to vindicate their principle.

'Such is the law of England, as it has existed from early times down to the present hour. I am not here to defend the law, but to administer it. Perhaps the lawgiver may have laid down a rule not always infallible; he may, in some instances, have diverted hereditary wealth from its proper channel, by enriching the fruit of an adulterous intercourse, and he may thus have created the relation of parent and child where it had no real existence.

In my opinion, these occasional and very rare deviations from justice amount to nothing more than the price, which every member of the community may be called upon to pay, for the privileges of an enlightened code. No laws can be framed sufficiently comprehensive to embrace the infinite varieties of human action; and the labors of the lawgiver must be confined to the development of those principles which constitute the support and security of the society. He views man with reference to the general good, and to that alone. He legislates for men in general, and not for particular cases. No one can doubt that the interests of society are best consulted by making a question of such frequent occurrence as legitimacy, *to rest on a limited number of distinct facts*, easy to be proved, but not to be counterfeited, instead of leaving it to be the result of inference from a series of indefinite facts, separately trifling, and only of importance collectively, from the object to which they are applied. Marriage and cohabitation afford us a more sure solution of the question of legitimacy than we could arrive at by any reasoning on the conduct of the husband and wife. The conduct of Lord and Lady Banbury may be satisfactorily accounted for by the supposition, that Nicholas was considered illegitimate by his mother; but if she cohabited with Lord Banbury at the time of the conception, she may have been mistaken in her judgment of the father to whom she assigned the child, and it would be monstrous that the *status* of any individual should be left to the determination of the very party, who is expressly disqualified by law from giving any evidence on the subject.'

The exertions of Lord Erskine were unsuccessful, and on the 18th day of June, 1813, the House resolved, that the petitioner was not entitled to the title, dignity, and honor of Earl of Banbury. On this a most eloquent protest was drawn up by Lord Erskine, and signed by three Princes of the blood royal, and seven other peers.* The Edinburgh Review, in an article before quoted, while confessing that this decision of the House has overturned the former law of legitimacy, acquiesces in its propriety on the ground, that it introduces no confusion or uncertainty, but merely adds one to the list of circumstances competent to establish illegitimacy, namely, concealment of the child from the husband. On the proof of such concealment, the reviewer argues, that this case and the subsequent one of the Gardner peerage claim were decided. If such be the fact, we have merely assimilated our own law to that of the Code Napoléon, which admits but three proofs of illegitimacy,—impotence, non-access, and concealment. But we cannot view the matter in this light. In the first place the concealment of the children from Lord Banbury is very far from being actually proved. The grounds for such a hypothesis are his uniform non-recognition of them by deed, will, or other declaration, and the name of Vaux which they bore in infancy. But it must not be forgotten, that the Earl often saw, and perhaps slept with Lady Banbury during her pregnancy. He was in the same house with her at the time of her confinement. Is it likely that neither eyes or ears should give him intimation of the fact? Is it not equally probable, at least, that he was acquainted with the adulterous commerce Lady Banbury carried on, and disposed to tolerate it from corporeal or mental imbecility, or perhaps from base and interested motives? The complaisance which endured the wife, need not extend to recognise the children. He could feel no inclination to confer on them the benefits of his title or property, but would naturally leave them to Lord Vaux to name and nurture. This is an improbable theory doubtless, but we have only a choice of improbabilities. In the second place, if there was a concealment, the report of the case shows that the opponents of the claim used it only as a circumstance, indicating a presumption of illegitimacy. They laid no stress on its nature, nor did they regard it apart from other circumstances. We take the plain statement to be, that the law formerly stood thus,

Presumption of legitimacy may be rebutted by *physical* evidence *proving* the contrary.

And that it stands from the Banbury peerage case,

Presumption of legitimacy may be rebutted by *physical* evidence *proving*, or by *moral* evidence *rendering probable* the contrary.

Mr Phillips is, therefore, justified in laying down as a doctrine to be extracted from this case, 'that the jury may not only take into consideration, proofs tending to show the physical impossibility of the child born in wedlock being legitimate; but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct, and of declarations connected with conduct, and to every induction which reason suggests for determining upon the probabilities of the case.'* Such a law has at least the disadvantage of uncertainty, and of holding out strong encouragement to fraud and perjury. To what evils it may hereafter give rise, we do not venture to predict. But of one thing we are sure, that it puts in peril the legitimacy of every child who may have the misfortune to spring from an adulteress. It needs no ghost to teach us that such a woman will rather ascribe the paternity of her offspring to a favored lover than to a detestable husband. She will try to believe it so, and communicate the belief to her paramour. He is not unlikely to be flattered and pleased by the intelligence, and may be anxious to possess himself of the child from birth, to rear and educate as his own. But this is impossible without concealment. A secret confinement is resolved on, and the child conveyed away at once, and placed under the adulterer's care. It cannot be denied that this child is bastardized by the new law. Yet he, possibly, may be equally legitimate with the most chastely descended peer, who condemns him.

[To be continued.]

* See Lords' Journals, vol. xlix. 178.

* A Treatise on the Law of Evidence, V. ii. p. 288. Ed. 1829.

## INDEPENDENCE OF THE JUDICIARY.

We shall now proceed to examine the provisions respecting the judiciary, which are contained in the constitutions of the different states, and their bearing upon the independence of the tribunals. Of these, the first that we shall consider, is found, in terms, in the constitution of Virginia only, but it has been asserted to exist by implication in those of many if not all of the other states, as well as in that of the United States. It is that which authorizes the legislature to abolish a whole court by a single act,—to destroy the office, and thus to remove the incumbent.

This mode of vacating the tribunals has been already adopted in this country, and in more than one instance, and some of our readers have not yet forgotten the deep and long excitement which ensued; it may also be adopted hereafter, and be attended with similar irritation. At the present moment when all party feeling upon the subject has subsided, and when we can recur to the past as matter of history, let us look at the legality and policy of such a measure, and endeavor to ascertain its tendency with calmness and impartiality. Its brief examination may well be allowed to us, for there is no measure that acts more directly or powerfully upon the stability of the tribunals. Before entering upon the immediate discussion, it may be observed that the measure alluded to—the power of abolishing the courts by an act of the legislature—supposes all the provisions expressly made to have failed; it proceeds upon the necessary idea that the legislature cannot be induced by its requisite majority to address the governor, that there is no ground for impeaching the judges, and that they have not been guilty of misbehaviour. In other words, it is to be adopted as a last, and desperate remedy. This measure, we shall contend, is unconstitutional, and dangerous.

And here at the outset, we remark, that nothing warranting such a measure can be found, in terms, either in our own national constitution, or in those of the several states, with the solitary exception already mentioned. Not a line, or word, or syllable, not a hint can be found, referring to such a measure, as having ever been contemplated by their framers. We ask then, is it conceivable that the power in question, one by which the tribunals of a state may be destroyed in a moment, and without any alleged cause for their destruction, has been vested by the people in the legislature—and yet that not the slightest allusion to its exercise or existence should be found? If this may be believed, may we not believe anything—may we not suppose implied powers of any and every description to have been conferred upon the legislature, and thus make them in fact omnipotent?

We also contend that this power has been prohibited, by the provisions actually existing respecting the judicial office. These provisions point out the modes in which the judges may be removed, and they generally vest the power in the governor after he has been addressed by both houses—or in the senate, after a conviction upon impeachment. Aside from these modes of removal, the office is made wholly dependent throughout its prescribed term, whether that extends through life or is confined to a certain age or number of years upon good behaviour only. Such provisions when they declare the manner and the cause of removal, also declare in spirit and by necessary implication, that there shall be a removal in no other manner and for no other cause. The maxim, 'expressio unius

est exclusio alterius,' here applies directly.—Without such a construction, the provisions actually made have no meaning and are merely idle words; for if other modes of removal than those specified in the constitution may be legally adopted, why are any specified whatever—why was not the whole subject left expressly to the discretion of every legislature, or why was not the constitution absolutely silent upon the matter?

What is a constitution in the political sense of the term? In a republic, it is that instrument by which the people declare that they have chosen, for their own benefit, to part with certain portions of that power which is originally inherent in themselves, and always derived from themselves. The power thus parted with is usually distributed among three co-ordinate departments—each of which is distinct from the others—each of which has powers peculiar to itself—and each of which derives all its powers, as well as its existence, from the people. So far as these powers are peculiarly vested, no other department can interfere with their exercise; the limit has been assigned and fixed by a higher agent, and cannot be transcended. The moment that the limit thus fixed, in any case, is passed by any other department, its first step is a mere usurpation, and may rightfully be resisted in any manner whatever. To apply then these simple and familiar principles for a moment: if no express and no implicit recognition of the mode of removing the judges which we are now considering, can be found in the constitution, what shall we style its exercise? It is usurpation only, and can claim no obedience.

If the brief hints we have thus presented are as satisfactory to others as they are to our own minds, let us next inquire into the expediency of the measure in question. And it requires no argument to establish the position that, whatever is unconstitutional, is inexpedient and dangerous. A constitution is adopted that it may be obeyed. It is the great charter by which the government are to direct their course. It is the towering landmark which is ever to be kept steadily in view, and which can never be lost sight of without also losing sight of prosperity and safety. To sanction any violation of its articles, however slight, is virtually to sanction every violation; it is in fact to declare, that this solemn expression of the will of the people has no binding force, and it thus makes the legislature supreme over the law and over the community.

The direct influence of the measure in question upon the stability and independence of the tribunals, will be apparent to every one. Invest the legislature with this power, and from that moment the judiciary are defenceless; a single vote not only removes them from office, but abolishes the office itself. To expose the dangerous tendency of such a result would seem superfluous, especially after the examination given to it in the preceding number, yet we shall allude for a moment to the necessary influence which such a state of things will have upon the mind of every judge. He sees himself the creature of the legislature, dependent upon their will, their caprice, for his office and his sustenance, and never secure of retaining them for a single year. How will he ever dare to expose himself to their displeasure, when such is the penalty. To suppose that most judges will look steadily at the point of duty unwarped by any of these counteracting forces, that they will face the frowns of those who are able to displace them, and decide only as law and justice direct, is to suppose what human frailty denies, and facts disprove. Let the judiciary be thus enslaved and public morals and patriotism become sufficiently corrupted, and we shall then have but two departments in our government; a legislature, to enact and virtually to expound the laws; and an executive, which will be little better than the mere organ of their will. A legislature that has usurped power enough, by construction, to make the judiciary dependent, will never be at a loss for means to impose a similar yoke upon the executive.

What then will be the result of the measure under examination upon the community at large? how will the laws be administered to the people by the tribunals? We answer, the people will be affected as all other communities have been affected, where the judges have been the creatures of the supreme power. The government, no matter what may be its form, whether it is vested in one or in a hundred hands, whether it is hereditary or elective, will control the decisions of the court whenever it sees fit; and the scales of justice will be swayed from their equilibrium just so often, and just so far, as its own interest or that of its ministers and favorites shall incline. We do not intend, when using this language, that our own country, where so much now exists and operates to produce a contrary result, will be speedily the scene of such a perversion of justice. Years must elapse, and the tribunals must generally feel their impotence, and the people must become accustomed to the spectacle of their overthrow, before these predictions can be realized. Nay, we do not believe, until our institutions have become generally corrupt, and the people have been gradually made willing to resign their present glorious inheritance of liberty and law, that such predictions can be realized. But we do believe that the introduction of such a mode of removing the judges as a doctrine into the system of our national policy, and its occasional adoption and exercise by successive legislatures, will hasten on the time when all the evils which we have described as now contingent and indefinitely remote, will then be actually and fearfully felt; when the rescripts of a Venetian senate will take the place of impartial decisions, and law and justice will be known among us rather as names than as things. Preserve our tribunals independent, and whatever else declines, we shall yet in a measure be safe; destroy their independence, and in the end everything else that we now prize, will be in danger.

The further discussion of the subject will be resumed, and probably finished, in our next number.—*Journal of Law.*

## CHIEF JUSTICE SHAW.

Mr Chief Justice Shaw is between forty and fifty years of age; of a firm constitution, and of laborious habits; of extensive and of various legal learning; of singular clearness of perception and communication; and of a reach and comprehension of mind, admirably adapted to master the most difficult and complicated legal questions. Men of great acuteness of discernment are often found to be too subtle and refined for the practical business of the bench; but Mr Chief Justice Shaw happily unites the soundest practical sense with a very high degree of acumen and discrimination. He is also uncommonly exempt from party bias of all kinds—(and in *these days*, such a qualification is of more than ordinary importance in all judicial officers,) and is blessed with a temperament precisely fitted to the station he is called to assume.

There are men in Massachusetts who are more extensively known abroad, and even within the limits of the state—and if the office had been filled by a vote of the *primary assemblies* of the people, (like that of Governor) it is not probable that Mr Shaw could have succeeded. He has not been a political leader, nor has he been led by politicians. Though often called by the people of Boston into the Senate or House of Representatives, he has not pursued the course which gains the highest eclat—but has diligently attended to the best interests of his constituents and of the commonwealth; and exerted his efforts for their good, without direct reference to his own fame or advancement.

This is the second instance only, in which a Chief Justice of Massachusetts has been taken from the bar. But it has always been done in the Supreme Court of the United States; and the present Chief Justice of the King's Bench is the only man who, for the last century, has been promoted to that office from a lower seat on that bench.

As a general rule it seems to us decidedly preferable, for many reasons, that a Chief Justice should be taken directly from the bar. He will better know the deficiencies and peculiarities in the court, (if any exist) which require correction, than one who has been on the bench, and who, therefore, has been excluded from that *unreserved* intercourse with the members of the profession, which alone can apprize him of their views and opinions on topics of this nature. A puisné judge it is true, may on his accession to office, carry equal knowledge of these things to the bench—but he cannot carry there an equal *power* of correction. We believe we express a very common sentiment, when we say that much more confident and rational hope of *improving* the jurisprudence of any state or country is allowable, when the head of the court is selected from the bar, than when a side judge is made Chief Justice. There are doubtless exceptions to this remark—and we doubt not that either of the associates of the late Judge Parker whom he left to mourn his sudden death, would have ably and satisfactorily fulfilled the duties which are devolved on his successor.

## ENGLISH CASES.

COURT OF KING'S BENCH.—OCT.

Present,—His Honor the Chief Justice, and the three Puisné Judges.

This being the last day of the term, judgment was delivered in various cases that had come before the Court, of which the following were those of most interest.

*Keys vs. The Quebec Fire Insurance Company.*

This was an action brought by the plaintiff as one of the Stockholders of the Quebec Fire Insurance Company, to obtain from that Company an account of all the profits and advantages to which he, as a proprietor of ten shares therein was entitled, according to the articles of association; for the purpose of establishing his right to a full proportionate share of such profits and advantages, notwithstanding a by-law, or resolution, of the Directors which would operate to abridge his share of those profits and advantages most materially. It appears that a Resolution was entered into by a board of Directors of the said company, on the 23d of Feb'y last, that after the next 31st of March, the discount to be allowed to Stockholders upon

the amount of premiums to be paid to the Company, should be 33⅓ per cent, and that all Stockholders should be entitled to such discount to the annual amount of £500 for each share.' The Plaintiff never having effected any Insurance with the Company, was deprived, by the said Resolution of an entire third of his just share of the profits and advantages arising from such insurances as were effected by other Stockholders; and brought this suit to try the validity of that Resolution, by which the Tariff of premiums, established in conformity with the articles of association, was divided into two different rates, one applicable to Stockholders effecting insurance with the company and the other to individuals, not being Stockholders, effecting insurances.

The defendants had entered a demurrer, or *defense en droit*, on the ground that the suit was improperly brought as making the illegality of the by-law, a specific ground of action, inasmuch as the by-laws of any corporation could not be within the jurisdiction of a Court of law.

The decision of the Court hereon was delivered by his honor the Chief Justice, who said the case was an important one, not only to the parties concerned, but to all the partners in every Joint Stock Company. With regard therefore to the *defense en droit*, it had been argued that no action could be specially brought by one partner of a Joint Stock Company, against the Company as a corporation, in the same manner as the partner of a mercantile concern, could not maintain an action against another partner for any claim arising out of the partnership. But here there was no demand of money, no claim of debt—there was nothing but the demand of an account; and the declaration was a mere narration as to the grounds, on which the plaintiff considered the by-law, or resolution of the Directors, which he complained prejudiced him, as insufficient, and contradictory to the articles of Association of the Company. It was an account, and nothing but an account that was asked for. The Counsel for the Company had admitted that an account existed in conformity with the resolution in question, which it was denied, the plaintiff could legally object to in a Court of Law, but if he could not bring it before this Court, he would be remediless in case of Adlee, vs. the Whitstable Fishery and Dredging Company, (Cases in Chancery, p. 315, *et seq.*) in which the validity of a by-law was sought to be called in question, it was laid down by Lord Eldon, that a partner of a Joint Stock Company has a right to bring an action against the Corporation of which he is a member, for, 'if the consequence of such management (in forming by-laws) is that a Court of law, cannot enter into the validity of a by-law, the question is whether this Court will not hold jurisdiction for the purpose of sending that question to a Court of law, otherwise the most unreasonable thing might be done without a remedy in any Court.' 'The mode of trying the question of the validity of a by-law, appears to be by an action.' Hence if such an action in common law can be maintained, it appears that this action may, and the general allegations of the defendants are met by this case. There is a special allegation, however, that the declaration does not state any refusal to grant the account desired; but this is in fact an application to set aside the resolution entered into by the directors—there is no conclusion—no prayer for judgment of a debt claimed—so there need not be any statement of a refusal to grant an account. But it is shewn on the face of the declaration that the account required would never have been obtained had it been asked, it being considered, that the plaintiff was not entitled to any portion of these profits which were given up to certain stockholders, in consequence of the resolution in question. The declaration thus accounts for there being no demand of account made, nor any refused to grant it.

The Court determined that the *defense en droit* should be over-ruled; and that the parties should proceed.

*Dalkin Sen. vs. Dalkin Jun.*

This was an action brought by the father against the son, for wages during several years he had been employed in superintending the rope walk of the defendant. It appeared that the father boarded and lodged with the son, and several sums had been paid to him from time to time, but no specific agreement existed as to the amount of wages. This action had been brought three or four terms back for services rendered by the plaintiff to the defendant, and as there was no evidence of the quantum of wages, that question had been referred to arbitrators, who reported that £25 should be paid to the plaintiff, and £25 per annum afterwards to him for life. With this report the plaintiff was not satisfied, and, on the ground of its not stating what specific balance was due to the plaintiff, it was set aside, and fresh arbitrators appointed, (Messrs Tremain and Newton.) who reported no wages at all were due to the plaintiff. It was now prayed to have this report also set aside, and other reference made, (but not to the same arbitrators,) as it did not fulfil that which it was directed to establish, namely the quantum of wages that was due.

Mr Aylwin, for the plaintiff, observed that the only question for the consideration of the referees, was the quantum of wages due, the judgment of the court being in favor of the plaintiff, sending the case to arbitrators, only to determine how much that judgment should be for. The first referees did not appear to have been at all regulated by the ordinary principle of law, but, taking this to be a question of alimentary allowance between farther and son, had wandered into equity, and followed their own ideas in that respect, for though they hed awarded one sum of £25, to be forthwith paid, that seemed to be meant only as an advance of the first year's life annuity they awarded. In the last award the referees erred on the contrary. The only question referred to them was the quantum of wages due—the judgment being a declaration that wages were due; but they erected themselves into a court, thought fit to unrip all the proceedings and pronounce judgment *de novo* and after this come gravely into court, and say that the defendant owes nothing. It was to be regretted that Mr Tremain had not been objected to as referee, as he had himself been engaged in partnership with the defendant in that very rope-walk. Yet, if they had confined themselves to the single question before them, how much was due? the plaintiff would have submitted to receive whatever sum they awarded. But this award leaves the question in the same state as when the interlocutory order was given, for the only query left to the referees remained unanswered.

Mr Justice Bowen observed that the terms of the order of reference were, to inquire what wages were due, *if any*.

The Court took the case *en deliberé*, and on the 20th decided that the plaintiff should take nothing by his motion, the award having been made upon a reference to report, what wages were due, *if any*, was ordered to be homologated, and the action dismissed, each party to pay his own costs.—*Quebec Star.*

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ROLLS COURT—MAY.

*Miller vs. Cooper, Minett, and Co.*

This case came on for further directions on the Master's report.

Mr Bickersteth appeared for the plaintiffs. This bill had been filed to set aside a fraudulent deed of assignment, and to obtain restitution of the property thereby wrongfully acquired. The plaintiffs were the executors of a man named Miller, who, by the death of his father, had been left heir, after the death of his mother, to the reversionary interest in a considerable property, including 4,300*l.* in Old Navy Five per Cents. Miller during his father's life was in great indigence, and at one time a prisoner in the Fleet, where he became the subject of the transaction which gave rise to this bill. A man named Cooper, the defendant, obtained from him, for the consideration of 1,000*l.* the assignment of his interest in the 4,300*l.* Navy Five per Cents. Cooper had obtained the 1,000*l.* from Minett and Co., bankers, in Austin-friars, into whose hands he had transferred the assignment, and who had been made defendants to this bill, but had been dismissed afterwards, as it appeared that they had not participated in the fraud. In his answer to the original bill, Cooper had affirmed that Miller had been indebted to him to the amount of 1,800*l.* and a reference had been directed to the Master to inquire into that fact. It appeared that Cooper had induced the unfortunate Miller to sign a paper, acknowledging a debt to that amount, but the Master found that no such debt had ever existed between the parties. Miller died shortly after the assignment, and his mother died in 1823, from which time the defendant had enjoyed that sum which he had obtained from Minett and Co., in lieu of the reversion of the 4,300*l.* The restitution of that sum was the object of the bill.

Mr Agar, on the part of the defendant, argued that the plaintiff had no right to file the bill. The deceased, Miller, had the power of appointing the 4,300*l.* The assignment was tantamount to an appointment. If that appointment was good, there was no matter for a bill—if it were not, then the reversionary interest went to Miller's next of kin, and not to his executors.

His Honor said that this was a case of great fraud. The defendant had persuaded the deceased, Miller, whom, as proved by the evidence, he called 'a wretch' (and a poor wretch indeed he must have been, observed his Honor,) to acknowledge in writing a debt to him (Cooper) of 1,800*l.* By the exhibition of this acknowledgment, the latter had been enabled to obtain the loan, which otherwise would have been impracticable, of 1,000*l.* The objection to the bill he considered most superficial, and, sitting there in a Court of Equity, he could not consider Cooper in any other light than as a trustee to that fund, of which he had so fraudulently possessed himself. He should, therefore, order Cooper to pay the difference between 1,000*l.* and the 4,300*l.* with interest on the latter from the time of the death of Mrs Miller. He should also decree that Cooper should pay the entire costs of this proceeding.

## RECENT ENGLISH DECISIONS.

### RELEASE.

A nephew who was the heir-at-law, and sole next of kin of the testator, having taken the opinion of counsel as to the widow's rights under her husband's will, and being advised that she took the residue absolutely, contracted to sell her a house which had descended to him as heir; and part of the agreement was, that he should release all demands against her as executrix, or against her deceased husband's personal estate. A general release executed in pursuance of this agreement, was held to be valid, and to vest the stock in the executrix absolutely, though it made no specific mention of the stock.—*Collier vs. Squire*, 3 Russell, 467.

Where disputed claims are compromised, the party actually entitled cannot afterwards claim the value of his rights.—*S. C.*

### REVOCATION.

A covenant to surrender copyholds, made subsequent to a will, is not in equity a revocation of such will, except *pro tanto*, as such a revocation only, is, at law, the legal effect of a surrender made in pursuance of that covenant.—*Vawser vs. Jeffery*, 3 Russell, 479.

Testator devised all his real estates, and some years afterwards made a conveyance in fee of certain land included in his will to trustees upon trust to sell for payment of debts. Held, that this conveyance did not revoke the will, because it declared that the surplus moneys arising from the sale should be personal estate of the testator.—*Hodges vs. Green*, 4 Russell, 28.

But if such a conveyance has the further purpose to provide an annuity for the separate use of the wife until the sale, it will be a revocation, because the wife would be entitled to the annuity after the death of the husband, if the sale do not take place in his lifetime.—S. C.

### SETTLEMENT.

Upon the marriage of A & B, the father of B settled a sum of money upon her and her husband, and the issue of the marriage; and covenanted, by will or otherwise, to settle upon the husband, and wife and their issue, as full and great a share of his property, as he should by will or otherwise, provide to or for the use of any of his younger children, 'to take effect on the death of the survivor of himself and his wife;' and in case he should die intestate, or omit to make such provision, that his executors should pay to the trustees of the settlement, as great a share of his property as his younger children should 'in that event' become entitled to. Held, that the trustees had a claim upon the estate in respect of advances made to the testator's younger children during his lifetime and subsequently to the marriage, and not merely for a provision equal to that which any of the younger children became entitled to at his death; the words 'in the event' not meaning 'upon his death,' but 'in the event of his dying intestate, or omitting to make the specified disposition of his property.—*Willis vs. Black*, 4 R. 170.

J M previous to his marriage with M A, transferred certain stock to trustees; and by a settlement made in contemplation of that marriage, the trusts of such stock were declared to be for the separate use of M A during her life; and, after her death, for J M if he survived her; but if he died in her lifetime, then for such persons as he should by deed or will appoint to; and in default of appointment, for his executors and administrators. J M died in the lifetime of M A having appointed an executrix, but without exercising his power. Held that the executrix was not entitled to the stock beneficially; but that it was to be administered by her as part of his general personal estate; on the ground that it was the property of J M before the marriage, and that the purpose of the settlement being only to make a provision for M A during her life, the presumed intention must be, that after her death, it was again to become a part of the estate of J M.—*Collier vs. Squire*, 3 Russell, 467.

### SOLICITOR AND CLIENT.

A defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between the country and the town solicitor, made in the relation of client and solicitor, either during the cause, or with reference to it, though previous to its commencement.—*Hughes vs. Biddulph*, 4 Russell, 190.

A plaintiff is not entitled to the production of a letter, admitted to be in the defendant's possession which was written by him to his solicitor after a dispute had arisen between the parties, directing the opinion of counsel to be taken upon the matter in question.—*Vent v . Pacey*, 4 Russell, 193.

### VENDOR AND PURCHASER.

Bill for the specific performance of a contract for the sale of an estate. The facts were, that after the delivery of the abstracts which had been compared with the deeds by the solicitor of the defendant, but prior to any approbation of the title, the office of the plaintiff's solicitor was accidentally burnt down, and some material title-deeds were destroyed. The Master reported that the abstracts delivered did disclose a good title to the estate, and that the plaintiff could then make a good title, regard being had to the fact of the destruction or loss of the title-deeds. The bill was dismissed with costs.—*Bryant vs. Busk*, 4 Russell, 1.

Every vendor must necessarily be bound to furnish the purchaser with the means of asserting his title, and defending his possession. The title-deeds are the ordinary and primary means for that purpose. If the primary means do not exist, there may be secondary means to the same end. There may be means of proving what were the contents of the deeds, and that the deeds were duly executed and delivered; and the vendor must furnish the purchaser with the means of such proof. If no such proof can be furnished, the purchaser is entitled to be discharged.—*Per Cur. S. C.*

## RECENT AMERICAN DECISIONS.

### INSURANCE.

7. Thus, a ship was insured for two years, by a policy made at Boston, where there was no marine rail-way, and before the expiration of the time she put into a neighboring port to be repaired upon such a rail-way, this mode of repairing having got into pretty general use since the making of the policy, and while she was hauling upon the rail-way she was blown over and bilged; and it was *held*, that this was a loss within the general words of the policy, 'all other losses and misfortunes to which assurers are liable by the rules and customs of insurance in Boston.' *Ellery vs. N. E. Insurance Co.* 8 *Pick.* 14.

8. A party interested in a ship, but whose name does not appear in the custom-house documents or bill of sale, is not obliged, for this reason merely, to disclose the nature of his interest at the time of getting insurance, unless he is questioned in this respect by the underwriters. *Bixby vs. Franklin Ins. Co.* 86.

9. Where a master of a vessel, insured from one port to another, intends to deviate by putting into an intermediate port and actually puts in there, the assured may nevertheless give evidence that necessity, and not the original intention, was the immediate cause of putting in, and that consequently there was no deviation. *Hobart vs. Norton.* 159.

10. A vessel being advertised for a voyage from Boston to Charleston, took goods for the latter port, which, by the bill of lading, were to be delivered there, and which the shipper caused to be insured for such a voyage. She took other goods for Edgarton in the island of Martha's Vineyard, it being the original intention to put into that port. The vessel did in fact put into Edgarton, but the course of the wind and tides was such that she must have so put in, had there been no such intention originally. The goods were damaged by perils of the seas in the course of her voyage to Charleston, and sold at a loss. *Held*, that the owners of the vessel were not answerable to the shippers for this loss. *Ibid.*

11. The intention, at the commencement of a voyage, to put into an intermediate port out of the course of the voyage described in the bills of lading and advertisements, the termini being still the same, is not the substitution of a different voyage, but is only an intention to deviate. *Ibid.*

### INSURANCE COMPANY.

1. The by-laws of an insurance company provided that the certificates of stock should be transferable only at the office of the company, by the holder personally or by his attorney, and that transfers should be authenticated by the president and attested by the secretary, and that it should be the duty of the president to attend at the office during business hours. An assignment of some shares was made to two copartners, with a power to them *both*, to transfer the same on the books of the company, and *one* of the partners called at the office during business hours, and, the president being absent, exhibited to the secretary the assignment and power of attorney, and demanded that the shares should be transferred on the books of the company and certificates issued to himself and his co-partner, but the secretary declined doing anything in the matter, saying it was the president's business. The assignors were indebted to the company in one sum that was then due, and in others not then due. *Held*, that the company had no lien upon the shares as security for their demands against the assignors, and that they were bound to make a transfer of the shares on their books as demanded, and to issue new certificates to the assignees. *Sargent vs. Franklin Ins. Co.* 90.

2. The purchaser of shares of the stock of an insurance company is entitled to a certificate, on producing evidence of the assignment, to the officers of the company at their office. *Ibid.*

3. The shares of the capital stock of an insurance company are personal property of an assign-

able character, and any by-law of such company which should require the transfers to be made only at its office personally or by attorney with the consent of the president, would be a restraint contrary to the general law of the commonwealth, which permits the right of personal property and incorporeal hereditaments to be transferred in various ways. *Ibid.*

4. An insurance company has no implied lien on the shares of the stock, as security for debts due from any of the stockholders. *Ibid.*

5. Dividends declared by an insurance company, on shares of a stockholder indebted to the company, may be retained by the company towards satisfaction of the debt. *Ibid.*

6. Where an insurance company, being bound to enter on its books a transfer of shares in pursuance of an assignment of the same, made by the former holder, refused to enter such transfer, and caused the shares to be attached and sold as the property of the former holder, it was held to be liable in damages to the assignees of the shares; and the amount of damages in such case is the value of the shares at the time of such refusal, with interest from that time. *Ibid.*

THE JURISPRUDENT.

BOSTON, SATURDAY, NOVEMBER 27, 1830.

## SUPREME COURT.

### TRIAL OF JOS. JENKINS KNAPP, JR.

Concluded from page 135.

It is to be recollected, that at the trial of John F. Knapp the same learned gentleman was at the request of the law officers appointed to aid them, and that there was no objection then made by the prisoner, or his counsel. And although that appointment strictly was for the then pending trial, yet if the other trials had followed immediately, the Counsel for the Government would have had reason to suppose that they were to receive his assistance in those trials, unless good objections should have been made. It is said by the law officers, that the preparations for this trial have been made under a similar expectation on their part, and no objection was made to this measure until the jury were empannelled.

It is to be understood that the Solicitor General concurs in the application on the part of the Attorney General, and that two gentlemen only are to address the jury in the case.

It is further to be understood that the 'direction and control of the prosecution' are to be with the Attorney General, who acts under oath, and upon his official responsibility.

We give no opinion upon any application of this nature under any other circumstances than such as are found in the case now before us.

When the reading was concluded, Mr Gardiner observed, that the statute required that there should be no fee or hope of reward to stimulate the exertions of the prosecuting counsel. The objection in this case arose from the belief that the assistant counsel was retained and feed by a private individual. The objection falls to the ground, if this is not the fact.

The *Court* so understood Mr Webster—and observed that there was now no question before the Court.

Mr *Dexter* here observed that he did not understand Mr Webster to have said he received no fee from any private individual—and if he were wrong he should like to be set right.

*Wilde, Justice*, said he distinctly understood Mr Webster to say that he came solely at the request of the Attorney General, and had no other inducement.

The Attorney General here rose to explain the manner in which he procured Mr W., but was stopped, there being no question before the Court.

Mr *Dexter* said he should like to know whether Mr W. expected any fee from any private individual.

Mr Webster said if it would make it any stronger, he would repeat it.

Mr Dexter said he was satisfied.

The *Court* again decided, in reply to the Attorney General, that no objection to a juror could be raised after he was sworn.

The question respecting the admissibility of Knapp's confession then came up. Mr Webster was impressed with the conviction that it was clearly admissible, according to the best English authorities. Between the confession made by a man, of his own crimes, and a gratuitous disclosure implicating others, there was a wide difference.—In a simple confession, it is supposed he may be influenced by hope of reward, or favor, or fear of punishment. He may divulge or withhold whatever he thinks may promote his own interest. But in *disclosures*, made under offer of indemnity, the prisoner is not at liberty to disclose or to refrain from doing so, at his option. He must tell the whole truth. And from the circumstances in which he is placed, it is to be presumed that he does speak truth. The moment he receives assurance from the government that he shall not be prosecuted, he is beyond hope or fear; he is as secure as if pardoned. The practice in this country places the defendant much farther beyond hope or fear, than the practice in England. There the prisoner can only receive the assurance of the Justice of Peace who commits him, that he will recommend that his testimony may be received; which recommendation may be overruled by the Court. In this country the public prosecutor has the absolute power of preventing his ever being brought to trial, and thus securing him perfect indemnity, and placing him beyond the reach of hope or fear. He can be thrown back into a state of uncertainty only by departing from the truth.—What motive induced the defendant to adopt this course, and violate the pledges which he had given to the government in return for the assurance which he had received? Truth was the only condition of his safety. Everything depended upon his telling the truth.

Why should the evidence of a criminal be admitted against others, when not good against himself? The principle would deprive the law of one of its most important prerogatives, and greatly impede the administration of justice. A man might receive this assurance of indemnity on condition of his turning State's evidence—alter his mind, and refuse to testify on the stand against his accomplices— they are consequently acquitted for want of evidence—and he then comes forward and claims his privilege, on the strength of which he is acquitted—and nobody is brought to justice.

The objections which exist to receiving the confessions of a man not certain of his fate have no bearing upon the disclosures made by the prisoner at the bar. Lord Mansfield says, if a prisoner make confessions implicating his accomplices, on receiving promise of indemnity, and when brought into Court, refuse to testify, fail to disclose the whole truth, or falsify in the minutest particular, he must be hanged *on his own confession*. Modern usage has modified the rigor of the ancient law so far, that if the prisoner demonstrate the honesty of his intentions, he is allowed to go clear. The ancient law allowed not the slightest accidental discrepancy. If he did not testify in Court precisely as he had confessed elsewhere, he was hanged on his own confession. The meaning of *confession* in this case is obvious. The prisoner is convicted on that confession which, if adhered to, would have saved him. Learned men would not waste words to show that a man might be hanged on his *own confession of individual guilt*. Every body knows that. But they mean to say that a prisoner who makes such disclosures as to induce the Government to give him assurance of indemnity, *and then violates the pledge on his part*, may be hanged on his former confession. Judge Christian relates a case of a man thus circumstanced, who, when brought upon the stand, refused to *abide by his former confession*, whereupon the Judge ordered a new indictment to be found, and he was convicted upon his former confession. Starkie relates the case of a man who made confession of his guilt in consequence of a constable having falsely represented to him that his accomplices were taken, but having discovered the deception, denied all previous confession and refused to give evidence, yet was convicted *upon his own confession*. It is true this case is only given in a note, and has not found its way into any volume of reports, but its authority has never been questioned or doubted by any. Moreover, there is no opposing authority. Cases of this kind must have been constantly occurring in England, and if the objections raised in this case were sustainable, it could certainly be shown.

The English Courts and this Court say that whatever a man confesses under the excitement of *hope* or *fear*, is not to be received in evidence. But no threat of consequences or hope of immunity was held out to the defendant at the bar, to induce him to confess. The whole thing originated with him and his friends. Indeed, it may be said to have originated with the defendant *personally*. The first thing we hear of, is, his asking Mr Colman *whether he thought they could prove it?* Prove *what?* Mr Colman had not charged him with guilt. The conversation began with himself, and with the supposition that he needed the mercy of the State. Mr Colman uttered neither *threat* or *promise* in the technical acceptation of the words. No promise, except that he would keep his secret inviolable. He gave him no *advice to confess*, and in reply to a question of the defendant, told him he did not know what course was best for him to adopt; but offered his confidential services.

The mere communication of *facts* or *other conversations*, would not rule out the confession. There must be an *inducement*. The mere statement of the *fact*, that Palmer was confessing, and had made application to be admitted as State's evidence, is no valid objection to the admissibility of his disclosures. It was true. To shut out confessions on this ground, would exclude *all disclosures* made on *knowledge of facts*. To say that a confession should not be received, because the party was acquainted with *facts*, would be strange doctrine. No doubt the prisoner was assured of the services of the witness in procuring him indemnity if possible. The last interview, at which the prisoner did confess, was sought by the defendant himself. Mr Colman strove to avoid it, and was twice sent for before he went into the

cell. He did not tell defendant it would be better or worse for him to confess, but told him he must act on his *own responsibility*; and when carrying the offer of indemnity from the government to him, told him it was given upon the *sole condition* that his confession should be full and implicit, and that if it were not so, if there was any withholding, denial, or contradiction, it was not to avail him.

Mr *Dexter* said, this was a question of great importance, and he regretted to be obliged to reply entirely without preparation—it was so difficult to take up and follow another's arrangement. It had been urged against the recognition of the rule of law which would exclude the confession of prisoner, that it would lead to public inconvenience and injury, by sometimes preventing the conviction of the guilty. True; but the same may be argued against *any rule of law* protecting the prisoner. It is acknowledged to be settled, that no confession induced by any *promise* or *threat* can be received; but it is contended, that the confession in this case could not have been obtained by any such consideration, *because* the prisoner was in perfect safety at the time of making it. Wherein does this differ from common cases of involuntary confession, *voluntarily repeated?* We have a right to show that it does not differ at all, and that the circumstances attending the verbal confession were such as to taint the posterior one in such a manner as to prevent its being received. Nothing occurred to give the latter a different character from the former, and the question recurs, what was the inducement to the *first confession?* The doctrine which it is desired to introduce in this case, is precisely the old doctrine of approvements *not modified* according to the modern practice, as is contended, but in all its *unmitigated severity.*

No case in the English books touches *this*, except that of Hall. If a statement is made to a prisoner, which has a *tendency* to excite hope or fear in him, that rules out his testimony; but the *truth* or *falsehood* of the information so given has *no effect* on the admissibility of his confession. A confession made under *expectations excited by another*, is not a voluntary confession, whether the expectation be of government indemnity or any other benefit. The admission of a prisoner to testify amounts to a recommendation to favor; and if he refuse to *perform his agreement*, he forfeits all claim to favor on that ground. Here is a *hope* and a *fear*. We are willing our case should stand upon this ground. The contract with government is forfeited by the prisoner's *own act*, but this does not authorise them to introduce *evidence not otherwise allowed.* If he is put upon his trial and executed, upon evidence that could not have been admitted under other circumstances, he is then executed, not for being accessory to the murder of Mr White, but *for breaking his contract with the government.*

It cannot be said with justice, that no inducements were offered the defendant, which ought to cause this evidence to be ruled out. Mr Colman's *offer of aid*, must have meant, I will do all in my power to extricate you from your perilous situation.—From *whom* did the proposition to confess proceed? Not from the *defendant;* he was led into it. The remark of Mr *Colman* that he would not divulge what defendant should communicate to him, except for the purpose of procuring an indemnity from government, amounted to a promise, that he would use all his exertions to procure such indemnity. At the second interview between that gentleman and the prisoner, Mr Colman told him that certain gentlemen in whose opinions he had confidence, thought there was *evidence enough to convict him;* that Palmer had applied and would probably be *admitted* as State's evidence; that he did not know what could be done with respect to admitting Knapp as State's evidence, but that he would do for him *all that he could.* Here are *inducements.* If the *verbal* confession was not a credible one under these circumstances, no subsequent *repetition* can render it admissible.

The point was reserved by the Court, for decision on Wednesday morning.

Mr *Gardiner*, in reply to a question from the Court, would not dispute that Mr White was found dead in his bed, but would deny that John Francis Knapp was *present, aiding and abetting in his murder.*

*Morton, Justice.* They have a right to show that John Francis Knapp was not a *felon himself*, or was innocent of the *particular crime* for which he suffered, but no further. A record of conviction, is all that is necessary to prove the guilt of the principal.

*Gardiner.* Record of conviction is evidence to establish the guilt of the principal and all its legal consequences as to *himself*, but cannot compromise the rights of him who is accused *as accessory.* In the record it appears that John Francis Knapp was convicted as principal, being present, aiding and abetting. But the *accessory* notwithstanding the record of the conviction of a principal, may dispute his guilt.

*Dexter.* In this case, the indictment charges, that Joseph Jenkins Knapp, jr, hired and procured the murder to be committed. There are *two facts* to be proved here: that the principal was guilty, and that the accessory hired and procured, &c. Defendant might say that if he had been tried with his principal, both would have been acquitted; or that his counsel would have been able to satisfy the jury of his own innocence. Both the charges in the indictment are to be proved. It is against the rules of evidence to refer to the testimony produced in former trial against prisoner.

At 12 o'clock, the Court adjourned to 2 P. M.

In the afternoon, evidence was introduced to prove the death of Mr White, &c.

Benjamin White, Lydia Kimball, Catharine Kimball, Henry R. Daland, Lewis Endicott, Dr Johnson, John W. Treadwell, Benjamin Leighton, Thomas Hart and Mr Lummus were severally sworn, and testified, as on the former trials.

Mr *Dexter* objected to the introduction of testimony respecting Richard Crowninshield, jun. Whether defendant hired Crowninshield or not, was not in question in the present trial.

Mr *Colman*, in reply to a question from Court respecting an endorsement made by him on the written promise of indemnity from government to defendant, stated that it was as follows:—'His confession was to be full and explicit, and if there was any withholding, denial, or contradiction, it was not to avail him.'

A little before 6 o'clock, the Court adjourned to Thursday morning.

At the opening of the Court Thursday morning, a learned and able opinion of the Judges, in writing was delivered by Judge Putnam on this question which it seemed to be agreed by the Counsel was the first time it had arisen in any of the United States:

Whether the confession of an accomplice, made in consequence of a promise from the Attorney General to admit the accomplice as a Witness for the Government on the application of the accomplice, can by law be admitted as evidence against the accomplice himself, after he shall have refused to testify on the trial of those whom he had accused?

The Court, in their opinion on this question, discussed the general principles of evidence and numerous cases in English law bearing on the question. They considered it fully proved in the present case that the Prisoner had no other inducement operating on his mind to make the written Confession offered in evidence than the promise of the Attorney General that if he chose to disclose fully all he knew as to the murder, and would ingenuously testify all his knowledge at the trial of his accomplices, such confessions should not be evidence against himself; and the Court decided that the Prisoner, having thus been made sure of his own safety, did not make the Confessions under the influence of hope or fear, and that his mind was left free and unbiassed, and that he had no temptation to swerve from the truth, and that the government could give in evidence the confessions of J. J. Knapp, jun. on his trial, in the same manner as the voluntary confessions of other accused persons are usually given in evidence, their weight and credibility to be judged of by the Jury.

The opinion was listened to with profound attention by the members of the Bar and a crowded auditory. The written confessions were then read to the Jury by the Attorney General.

*Salem Gazette.*

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*Rhode Island.*—The Supreme Court of Rhode Island has determined that a license for retailing spirits cannot be transferred [illegible] other place than that named in it. A question is before the court, whether lottery tickets, after a drawing, is such evidence of property as to make the taking of them larcency.

*Perjury.*—A prisoner accused of perjury alleged to have been committed in taking a false oath before the Judges of elections at Charleston, S. C. in regard to his qualifications as a voter, was recently brought before Judge Bay, on a writ of habeas corpus, and after argument, the Judge gave an opinion that taking a false oath at an election is not perjury. To constitute the crime of perjury at common law, a false oath must be taken in a judicial court, in some matter of consequence occurring in a civil suit or criminal prosecution.

*Judge Collet.*—We learn, with regret, of the severe sickness of Judge Collet. Should he not recover, there will be three Supreme Judges to elect this winter.—*Cincinnati American.*

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'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 23.

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PICKERING'S REPORTS, Vol. 8th. This day published and for sale by HILLIARD, GRAY & CO. Oct. 23.

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This day received by GRAY & BOWEN, 141 Washington Street.

THE WESTMINSTER REVIEW, No XXV. for July 1830.

Contents: 1, The Ballot: 2, Carwell: 3, Government of Lower Canada: 4, Wilson's life of Daniel de Foe: 5, Greek Lexicons: 6, Physiology and Cultivation of Trees: 7, Game of Life: 8, Dobell's Siberia: 9, Bishop of London and Sabbath Breaking: 10, Three Courses and a Dessert: 11, Clarendon: 12, Moorsom's Nova Scotia: 13, Religious Disabilities: 14, Stamp Act and Synod of Somerset House: 15, Patronage of Art, and the President of the Royal Academy: 16, Distress of the Country: 17, Egyptian Notation: 18, Great Britain and France: Postscript to the Article on the Ballot.

The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis, relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist. Oct. 23.

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Finelly's Law and Practice of Elections, 1 vol. 12 mo.

Crabbe's History of the English Law, 1 vol. 8 vo. Oct. 23.

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PRINTING. The Printing House of I. R. BUTTS, corner of Washington and School Streets, is supplied with materials suitable for Book, Job, and every other description of Printing. Oct. 23.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fiftyfifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy,* with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Euro possess Dictionaries, which have kept pace with t advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is usted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

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THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, DECEMBER 4, 1830. NO. XIX.

## MEDICAL JURISPRUDENCE.

### LEGITIMACY.

Concluded.

It now remains to notice a question, which may easily arise under all modifications of the law of legitimacy, and is one of the most interesting and difficult problems involved in medical jurisprudence. We mean the extent to which variations from the ordinary term of gestation may take place in woman, whether the birth be premature or protracted. On this, the highest medical authorities are at issue, some adhering closely to the regular period of forty weeks as the extreme time, while others extend their indulgence, even to the utmost verge of eleven calendar months. The latter was of course the favorite opinion in the olden times, when a taste for the marvellous prevailed, while the former accords better with that modern scepticism which grows daily more fashionable, especially among professors of the healing art. Dr Beck, whose work has so often been our text-book in these papers, inclines strongly to believe, notwithstanding the analogies derived from animals, and the recorded cases of medicine and law, that little or no extension beyond the ordinary period can possibly take place. He is supported in this opinion by most eminent practitioners of our own time. Yet the illustrious Hunter declared, that he had *known* a woman bear a living child in a perfectly natural way, fourteen days later than nine calendar months; and *believed* two women to have been delivered of children alive in a natural way, above ten calendar months from the hour of conception. Many other scientific and veracious persons may be adduced, who vouch for the possibility of such facts from their own experience. All, however, seem agreed that a prematurity of two months or less is no ground for questioning legitimacy. A few examples of the extent to which credulity was once carried, on these subjects can hardly fail to be amusing. To France the palm of absurdity belongs; for the parliament of Grenoble went so far as to declare the issue legitimate, where the husband had been absent four years, the wife declaring that conception had taken place through the force of imagination alone. 'Ut mulier per fortem imaginationem putaverit, se in somniis rem habuisse cum marito, atque sic concepisse.'

Godefroy mentions a widow who was delivered fourteen months after the death of her husband. The issue was pronounced legitimate by the parliament of Paris, because she had lived during the whole period of widowhood with her husband's relatives, who observed no impropriety in her conduct, and because she showed deep and constant grief for the loss of her partner. Bartholin tells us of a young girl at Leipsic, who on accusing a person of having seduced her, was confined and strictly guarded. At the end of sixteen months she brought forth a child, which lived two days. In 1638, a female was delivered one year and thirteen days after the death of her husband. The opinion of the medical faculty at Leipsic being required, they pronounced the child legitimate. There had however been a month of labor, pains, etc. Sueur, residing at Caudebec, in Normandy, was struck with apoplexy on the 14th of May, 1771, and died on the 16th. His wife, Marie Rose, had never been pregnant during the six years of their marriage. On the 11th of the following September she declared herself with child, and on the 17th of April, 1772, eleven months and one day after his death, she was delivered of a son. On appeal to the parliament of Rouen, a decree was obtained in favor of the child's legitimacy. The unexceptionable nature of Marie's character, and the possibility of protracted gestation were much insisted on. Petit, the celebrated surgeon, relates a case, on the authority of Heister, of a female, wife to a bookseller at Wolfenbuttel, who was delivered thirteen months after her husband's death. The individuals interested proposed to contest the the legitimacy of the infant, but were deterred on account of her excellent character. So convinced was one Christopher Misnerus, who had acted as shopkeeper during her widowhood, of her virtue, that he married her shortly after; and had two children by her, and each of them was born after a gestation of thirteen months. From a large collection of French and German cases on this subject, we may infer that in both countries the law was very unsettled, and the decisions of the Courts mainly regulated by the female's previous character. In France this evil has been remedied by the Code Napoloén, which makes the legitimacy of the child disprovable, where there was no access by the husband from the three hundredth to the hundred and eightieth day before its birth.

The law of England appears to be equally unsettled on this subject. We find these cases in the books. In the 18th year of Edward I. Beatrice, the wife of Robert Radwell, was delivered of a son, eleven days after forty weeks. The husband had been seriously ill, and had no access to his wife for one month before his death. The child *was presumed* to be a bastard, and judgment was given accordingly. Gilbert de Clare, Earl of Gloucester, died on the 30th of June, of the 7th of Edward II., and on the 28th of January, of the ninth year (within one day of a year and seven months,) his sisters and co-heirs prayed livery. The Countess pleaded, that she was big by the Earl, which was accordingly found *per inquisitionem*. The matter remained in deliberation for more than a year longer, when the Countess still delaying to bring forth, livery was granted. In another case, during the 18th of Richard II., Andrews, the husband, died of the plague. His wife, who was a lewd woman, was delivered of a child, forty weeks and ten days after the death of the husband. Yet the child was adjudged legitimate, and heir to Andrews, for *partus potest protrahi decem dies ex accidente*. In another instance: 'Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb. Thecar dies. Duncomb, within three weeks of his death, marries her; and two hundred and eightyone days and sixteen hours after his death she is delivered of a son. Here it was agreed: 1. If she had not married Duncomb, without question the issue should not be a bastard, but should be adjudged the son of Thecar. 2. No averment shall be received that Thecar did not cohabit with his wife. 3. Though it is possible that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar.' All these cases may be found collected in Hargrave's note to Coke Littleton, 123. b.

Britton, Bishop of Hereford, in the reign of Edward I., and distinguished for his knowledge of the common law, has left us a most curious specimen of the wisdom of our ancestors in settling the legitimacy of posthumous children. 'If a woman, upon the death of her husband, gave out that she was *enceinte*, an examination of her person should take place, and upon the declaration of the examiners, doubting or confirming her statement, she should be committed by the sheriff to a castle, or some other place of safety (so that no woman, or person of whom suspicion could be entertained, should have access to her,) until her delivery. In case her delivery did not take place within forty weeks from the death of her husband, she should be punished by fine and imprisonment; but if her delivery did take place within the forty weeks, then the issue should be admitted into possession, and no one be allowed to aver that it was begotten by other than the husband.' It would seem, then that our sage fathers expected, from lawfully begotten, a more orderly conduct than from others, while they thought those of a less regular origin would keep up their bad character by shewing irregularity and tardiness about their coming into the world.

For more than two hundred years before the contest for the Gardner peerage, the question of protracted gestation seems to have escaped legal inquiry, if we except the single case of Forster and Cooke.* In that instance a legatee filed a bill to have his legacy, and in order to [illegible] the person on whom he had claims, it was necessary to establish a will. But as it is [illegible] in Chancery, for establishing a will, to have the heir-at-law before the Court, it was a question to whom that title properly belonged, and so the period of gestation came to be considered. An issue was directed to try, whether a child, born fortythree weeks after the husband's death, was legitimate; and it appears that the jury found this posthumous child to be the heir-at-law. The interests of the legatee were not affected, whichever way the verdict went; nor does it appear before what Judge the trial took place, nor whether a common or special jury was employed. The Lord Chancellor, who was counsel in the cause, afterwards declared in the Lords, that he held it to be a case of very small importance.

Although the decision of the Gardner barony claim did not depend upon the evidence produced of prolonged pregnancy, but mainly rested on the precedent of the Banbury peerage, the question was, notwithstanding, most elaborately discussed in that case. The following is a brief outline of the facts:

In the year 1796, Captain Gardner (afterwards

* Brown's Chancery Cases, iii. 349.

Lord Gardner) married Miss Adderly. They lived together upon the ordinary terms of man and wife until the 30th of January, 1802, on which day Mrs Gardner took leave of him on board his ship, off St Helens, and proceeded immediately to London. Shortly afterwards, he sailed to the West Indies, from whence he returned to England on the 11th of July following. It appeared in evidence, that for some time before Captain Gardner's departure, his wife carried on a secret correspondence with a gentleman, named Jadis; and during the whole time of her husband's absence there was clear proof of adulterous intercourse. Upon Capt. Gardner's return to England, he found his wife apparently with child; and she, with the hope of being delivered within the proper time, publicly avowed her pregnancy. After employing many expedients to accelerate delivery, such as jolting in her carriage over rough stones, without success, she at length perceived that the child could not be brought into the world in time to make it at all probable that Captain Gardner was the father. She then declared herself to have been deceived in her belief of pregnancy, and that her change of shape was attributable to dropsy; at which imposture her medical attendant appears to have connived. Her husband, and the whole of his family, were deceived by this representation. Mrs Gardner, upon her confinement coming on, revealed the truth to her brother, who took Captain Gardner out of the way. On the 8th of December, 1802, Mrs Gardner was delivered in secret, in the presence of three persons only. The child was immediately conveyed away to an obscure lodging in Swallow Street, and was afterwards christened by the name of Mr Jadis, who, in all respects, treated it as his son. The birth was carefully and successfully concealed from Captain Gardner, who did not even discover his wife's criminality until she left his house, in the year 1803. He subsequently obtained a divorce, and married again. His wife became the bride of Mr Jadis. Captain Gardner succeeded to his family title in the year 1808, and died in 1815, leaving a son by his second marriage, who, in the year 1824, presented his petition to the King, praying to be entered on the Parliament roll as a minor peer. This was opposed by his elder brother, who claimed to be the heir of Lord Gardner. The committee of privileges decided in favor of the junior claimant. Upon the circumstances of concealment and adultery, it seems to have been contended, that there was a *moral* impossibility of Lord Gardner's being the father of Mrs Gardner's first son, and on this the question was mainly decided. It was further urged, that from the length of time, three hundred and eleven days, that elapsed between the last opportunity of access and the period of birth, there was also a *physical* impossibility.

At this remarkable trial nearly all the medical practitioners in London, of any reputation or experience in midwifery, were examined at great length. In the evidence of those who appeared to prove, that a variation of any magnitude from the legitimate period of gestation was a thing unknown, we find much more decision and explicitness than in that of their opponents. The former, however, had the peculiar advantage, that their opinions were received as evidence, being, as they averred, the result of their personal experience, while the latter were continually interrupted and silenced by objections raised to their testimony, on the ground that the cases which they quoted were hearsay statements, communicated by women liable to self-deception, und consequently inadmissible by all the rules of law. This, although a correct, appears an unjust cavil; as in a question of this kind, it is very evident that the moment of conception, on which all depends, can very rarely be known to any but the mother herself. Some strong facts were, nevertheless, brought forward. Dr Granville instanced the case of his own wife, where the term gestation, if reckoned from the non-appearance of the *catamenia* at the proper time for the periodic return (as is commonly the custom,) amounted to three hundred and six days; and, if reckoned from the last appearance of the discharge, to three hundred and thirtyfive days. Mr John Sabine positively affirmed, that the delivery of his own wife had been protracted to the end of ten calendar months. Drs Conquest and Power gave some very clear and satisfactory evidence to the same purport.

Without presuming to give a positive opinion on a subject so involved in obscurity, we must confess an inclination to believe in the possibility and the rareness of these phenomena in gestation. Although we have the declaration of individuals, remarkable for science and experience, that they never knew an instance in which the term of nine months was materially exceeded, such testimony seems more than counterbalanced by the assertion of men equal to them in knowledge aand veracity, who say, that they have known such irregularities in their own personal experience. It is urged against the latter, that their convictions must, of necessity, depend upon the declaration of the mothers themselves; that these mothers are constantly deceived, and many instances are adduced where women have miscalculated most remarkably. The fact is, that on this subject no science or care can insure anything like accuracy. Females are accustomed to date conception from the time of the disappearance of their usual disorder. But it may happen, that pregnancy commenced immediately after its last appearance, or nearly thirty days before, or on any day during the interval. The practice of reckoning from the last possible moment is much in favor of those gentlemen who fix two hundred and eighty days as their limit, because it goes to include cases as conforming to the regular period, which *may* have gone on to the three hundred and tenth day. But we have the opinion of many scientific men, that it would probably more consist with truth to reckon from the last disappearance of the *catamenia*, as then pregnancy is most likely to commence. We must think, therefore, that in a matter of so much obscurity and doubt, an extension of three hundred and ten days should be allowed, and that a greater protraction only should be considered proof of illegitimacy.

## SAMUEL ROMILLY.

Samuel Romilly was born on the first of March, 1757, in Frith-street, Soho, Westminter. His grandfather, a native of France, retired from that country on the revocation of the edict of Nantz, and settled in England, where his son, Peter Romilly, was brought up to the trade of a jeweller, and married a lady of the name of Garnault, the descendant of a French family; of this marriage the only children who attained the age of maturity were Thomas, Catherine, and Samuel, the subject of this memoir.

He was distinguished in his early youth by great vivacity and sensibility of temperament, the frequent companions of genius. Of his education little has been recorded; but he appears to have been principally indebted for his acquirements to his own exertions, aided by the suggestions and advice of his friend the Rev. John Roget, who subsequently married his only sister. Being originally destined for the profession of an attorney, he was placed by his father under a respectable gentleman in the six clerk's office; but in consequence of the strong predilection which he manifested for the bar, he became, in May, 1778, a member of Gray's Inn, and studied for some time in the chambers of Mr Spranger. In a letter addressed to Mr Roget, who was then travelling on the Continent, he gives the following account of the manner in which he passed his time:—'You ask me how I spend my time;—in a manner so uniformly the same, that a journal of one day is a journal of all. At six or sooner I rise, go into the cold bath, walk to Islington to drink a chalybeate water (from which I have found great benefit), return and write or read till ten; then go to Mr Spranger's where I study till three, dine in Frith-street and afterwards return to Mr Spranger's where I remain till nine. This is the history of every day with little other variation than that of my frequently attending the courts of justice in the morning, instead of going to Mr Spranger's, and of often passing my afternoons at one of the houses of parliament.'

In another letter to the same correspondent, we find traces of that admirable spirit of benevolence which at a subsequent period directed all his exertions in public life. 'Have you ever heard of a book published here sometime since by a Mr Howard, on the state of prisons in England and several other countries? You may conjecture from the subject that it is not a book of great literary merit; but it has a merit infinitely superior: it is one of those works which have been rare in all ages of the world,b eing written with a view only to the good of mankind. The author was some time ago sheriff in the country, in the execution of which office numerous instances of abuses practised in prisons came under his observation. Shocked with what he saw, he began to inquire whether the prisons in the adjacent counties were on a better footing, and finding everywhere the same injustice prevail, he resolved, though a private individual, to attempt the reform of abuses which had become as general as they were shocking to humanity. Accordingly, he made a visit to every prison and house of correction in England, with invincible perseverance and courage; for some of the prisons were so infected with diseases and putrid air, that he was obliged to hold a cloth steeped in vinegar to his nostrils during the whole time he remained in them, and to change his clothes the moment he returned. After having devoted so much time to this painful employment here, he set out on a tour through a great part of Holland, Germany, and Switzerland, to visit their prisons. What a singular journey!—not to admire the wonders of art and nature—not to visit courts and ape their manners; but to compare the misery of men in different countries, and to study the art of mitigating the torment of mankind! What a contrast might be drawn between the painful labor of this man, and the ostentatious sensibility which turns aside from scenes of misery, and, with the mocking of a few barren tears, leaves it to seek comfort in its own distresses!'

In the year 1781, Mr Romilly passed several months on the Continent, visiting Switzerland, the borders of Italy, and the principal parts of France. At Paris, he became acquainted with several of the most distinguished men of letters of that day.

His correspondence with his friends presents a lively picture of the impressions which he received from the state of society in France.

After spending the usual period of probation in unremiting and successful labor, Mr Romilly was called to the bar on the second of June, 1783. In a letter written at this period, he has described the feelings with which he contemplated the entering upon his profession,—feelings which betray the nervous and susceptible temperament with which he had to struggle. 'The nearer I approach the term, which I formerly so often wished for, the more I dread it. I sometimes lose all courage, and wonder what fond opinion of my talents could ever have induced me to venture on so bold an undertaking: but it often happens (and I fear it has been my case), that men mistake the desire for the ability of acting some very distinguished part.'

In another letter we find the early traces of that noble and pure ambition which, throughout the whole of his public life, elevated the character of Sir Samuel Romilly. 'It would seem, my dear Roget, by your last letter, that you thought I had affected doubt of succeeding in the way of life on which I am to enter, in order to draw from you such praises as might encourage me in the pursuit. I assure you that I had no such wish, and that what I wrote to you was but a faithful transcript of what I felt. Could I but realise the partial hopes and expectations of my friends, there would be no doubt of my success, almost beyond my wishes; but in myself I have a much less indulgent censor, and in this, perhaps, alone, I cannot suffer their judgment to have equal weight with my own. I have taught myself, however, a very useful lesson of practical philosophy, which is, not to suffer my happiness to depend upon my success. Should my wishes be gratified, I promise myself to employ all the talents and all the authority I may acquire for the public good—*Patriæ impendere vitam.* Should I fail in my pursuit, I console myself with thinking that the humblest situation in life has its duties, which one must feel a satisfaction in discharging; that at least my conscience will bear me the pleasing testimony of having intended well; and that, after all, true happiness is much less likely to be found in the high walks of ambition than in the *secretum iter et fallentis semita vitæ.* Were it not for these consolations, and did I consider my success at the bar as decisive of my future happiness, my apprehensions would be such that I might truly say, *Cum illius diei mihi venit in mentem, quo mihi dicendum sit, non solum commoveor animo, sed etiam toto corpore perhorresco.*'

For several years the anticipations of Mr Romilly seemed to but too correct. It was truly said by Lord Erskine*, when speaking of advancement in his own profession, that, 'success in life often depended more upon accident and certain physical advantages, than upon the most brilliant talents and the most profound erudition.' Unfortunately, those physical advantages were wanting to Mr Romilly at the commencement of his professional life. A nervous and diffident temperament deprived him in public of the free use of his powerful faculties, and prevented him from displaying the real extent of his skill and acquirements. For four or five years he continued to attend, with little practice or emolument, the courts of equity at Westminster, the midland circuit, and the Warwick sessions. In one of his speeches in the house of commons he has alluded, in answer to the charge of being a mere theorist, to the practice which he had seen in courts of law:—'Whatever may be the opinion entertained of my labors, I can scarcely think that my honorable friend is serious in his opinion that all practical legislative wisdom has quitted this great city, and that we in the court of chancery are a sort of easy speculative *dilettanti* lawyers, wholly incompetent to form any sound opinion upon criminal legislation. That I may be mistaken I am very ready to admit; but if I am really as ignorant as my honorable friend supposes, my ignorance must be most unpardonable. The subject of criminal law has always been most interesting to me: it has more or less through life been my particular study. For fifteen years I constantly attended our courts of criminal law; and although my researches may not have been very successful, I am in possession of notes by which my honorable friend may be convinced I was not wanting in diligence, and that my endeavors to collect information were not confined to the collection of a few scattered remarks in our superior courts upon the circuit, but extended to the courts of quarter session, where I had the honor for many years to practise.'* At length the assiduity of Mr Romilly was rewarded by a moderate share of encouragement, and by the gradual subsiding of those nervous feelings with which he had been harassed. In 1791, he had acquired considerable practice as a junior counsel; and in 1797 he began to be be known as a leader.

The late Marquis of Lansdowne, to whose friendship and patronage, thirty years earlier, Mr Dunning had been so much indebted, had the acuteness to discover, and the kindness to encourage, the rising talents of Mr Romilly. He was a frequent guest and visitor at the mansions of Lord Lansdowne in London and in Wiltshire, where he attracted the notice and won the friendship of many of the most distinguished persons of his day. Here, too, he first became acquainted with a lady, the eldest daughter of Francis Garbett, Esq., of Knill Court, in the county of Hereford, to whom he was afterwards married.

The promotion of Sir John Scott, the attorney general, to the chief justiceship of the common pleas, in the year 1799, added greatly to the practice of Mr Romilly, who in the following year, was appointed one of his majesty's counsel. From this period he took that distinguished station in the court of chancery, which he held for nearly twenty years.

But as yet he had never ventured into political life. The cares of his profession, and the securing of his own independence, had hitherto wisely claimed all his attention. At length, however, that noble field of exertion, which public life in this country offers, was opened to him, and ample means were afforded him of carrying into effect the great and useful designs which he had so long and so fondly cherished. On the formation of the new ministry, in 1806, he was appointed his majesty's solicitor general, and was immediately returned to parliament as one of the members for Queenborough. On accepting office, he received the customary honor of knighthood. Soon after having taken his seat, Sir Samuel was appointed one of the managers on the impeachment of Lord Melville; a duty which he performed with extraordinary ability.

[To be continued.]

Cobbet's Parl. Deb. vol. vi. p. 427.

* Speeches, vol. i. p. 341.

## AMERICAN CASES.

### SINGULAR CASE.

A case of rather singular kind has occurred in S. Carolina, growing out of the power vested in its Chief Magistrate to commute the punishment of capital offence. A man named Jeremiah Smith, for a crime committed, was sentenced to death in 1821, but was pardoned by the Governor on condition of his suffering an imprisonment, three months, and then leaving the state, never to return to it. After undergoing the imprisonment, Smith left S. Carolina and settled in N. Carolina, near the line of the two states. He was a blacksmith, and in 1826, the people of a neighborhood in S. Carolina adjacent to that in which Smith lived in N. Carolina, wanting one of his trade, induced this man by their persuasions, to move into their settlement, assuring him he would not be in any danger, and his good conduct since his conditional pardon would make his residence among them safe. It appears that he lived unmolested in S. Carolina in 1826 and 1827, until one of his neighbors with whom he had a fight, informed Governor Miller of Smith's being in the State, when the Governor issued his proclamation offering a reward for his apprehension. Smith in the mean time had returned to N. Carolina, where he was pursued by the person with whom he had a fight and two or three others, seized and brought, without any legal authority, into S. Carolina, and on the affidavit of one of the captors, committed to prison.

Having been brought before Chancellor Harper on a writ of Habeas Corpus, it was urged against his discharge, that although his arrest in N. Carolina was without authority, yet his detention in S. Carolina was lawful—that not having complied, with the conditions of his pardon, Smith was a convicted felon, unpardoned and unpunished, and ought not to be again let loose upon the community, no matter how irregularly he had been brought within the jurisdiction of S. Carolina.

Among other arguments used by the counsel of the prisoner it was contended, that having become a citizen of N. Carolina, he had as such, rights under the Constitution of the United States, of which no inferior tribunal could deprive him—that a clause of the Constitution declares, that 'the citizens of each State, shall be entitled to all the immunities of citizens in the several States.' That as a citizen of N. Carolina, he had a right to come into S. Carolina, and that in this character he came pure into the sister state—he had not become a citizen in N. Carolina upon conditions, as the Constitution makes none. It was contended that the pardon could not affect constitutional rights, and when they came in conflict the conditions of the pardon must yield to the rights which the prisoner had acquired as a citizen of N. Carolina.

The Chancellor decided against the release of the prisoner, and remanded him to jail. His case which has excited a good deal of interest, is to be again argued on the motion to pass upon him sentence of death.—*Georgia Recorder.*

### *Joseph Badger vs. Charles Ball.*

The case under this title, to which we made allusion a few days since, was decided yesterday in the U. S. Circuit Court. It was an action, in its technical form, for trespass by force and arms upon the plaintiff's daughter, now a young lady about 19. It was given in evidence that the plaintiff, soon after his removal from Boston to

Brooklyn, having occasion for the services of a physician in his family, called upon the defendant, a licensed practitioner of very respectable character, who accordingly attended, and was received into the family with all the confidence that usually follows that intimate relation. In July, 1828, Mr Badger was compelled to go to sea, and previous to his departure, solicited the friendly attentions and medical advice of the defendant towards his wife, who was in delicate health. In the latter part of August, Mrs Badger was confined. The defendant attended her. On the third day after her confinement, he called, and on his return from her chamber, requested one of the children to invite Sarah, the daughter, who was in the garden, into the parlor. She obeyed the summons, and set down on the sofa, along side of the Doctor.

After some inquiries respecting her health, the alleged trespass took place, the particulars of which we cannot with propriety detail. The young lady however fainted from terror. When she was in some measure restored to her senses, he arose and took his leave. That night, the family were alarmed by her cries, after she had retired to bed, and on hurrying to her room, they found her almost bereft of reason, exclaiming that 'Dr Ball was in the room, and was under the bed;' and it was not until she was taken into her mother's room, that her agitation was sufficiently calmed to enable her to sleep. The next day, the mother, feeble as she was, dictated a letter to the Doctor, expressive of her feelings at the outrage he had committed, and the matter remained until the return of the father. The health of the young lady continued much in the same state for about two months. Her reason was impaired—the life of Mrs B. was greatly endangered, and the domestic peace of the family destroyed. These facts were sworn to by the young lady, her sister and her sister's husband, Thomas Rand.

On the part of the defendant, it was contended that the daughter had been in feeble health for some time previous,—that the defendant had visited her in his professional capacity and prescribed medicines for her,—that she was subject to hysterical affections,—and that her whole story was the fiction of an hysterical illusion, and not the reality of actual life. That the state of her health occasioned [illegible] ary aberration of intellect, and that her disordered imagination had conjured up this fabrication, from what was nothing more than a medical examination with a view to ascertain the cause of her illness. It was maintained that this prosecution was the result of a family combination, got up to extort money from the Doctor, who was known to possess a handsome property, and that even perjury had been resorted to, in carrying it forward. The interest of the case was heightened by the presence of Elisha Williams, Esq. of Hudson, as one of the defendant's counsel, who acquitted himself in a style of surpassing excellence. He was ably supported by his colleague, George Griffin, Esq. of this city. The counsel for the plaintiff, Messrs O. Hoffman and S. P. Staples, who by the power of their eloquence carried his appeal to the hearts of the crowded assembly, have added new laurels to their well earned reputation.

Judge Thompson charged the jury strongly in the defendant's favor. After an absence of an hour and a half, they returned with a verdict for the Plaintiff of *Two Thousand Dollars damages, and 6 cents costs.—New York Journal of Commerce.*

CISCUIT COUBT—R. I. DISTRICT.

*Opinion of the Court, in case of Saunders vs. Gould*

Judge Story, in delivering the opinion of the Court verbally, said that the rule of construction to govern this Court must be the same here, as is settled by the Supreme Court of the United States. In Gardiner vs. Collins, the decision of the Supreme Court that the half blood must inherit, went upon the construction of the statute of descents in R. I. as presented to the Court upon the face of it, without any settled construction on that point ever having been made by the Courts of Rhode Island.

When the same point came again before the Supreme Court, in the case at Bar, they saw nothing to change their opinion already given in Collins vs. Gardiner. They intimated in their decree, that a settled construction against the half blood in Rhode Island, if shown, would alter their opinion. This suggestion brought the cause back to this Court for the purpose of trying whether there were any settled construction.

In coming to a decision, this Court could have no reference to the opinions of legislatures or members of the bar. He was sure that all must see how extremely dangerous it would be to trust for the exposition of a law, to the secret motives that might have induced the passage of an act of a legislature. We can have no safer exposition of the intent of the legislature, than the words in which they have chosen to clothe that intent. The rule uniformly has been in the construction of a law, never to regard the private intentions of private legislatures. If we were to do so, we must examine all who were contemporaneous with the passage of the law, in doing which we should find as many motives as there were legislators—and that many of those present when the law was passed hardly thought of it at all. It necessarily must happen, in all legislative bodies, that most of the general laws will be found to have passed with the attention of a few of those most acquainted with the subject, who gave their minds to it, particularly if they were legal men.

The motive of an individual Legislator, therefore, cannot be received as the motive of the law, and we exclude all opinions of legislators, whose depositions have been introduced into this case, on the same ground that we should exclude parol evidence to explain a written instrument. There is no safety to the community in any other construction, and what would be the effect upon the rights of property or the construction of crimes, if we were to rely upon the frail memories of men for an exposition of what they hoped or feared would be the operation of a particular law.

In reference to another mass of testimony brought into this cause—the dispositions of members of the Bar.

The opinions of the Bar would always have great weight with the Court. We are bound to respect those opinions, and we often listen with delight to the instructions we receive at the Bar, from minds superior to our own. But such as it is, we are required to form our own opinions upon the law, without being at liberty to take the opinion of any man, however elevated. We are enlightened by the reasoning and argument at the Bar, but we cannot delegate our opinions even to minds far above our own. While we respect their opinions, we are not at liberty to bind our judgments by them.

The same remark was more particularly applicable to that mass of the testimony derived from gentlemen who occupied judicial stations, in this State.

The Court regretted that they had not originally confined these depositions to the simple inquiry whether there were any settled practice or exposition in this State, on this subject. It was to be regretted that an examinatian had been gone into in these depositions, which has lead to an exhibition not honorable to the jurisprudence of any State. Very unfortunately there were in them many contradictory statements, which cannot be reconciled, and which had it been necessary, must have led the Court to weigh the relative credibility of the witnesses.

But the whole mass of these depositions all goes to the result; that there never was any settled judicial construction on the point at issue in this State. Nothing therefore, has occurred in this trial, to change the opinion formed by the Supreme Court.

The Judge next inquired whether there had been a long settled opposition of the law, equivalent by the frequent practice under it, to a judicial decision, as in the case of the acknowledgment of deeds by the Judges in Pennsylvania.

The Court could find no such exposition here. The diversity in the opinions of the Bar, show that there could have been no settled practice. In fact, the very great preponderance, and almost unanimity of the Bar, in favor of the construction put upon the statute by the U. S. Supreme Court in Collins vs. Gardiner, was conclusive that no settled practice prevailed, to the exclusion of the half blood. This Court, therefore, was bound by the decisions of the Supreme Court, in Collins vs. Gardiner.

It had often been his fortune to have his opinions in this Court, reversed by the Supreme Court, and he had often been obliged to carry into effect their opinions against his own. It was the duty of this Court, sitting as a subordinate tribunal, to conform to the opinions of its superior tribunal, otherwise we should assume to sit here as a superior Court, to reverse the decisions of the Supreme Court. If then, he would be bound to carry into effect the opinion of the Supreme Court, when against his own, he certainly was bound to do so, when against his own, he certainly corresponded with his own. On these grounds, the Court did not feel at liberty to interfere with the decision of the Supreme Court, in the case at Bar.

It could not be entertained for a moment, that mere traditional opinions were to constitute the rule of construction of a law—that we were to poll a whole state to find out the meaning of a statute. We must follow the terms of the law, or its settled construction by the state courts where it exists. He said this without any reference to what the general opinion might be, as the operation of the statute as it now stands. That was a question entirely debatable. If any one supposed the question presented in this case, was one not involved in great difficulty, he could not have duly considered it; but it must be obvious to all, that there was no settled construction here, that ought to alter the opinion already given by the Supreme Court. If any evils are to result from this, they are easily provided for. If the Legislature think this exposition inexpedient in its operation, five words will alter the statute.

In conclusion he stated that he had given the views of himself and his brother on the Bench (Judge Pitman) who would also speak for himself on that point. Let judgment be entered for

Plaintiff, conformable to the decision of the Supreme Court.

Judge Pitman then read an opinion satisfactorily explaining the grounds of his former difference of opinion with Judge Story, in the case of Collins vs. Gardner.

The other three cases vs. Gould were called.

Mr Randall claimed the right to have a trial by jury, and that in Rhode Island, by our common law, the jury were the judges of the *law*.

Judge Story replied that there was not a single fact to be tried in the case, and that his opinion had been settled for 19 years, that the Court is the sole judge of the *law*, in civil cases. It was therefore unnecessary to argue that point.

It was then agreed that judgment is to be entered for Plaintiff in all the cases, execution to be staid until the further order of this Court, and to abide the final decision of the Supreme Court. Defendants to take out a writ of Error to the Feb. Term of the Supreme Court in 1831. The argument to be in writing.—*Providence Daily Adv.*

## RECENT AMERICAN DECISIONS.

### MALICIOUS PROSECUTION.

1. Where in an action for a malicious prosecution it appeared that the defendant had caused the plaintiff to be twice indicted, and that the attorney of the commonwealth had entered a *nolle prosequi* on the second indictment, 'it appearing that the accused has been formerly acquitted of the offence charged against him in this indictment,' it was *held*, that the defendant might notwithstanding show that the second indictment was for a different offence from the one first charged, and that so there was probable cause for the second accusation. *White vs. Ray.* 8 *Pick.* 467.

2. There is a material variance between an indictment 'for drawing and depositing in and across a highway a quantity of stones,' and one 'for building a stone-wall in and upon the same highway;' and in an action for a malicious prosecution brought against the prosecutor of the last-mentioned indictment, it being proved that the plaintiff was guilty of the offence therein charged, and it not appearing, upon proper averments, that the two indictments were for the same offence, it was *held*, that the defendant had shown probable cause for the prosecution. *Ibid.*

### MORTGAGE.

1. Where land is mortgaged, a person who by taking possession of it disseises the mortgager, disseises also the mortgagee, and so long as the disseisor is in possession, the deed of the mortgagee will not pass his, the mortgagee's, interest in the land. *Poignard vs. Smith.* 272.

2. Where a person, without title, took possession of land which was under mortgage, and built on parts of it a carpenter's shop and a blacksmith's shop, and the tenants of the carpenter's shop occasionly used parts of the lot adjacent to their shop, to spread their boards on, and the tenants of the blacksmith's shop used other parts of the lot to run carriages on, and put tires on wheels, it was *held*, that this was a disseisin of the mortgagee only for the part of the land covered by the shops. *Ibid.*

3. Taking possession of a mortgaged estate for the purpose of foreclosure does not operate as a payment of the mortgage money; for the land still remains only a security for the money. *West vs. Chamberlin.* 336.

4. S having mortgaged an estate to W to secure the payment of several notes, W assigned the notes and mortgage to C, taking from C a written agreement with regard to one of the notes, which was for 500 dollars, that he, C, would pay 500 dollars to W as soon as it could be collected on the note of S. C received 30 dollars of S on account of this note, and took possession of the mortgaged premises for the purpose of foreclosure, and S occupied the estates for some time afterwards as tenant to C, but S, being insolvent, never paid C anything for rent.—In an action brought by W against C on his contract, before the three years for foreclosure had expired, the declaration also containing a count for money had and received; *held*, that the taking possession of the mortgaged premises did not amount to payment of the mortgage, and therefore that C was not liable on his contract; that C was not liable to pay the 30 dollars until the whole sum was collected, without notice from the plaintiff before bringing a suit for it; and that C, in this action, was not liable for rent which he had not actually received. *Ibid.*

5. A note, and a mortgage deed given to secure it, were handed with other effects, by A, the administrator of the mortgagee, to B, the guardian of the mortgagee's heirs, on a settlement, as their property, but the note was not endorsed, and no assignment in writing was made of the mortgage, but a power of attorney was given to B to act in the name of A. This power was not recorded. It was *held*, that the mortgager or his assigns, if acquainted with the equitable assignment, had no right to tender or pay the mortgage money to A, if such tender or payment was made with a design to injure B and the heirs; and that a discharge of the mortgage made by A would not defeat the rights of B. *Cutler vs. Haven.* 490.

6. *It seems* that the payment should be made to B, and that he might discharge the mortgage by cancelling the deed and giving up the note. *Ibid.*

7. Two parcels of land, in which S is entitled to dower, are mortgaged together as security for a debt. Afterward the mortgager conveys all his interest in one parcel to A. H. and in consideration of S's joining in the conveyance and releasing her right of dower, he conveys to her an estate for her life in the other parcel, upon which parcel she enters and takes the profits. The plaintiff purchases the mortgager's right to redeem this second parcel. P. H. having purchased A. H.'s interest in the first parcel, takes an assignment of the mortgage, and enters upon the mortgaged premises for foreclosure. On a bill in equity by the plaintiff to redeem, it was *held*, that S was not liable to contribute towards the redemption, nor to account for the profits of the second parcel, the lease for life having been made to her as an equivalent to her right of dower in both parcels. *Brooks vs. Harwood.* 497.

8. *Held*, also, that as the assignee of the mortgage could not have compelled S to pay over the rents and profits of the second parcel, without subjecting himself to her claim of dower in the whole land, he was not bound to account for them in this suit; and that the plaintiff had no equitable claim to them, as he purchased after the lease for life, and consequently at a reduced price on that account. *Ibid.*

9. *Held*, also, that the assignee of the mortgage was bound to account for the rents and profits of the first parcel, from the time of his entry for foreclosure. *Ibid.*

10. *Held*, also, that the plaintiff, upon paying the whole mortgage debt, deducting the rents and profits last mentioned, would be entitled to hold the whole estate mortgaged, excepting the part leased to S during her life, until he should be reimbursed the amount paid by him over his proportion of the mortgage debt. *Ibid.*

11. A and B, tenants in common, mortgage their land to C, to secure the payment of a joint and several bond, and A afterwards mortgages his moiety to C to secure a debt due from himself alone. C enters upon A's moiety of the land for breach of the condition of the second mortgage. He then brings an action against B upon the first mortgage for breach of the condition. *Held*, that the conditional judgment shauld be rendered for only one half of the amount of the bond. *Sargent vs. M'Farland.* 500.

12. Where a mortgage is given to secure payment of a note, and the assignee of the mortgage takes a new note from the mortgager, in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note, as against the mortgager himself. *Watkins vs. Hill.* 522.

13. Whether the exchange would operate as payment of the first note, as against a purchaser under the mortgager, *quære.* *Ibid.*

### NEW TRIAL.

1. A verdict will not be set aside as against evidence where there is evidence on both sides, unless it is manifest that the jury in giving their verdict must have mistaken or abused their trust. *Baker vs. Briggs.* 122.

2. In an action on the case, for falsely representing H to be 'worthy of credit,' knowing he was not, the defendant pleaded the general issue. The jury retired on Saturday afternoon and separated in about three hours, the judge having authorized them so to do, when they should have made up their verdict: and, on the following Monday morning, they rendered in a verdict, 'that the defendant did not say it was perfectly good, knowing it to be false and with intention to defraud.' The judge informed them what the issue was, directing them to retire again; which they did, and returned with a similar verdict, adding thereto, 'and they therefore find the defendant not guilty.' *Held*, that the latter verdict was defective in form only, and therefore that the separation of the jury and the return of the second verdict were not grounds for a new trial. *Winslow vs. Draper.* 170.

### NOTICE.

1. A purchaser of land without notice of an incumbrance, may convey the same free of the incumbrance to a purchaser who has notice. *Boynton vs. Rees.* 329.

2. Where notice of a petition for a review was served on the attorney of record of the nominal party, the party in interest being present when such notice was ordered, the Court, in their discretion, held the notice to be sufficient; no particular mode of notice being prescribed by the statutes respecting reviews. *Ferrill vs. Simpson.* 359.

### PERSONAL PROPERTY.

1. A building erected by an individual on land belonging to the government, he having no right in the soil, is, as between individuals, personal property. *Marcy vs. Darling.* 258.

2. So *held* in the case of a bathing-house erected on piles driven into the bed of a navigable river below low-water mark. *Ibid.*

PRESCRIPTION.

1. The time of legal memory or prescription in this commonwealth, does not extend further back than sixty years. *Coolidge vs. Learned.* 504.

2. Whether it extends further back than forty years, *quære.* *Ibid.*

3. In trespass *qua. cl. fr.*, a plea that the *locus in quo* has been from time immemorial a public landing place, in which every citizen has had from time immemorial a right of entering was held good. *Ibid.*

4. In trespass *qua. cl. fr.*, where the *locus in quo* had for a long time been claimed by the inhabitants of the town where it was situated, as a town landing-place, but not for their exclusive use, evidence of a long continued use of it by the public at large without any objection on the part of the town, was held sufficient to support a verdict finding it to be a public landing-place. *Ibid.*

PRINCIPAL AND AGENT.

1. A written authority is not necessary in order to enable an agent to sign for his principal, a contract required by the statute of frauds to be in writing. *Shaw vs. Nudd.* 9.

2. W, an agent for S, agreed with N, at Newburyport, to purchase of him a quantity of fish then at Newburyport, and N told W to go to C the next day and get him to sign the contract for N, if he was not in town himself. W accordingly wrote a contract, stating a sale of the fish by N to S for '12*s.* 3*d.* per quintal, and nine cents per quintal for delivering them in Boston, the wharfage to be paid by S, all other incidental charges to be paid by N, cash to be paid in Boston, the fish to be at S's risk when on board the vessel at Newburyport.' C signed this contract for N, and received from W a counterpart signed by W in behalf of S. C had no authority to act for N, except that communicated by W. C delivered the counterpart to N the same day, who received it without objection, and did not object to it for several days. N having refused to deliver the fish, S brought an action on the written contract to recover damages for the non-delivery; *Held*—

That N was bound by the contract, even if C had no authority to sign it, having adopted it. *Ibid.*

3. Also that by the contract the fish were to be delivered in Boston, and would not become the property of S until delivered there. *Ibid.*

4. Also, that therefore the damages recoverable must depend on the value of the fish at Boston, at the time when they ought to have been delivered. *Ibid.*

## RECENT ENGLISH DECISIONS.

WILL.

1. A., the son of B., died, having by his will charged his real estates with the payment of his debts, and subject thereto, having devised all his property, real and personal, to his wife. B. shortly afterwards made his will, and thereby gave an annuity for her life to the widow of his son, and made his grandson his residuary devisee and legatee. The son's estate being insufficient for the payment of his debts, B., by a codicil, directed his trustees and executors to pay his son's debts. Held, that the father meant, by this direction, only the payment of such part of his son's debts, as, after the due application of the son's estate, should remain unsatisfied.—*Walker vs. Lodge*, 3 Russ. 459.

2. Where legacies are given upon trust to accumulate the interest and dividends, such accumulation will not, in the absence of evidence of the testator's intention, pass by a gift over of the principal sums.—*Harvey vs. Cooke*, 4 Russ. 34.

3. A bequest of 'a cabinet, with whatever it contains, except money,' does not include a promissory note found in the cabinet.—*Read vs. Stewart*, 4 Russ. 69.

4. A bequest to all the children of A. and their issue, share and share alike, to be paid twelve months after the death of the testator, is an absolute gift to such children of A. as were living at the testator's death, to the exclusion of the issue of those children, and of the issue of such children of A. as died during the testator's lifetime.—*Butler vs. Ommaney*, 4 Russ. 71.

5. Where a testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should then be living, and as to such of them as should then be dead, leaving children, such children were to stand in the places of their parents; it was held, that the children of such children of B. as died during the testator's lifetime took no interest.—*S. C.*

[The children who died in his lifetime were all dead at the date of his will.]

6. A testator, by his will, gave certain annuities, and directed that the sums by which they were secured, should, as the annuitants died off, sink into the residue of his estate. By a codicil, he stated, that in case his property should not be equal to the payment of the annuities, they should be rateably reduced; the estate was not sufficient to pay them in full. Upon the death of any annuitant, the sum set apart for providing his annuity, will sink into the residue, and not go to increase the reduced annuities to the amount given by the will.—*Farmer vs. Mills*, 4 Russ. 86.

7. The intention of a testator, that a legacy should not vest until actually remitted, will be given effect to, when clearly expressed, and due diligence is used in remitting.—*Law vs. Thompson*, 4 Russ. 92.

8. Where a testator bequeathed as follows: 'unto my wife, who I make fully and wholly my executrix, I give and bequeath my house, with all my household furniture of every description, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of the house, and which may not be herein mentioned, she being subject to the payment of all my debts, funeral and testamentary expenses:' it was held, that money in the funds was not included.—*Collier vs. Squire*, 3 Russ. 475.

9. A testator bequeathed the residue of his personal estate to trustees, upon trust, to convert it into money, and invest the same in or upon government or real securities, of which they were to stand possessed, upon trust to pay the interest to A. for life, and after her death, the principal to B. The trustees permitted a share, which the testator had in an Indian Loan, called the Decennial Loan, and which paid ten per cent interest, to remain several years in that security, during which they paid A. the interest at that rate: the loan being afterwards paid off, they invested the money in the three per cents. Held, that the language of the will being imperative the executors ought to have converted this fund immediately; the tenant for life, therefore, was entitled only to such interest as the same would have produced, if converted into three per cent stock, a year after the testator's death; and that the trustees were chargeable for all surplus payments beyond what they would have paid if the money had been so converted.—*Dimes vs. Scott*, 4 Russ. 195.

WITNESS.

Where a defendant prayed that he might be at liberty to examine one of the plaintiffs as a witness, and it appeared that the plaintiffs were copartners, and had a common interest adverse to the defendant, the petition was dismissed with costs.—*Fereday vs. Wightwick*, 4 Russ. 114.

THE JURISPRUDENT.

BOSTON, SATURDAY, DECEMBER 4, 1830.

## PAINE AND DUER'S PRACTICE.

We introduce into our paper this week the contents of the second volume of the above work, intending hereafter to notice the Book more particularly. It may, at least, be satisfactory to our readers to know what the volume contains, that they may judge of its design and probable utility.

TABLE OF CONTENTS.

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*Chap.* 2.—*Of the Plaintiff's remedies if Special Bail be not put in and perfected according to the Condition of the Bail bond.*

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Sec. 2. Of proceedings against the sheriff.

*Chap.* 3.—*Of proceedings against Special Bail upon their Recognizance; their Liability; and of Bail's surrendering their principal, and the entry of an Exoneretur.*

*Chap.* 4.—*Of Judges' Orders, Common Rules, Affidavits, and Notices.*

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Sec. 2. Of common rules and rules by consent

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Sec. 4. Of the various notices, and of the service of notices and other papers.

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*Chap.* 7.—*Of Bills of Particulars.*

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*Chap.* 13.—*Of Attachments and proceedings as for contempts, to enforce the civil rights aud remedies of parties.*

*Chap.* 14.—*Of the removal of causes from a Court of Common Pleas or Mayor's Court into the Supreme Court before trial or judgment.*

*Chap.* 15.—*Of the Abatement of suits by death, marriage or otherwise.*

*Chap.* 16.—*Of proceedings and Actions in particular cases.*

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PART IV.—Of Judgment, Execution, Jail Liberties, Discharge of Insolvents, scire facias, Satisfaction of Judgments, Audita Querela, and Proceedings in Error, in Personal Actions, brought for the Recovery of any Debt, or for Damages only.

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Sec. 2. Of judgment records

Sec. 3. Of entering and docketing judgments, and of the priority and lien of judgments

Sec. 4. Of amending judgments; of setting off judgments; of the satisfaction and cancelling of judgments; and of audita querela.

*Chap.* 2.—*Of Execution.*

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Sec. 3. Of the fieri facias and proceedings under it, as regards lands, tenements, &c.

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Sec. 5. Of the capias ad satisfaciendum

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PART V.—Of the Practice in Ejectment, Mesne Profits, Waste, Nuisance, Partition; Replevin, Proceedings against Vessels, against Foreign Corporations, against Absconding, Concealed, non-resident Debtors, against Debtors confined for Crimes; Arbitrations; quo warranto, Mandamus, Prohibition; and Proceedings for the Admeasurement of Dower.

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Sec. 3. Of the appointment of trustees, with their powers and duties, and of the subsequent proceedings

Seec 4. Of the proceedings on certiorari and in error

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10.—*Of Attachments against Debtors confined for Crimes.*

11.—*Of Arbitrations.*

12.—*Of the Practice in Quo Warranto.*

13.—*Of the Practice in the Writ of Mandamus.*

14.—*Of the Practice in the Writ of Prohibition.*

15.—*Of Practice in Admeasurement of Dower.*

*Colonial Judiciary Act.*

*Forms of Judgment Records.*

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## QUARTERLY LIST OF LAWYERS

It will be perceived that we have placed on the last page of this week's paper a list of Lawyers now in practice, for the convenience of our readers and such as have occasion to transact business with members of the profession in different parts of the Country. Our design is to continue the list quarterly. If there shall be found any errors in it, we hope our patrons will do us the favor to furnish us the means of correction. We should be glad of the names of such gentlemen in New York, Philadeldhia, and Baltimore as are disposed to appear in the Jurisprudent as candidates for professional business.

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☞ We have received the letter of J. D. through the Post Office and think it expedient only to say, at present, that we found his pamphlet in the market and considered it a proper subject of remark and criticism. We selected from it such law as suited our purpose and left the rest. We did not suppose our readers would be much interested in the detail of facts and therefore omitted to introduce them. With these we have nothing to do. We must decline going into the investigation of that matter altogether, and, therefore must decline publishing his communication. There are other Journals less exclusively professional, and of greater circulation, to which we would commend him, if he thinks any further 'development of the facts' would be useful. There is nothing which could support us through such a trial but the prospect of a generous retainer—a thing that has not passed our hands since last Christmas. We will 'name through the post office our time and place' —*for any other purpose than to be shot*—whenever he will give us assurance that our services shall be even moderately rewarded and our time productively employed.

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*Judges in Ordinary for Kent, and Durham and Northumberland. Mr Brougham's bill.*—Mr Brougham's bill for the establishment of two new courts, one for Kent, the other for Durham and Northumberland, was introduced during the last session of parliament, and will be acted upon at the next session. The judges of these courts are proposed to be called judges in ordinary, with jurisdiction in causes of action in the nature of debt to £100, and in costs to £50, but not in actions where the title to real estate, or any franchise or right to toll, is in controversy. Questions may be carried from these courts to those of Westminster Hall by a bill of exceptions, as cases are carried to the Supreme Court in Massachusetts, by exceptions to the decisions of the Common Pleas. One provision of this bill is worthy of particular attention, and we recommend it to the consideration of our legislators. We refer to the provision that the parties may, by consent, refer their case to the decision of the judge, without the intervention of the jury, but the judge may still, if he chooses, take the verdict of a jury upon any particular fact, or upon all the facts.—*Jurist.*

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*Qui tam Suit.*—Geo. J. Willis vs. H. F. Sanders and L. Willson,—brought to recover a penalty incurred under the statute to prevent the making or setting up of lotteries, was tried before the County Court of this county, which closed their session last week. The Jury found the respondents had incurred a penalty under the statute equal to the whole amount of the scheme, and accordingly returned a verdict for the complainant of $402,660.

*Vermont Gazette.*

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A gentleman in the city who has been seven or eight years in practice and can furnish the best recommendations—would be glad to connect himself with some person of advanced standing and full business in the profession, as a partner, or otherwise on reasonable terms. Address to A. B at this office, with real n me.

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[To be continued.]

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, DECEMBER 11, 1830. NO. XX.

## MERCANTILE LAW.

### CONTRACT OF SALE.

Of the origin and nature of the contract of sale, a short exposition was attempted in the second number of the series; and as it is essential that first principles should be kept clearly in view, we beg to direct attention for a moment, to the account there given.

It is plain that we have to do with sales of personal property only; and without entering into a discussion, more technical than useful, as to the precise definition of these words 'Personal property,' we shall content ourselves with the broad and sufficiently intelligible proposition, that, with a very few exceptions, every moveable, which may properly be called a man's own, is freely vendible. One limitation only the policy of our ancient law thought it necessary to impose—that the seller should have the *visible* ownership of the thing sold, not a mere right to possess, but an actual and apparent possession. Thus, if I bought a commodity and paid the price, I was not allowed to sell it again before delivery—and the same rule applied to the price; for neither, on the other hand, could the person, from whom I bought it, even after delivery, assign to any other his right to the money which I had stipulated to pay. Property so circumstanced, was significantly termed *a chose in action*; the interest in it being in fact, nothing more than a right to sue for the commodity or debt, if withheld. Indeed the rule was founded on apprehension of the maintenance of suits*—a practice about which our ancestors seem to have been singularly sensitive, and which Lord Coke emphatically calls 'the most dangerous enemy which justice hath.'† But the necessities of commerce broke through the restraint. The law-merchant triumphed over common law and statute, and not only bills of exchange, the very nature of which implies transferribility, and bills of lading, but ultimately, though not without a struggle, promissory notes also were allowed to pass from hand to hand, and become available to the holder by a mere endorsement of the name. To other cases the prohibition still formally applies: but the courts have found it necessary to wink at the evasion of a rule, which it is inexpedient, if not impossible, rigidly to enforce; and at this day the *bonâ fide* assignee of a chose in action may, by the decent pretext of borrowing the name of the original proprietor, pursue even at common law the necessary remedies for reducing his right into possession.‡ Indeed the prohibition had long been almost nugatory; for the courts of equity, founding themselves on the principles of the civil law, which allowed such transfers, and regarding the conscientious obligation of the assignor, always recognised the rights of the assignee, and treated the former as a mere trustee for his benefit.*

A sale, as has been said, assumes its simplest form, when the bargain is immediately followed up by delivery on the one part, and payment on the other. But though the contract is thus brought immediately to a close, the consequences are not always so. The buyer may be disturbed in his possession by some one who has a prior title, or the quality of the commodity may not answer his reasonable expectation, or the purpose for which it was bought. It becomes necessary, therefore, to consider the effect of want of title in the seller, and the doctrine of our law as to warranty.

It is, as might be expected, a general rule that the seller can transfer to the buyer no better property in the thing sold, than he himself had at the time of the sale: but it is a rule qualified by a most important exception. The free interchange of commodities is so essential to the very being of society, that in most communities it has been considered expedient to protect transactions of sale, even sometimes at the expense of abstract justice. To this policy is referrible the Roman law of *usucaption*, whereby an innocent purchaser obtained by lapse of time an indefeasible title to the property of another.† The common law of England has adopted the principle, but changed, and in our opinion wisely changed, the application. It regards not so much the time which has elapsed since the sale, (although *that* also is a consideration by no means overlooked,) as the manner and circumstances of the sale itself. Thus it is laid down by Lord Coke,‡ 'that all sales and contracts of anything vendible in fairs or markets overt, shall not only be good between the parties, but also be binding on all those, who have any right or property therein'—a rule, which serves the double purpose of protecting an honest purchaser, and of encouraging at the same time that publicity of sales, which our law, rightly regarding it as the most effectual check upon knavery, was always particularly anxious to promote. But then, the transaction must be, so far as the buyer is concerned, perfectly *bonâ fide*. If he knew, or might have suspected the want of title in the seller—if there was anything clandestine or underhand in the dealing—nay, if the whole matter were not literally transacted in public, and before the eyes of men—he has no claim to the privilege. Accordingly Lord Coke, putting instances by way of illustration, goes on to say that, 'the rule does not extend to sales in a *covert* place within a fair or market, as in a back room or warehouse—or behind a hanging or cupboard, where a person passing before the shop cannot see—or where the windows of the shop are shut—nor to the sale of goods improper or foreign to the trade of the owner of the shop, as plate in a scrivener's shop, and *sic de similibus*—nor to sales by *covin*, as where the buyer knows that the seller has no right, or that the seller is an infant, *fême covert*, &c, unless the sale be of those things, which the *fême covert* usually trades in by the consent of the husband—nor to sales between sun-setting and sun-rising, though such sales are binding between the parties.'* One other exception it may be necessary to notice. When the subject of the sale is a *stolen* commodity, then if the owner has taken immediate steps for discovering the offender, and has prosecuted him to conviction or outlawry, he is entitled to reclaim the property, into whatever hands it may have passed, and even though it may have been sold in market overt.† But this privilege of the owner, the policy of which is apparent, does not extend to goods taken in piracy,‡ nor to such as are obtained by fraud and false pretences,§ to neither of which cases are the words of the statute applicable.

The establishment of fairs and markets was not, as some have supposed, matter of positive institution, but sprung, as we have seen, like every other institution,‖ out of the wants of society. That the government early interfered, either to regulate them, or, which is more probable, to turn them to profit, is evident from the fact that the right to hold them is a franchise from the Crown. It would not be uninteresting to trace the history of these licensed resorts for traffic; but it accords better with our present purpose merely to state, that they exist either by charter, or by prescription, which supposes a charter;—that market overt is confined to the spot where the market has been usually held,¶ and to the days which by the original creation were assigned for holding it.** In London, however, by immemorial custom, of which judicial notice is taken by the courts,†† every day except Sunday, is market day,‡‡ and every shop is market overt for those goods in which the shopkeeper ordinarily deals. But the privilege is strictly confined within the precincts of the *city*. A shop in the Strand, for instance, is not market overt.§§

Hitherto we have supposed a bare possession in the seller without pretence of title. But it may be, that though not the actual owner, he is clothed in some respects with the rights and character of

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* Co. Litt. 214 a. 266 a.

† Co. Litt. 369 a. It is interesting to observe how the laws of each age reflect light on the contemporary state of society. This law of maintenance savors strongly of feudal tyranny. It is a law to prevent the poor from combining to obtain redress for the injustice or oppression of the rich.

‡ 1 T. R 26. 619. The Courts will not allow the claim of the assignee to be defeated by a collusion of the assignor with the party sued; and therefore a plea of bankruptcy of the assignor, or of a release given by him, though ostensibly the person suing, will not in general be a bar to the action.

* 3 P. W. 199.

† Inst. lib. 2. tit. 6.

‡ 2 Inst. 371.

* 2 Inst. 714.

† By common law, enlarged by stat. 21. Hen. 8. c. 11.

‡ Bulstrode 29. Hob. 79.

§ 5. T. R. 175. Both the rule and the exception apply to goods pawned as well as sold. To prevent, however, the abuses to which the protection of sales in market overt might give occasion in London, where the facility of disposing of stolen property has long been a serious evil, it is enacted, by stat. 1 Jac. 1. c. 21., that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property. The word 'sale' includes a pledging. See 2 Campb. 336. n.

‖ The author of the Mirror supposes them to have been established for the purpose of insuring publicity in the sale, and refers the enactment of toll to the same policy.

¶ Godb. 131.

** 2 Inst 220. The legal definition of market comprehends a fair. 2 Inst. 220. c. 406.

†† Doug. 380. ‡‡ Cro. Jac. 68.

§§ 16 Mod, 521.

an owner. He may have, to use the language of the law, a special property in the goods. Thus a factor or consignee has charge of the goods of another; and if he sell them in fraud of his trust and to the prejudice of his principal, the fair purchaser will, nevertheless, be protected against the claim of the real owner, upon whom the consequences of his misplaced confidence must fall. But this, it must be observed, applies only to cases where the trust is *general*. If the possession have been given *for a specific purpose*, as to a carrier for conveyance, or to a wharfinger for temporary custody, the property is not changed by the sale of such a bailee,* and the owner may recover them even from a *bonâ fide* buyer. The following is an instance:—An action of trover was brought by one Wilkinson to recover the possession of some lead, which had been sent by him to the wharf of one Ellil, in the Borough, there to remain till sold. Ellil, though accustomed to sell lead from his wharf, had no authority whatever to dispose of the lead in question. However, he did sell it to the defendants, who bought it *bonâ fide* as his property, and paid for it immediately. It was contended, that this was a sale in market overt, and that no action could be maintained by the owner against the buyers. But Lord Ellenborough held that the sale by Ellil did not change the property in the lead, and observed that the doctrine contended for would give wharfingers the dominion over all the goods entrusted to them; but that a wharf could not be considered, even in London, as a market-overt for the goods bought there. Ellil, he added, had no color of authority to sell the lead, and no one could derive a good title to it, under such a wrongful conversion.†

But even the real owner, though in possession of the goods, cannot always convey an indefeasible title to a purchaser. A judgment may have been obtained against him for some debt or damages; and for the satisfaction of this judgment his effects are bound, anciently from the *teste*, or date of the writ, and now (in consequence of a most beneficial alteration introduced by the stat. 29 Car. 2. c. 3. s. 16.) from the delivery of the writ to the sheriff.‡ Yet a sale in market-overt before actual seizure by the sheriff will prevail against the right even of a judgment creditor; and the right itself extends only to the immediate purchaser from the judgment debtor. The king, not being especially named in the statute, is, by his prerogative, exempt from its operation, and the goods therefore of a crown debtor are still bound from the *teste* of a writ of extent.

And now the question naturally suggests itself, what remedy has the buyer, under these circumstances, against the seller? By the civil law, a warranty of title was annexed to every sale; it was considered as a necessary item of the bargain. In this respect, the law of England differs somewhat from the civil, and, consequently, from almost every modern code of jurisprudence. And though it may be granted, that the doctrine of implied warranty is more consistent with strict principles of equity, yet the partial rejection of it by our law is not without strong arguments of justification. The founders of our system adopted the policy of interfering as little as possible with bargains and sales. They considered that, in such matters, men in general may safely be left to themselves: at all events, they thought it was not the business of law to supply the place of vigilance in the party interested. Warranty might be made a positive stipulation in the bargain, and if so, the law would enforce it; but if this precaution were not adopted, the general maxim was *caveat emptor*—let the buyer look to it. To be sure, if fraud intruded itself—if studied deception were practised—the consequences were visited, in this as in every other transaction, upon him who practised it. Again, the maxim did not apply where the purchaser had no opportunity of exercising the requisite caution, or where he was thrown off his guard by the positive representation of the seller: accordingly, an affirmation by the latter, at the time of the sale, that the goods were his own, was always considered as equivalent to a warranty.

The rules which relate to warranty of title are, for the most part, equally applicable in cases of defect in the quality of the thing sold; and as this is a subject of great practical importance and almost hourly application—as the law also which governs it seems to be in the process of a gradual change—it may be worth the while, even at the risk of prolixity, to consider it somewhat in detail.

[To be continued.]

* For the benefit of the uninitiated, it may be proper to state, that a bailee is one to whose charge goods have been committed with a trust for the owner (*baillé*.)

† 2 Campb. 335.

‡ Who is bound upon the receipt of the writ to indorse upon it the day of the month and the year in which it was received.

## SAMUEL ROMILLY.

Continued from page 47.

No one ever entered the house of commons better prepared to perform the high duties incumbent on him than Sir Samuel Romilly. His habits of reflection, his extensive acquirements, his acquaintance with the laws and constitution of his country, his indefatigable industry, his clear philosophical intellect, his high personal character, and, lastly, but chiefly, the purity of his ambition, all qualified him to act a most distinguished part in public life. In entering upon the duties of his new station, Sir Samuel Romilly well knew that, in order to give effect to the great and useful designs which he contemplated, it was necessary for him to select some particular object, to the attainment of which his efforts might be principally directed. He felt that, however numerous might be the claims upon his patriotism or his humanity, it was necessary to make some one great question the principal end of his exertions, leaving it to others to pursue with the same diligence the various other objects, to the acquisition of which he could only hope to extend occasional assistance. In making this selection, Sir Samuel Romilly was fortunately induced to devote himself to the amelioration of our criminal code; a subject which had, from an early period of his life, interested his feelings and occupied a considerable portion of his attention. It has been sometimes objected to him, that he did not rather apply himself to the correction of those abuses, which had so long cast a discredit upon the court in which he practised; but it ought surely never to be regretted that he preferred the nobler labor of reforming a code, the impolitic severity of which had for centuries disgraced the institutions of our country. That portion of the community which is effected by our civil polity are never without the means of making their complaints heard; but the poor, the destitute, the uninformed, and the misled, the objects upon whom our criminal jurisprudence operates, have no voice to protest against the severities which the legislature may please to denounce. To watch over the interests of this wretched and degraded portion of society; to become the friend of those against whom every other hand was raised, and the protector of those who were abandoned, even by themselves, seemed to Sir Samuel Romilly a duty which claimed a decided pre-eminence.

Some time, however, elapsed, before he found himself prepared to bring forward the various measures which he had contemplated for the reform of the criminal laws. In the meanwhile he distinguished himself by the part he took in some important questions, with which the interests of freedom, and of humanity were closely connected. In the debates on the abolition of the slave trade, and on the alteration of the mutiny bill, he spoke at some length, and he introduced, during the same session, a bill, which subsequently passed into a law (46 G. 3. c. 135.,) for the amendment of the bankrupt laws; and also a bill, which was lost, for making freehold estates assets for the payment of simple contract debts. In the spring of 1807, on the dissolution of the Whig administration, he retired from office.

On the 18th of May, 1808, Sir Samuel Romilly introduced a bill to repeal the statute of 8 Eliz. c. 4. by which the punishment of death was inflicted for the offence of privately stealing from the person. With some amendments, this bill passed into a law. His next legislative effort was, a further improvement of the bankrupt law, by introducing the provisions of the statute 49 G. 3. c. 121. In the course of the same session, he took a considerable interest in the discussions which followed the disclosure of the conduct of the Duke of York.

In the session of 1810, Sir Samuel Romilly, in the prosecution of his humane design to soften the severity of the penal code, introduced three bills to repeal the statutes 10 and 11 W. 3., 12 Ann, and 24 G. 2., making the privately stealing in a shop goods of the value of five shillings, or in a dwelling-house, or on board a vessel in a navigable river, property of the value of forty shillings, capital felonies. His speech on this occasion he afterwards published, with some additions, under the title of 'Observations on the Criminal Law of England.' Notwithstanding the able arguments with which Sir Samuel Romilly supported the principle of these bills, and the industry with which he collected, and the clearness with which he expounded, a vast body of facts in confirmation of his arguments, all the bills were lost, the first in the lords, and the second in the commons, the third being postponed, and at length withdrawn. In the following year, however, Sir Samuel Romilly had the satisfaction of carrying through two bills, to abolish the punishment of death for stealing from bleaching grounds; and in 1812, he succeeded in procuring a repeal of the act of Elizabeth, making it capital in soldiers and mariners to be found wandering about the realm without a pass.

On the dissolution of parliament, in the year 1812, Sir Samuel Romilly was invited by a number of respectable gentlemen to become a candidate for the representation of Bristol. This invitation he accepted, and though defeated by a coalition between the forces of two of his opponents, he counted nearly seventeen hundred votes. He was subsequently returned to the new parliament for the borough of Arundel.

It is impossible, within the limits of this brief memoir, to detail the various efforts made by Sir Samuel Romilly to advance the great interests of freedom and humanity. No opportunity was neglected by him of introducing and recommending to the legislature the amendment of the criminal

law; and upon many other important questions of foreign and domestic policy he was not silent. The alien act, the persecutions of the French protestants, the game laws, the suspension of the habeas corpus act, the seditious meetings bill, the state of Ireland, the subject of lotteries, Lord Sidmouth's famous circular, the employment of spies and informers, the state trials in Scotland, the imprisonments for libel, the state of slavery in our colonies:—all these important topics in turn engaged his attention. In many instances, during the debates which arose on these subjects, it was his misfortune to witness the triumph of those who opposed the measures he had so greatly at heart. But the good seed which he and his fellow-laborers sowed was not cast upon a barren and thankless soil. Within the short period which has elapsed since the death of Sir Samuel Romilly, several of the great improvements which he so zealously promoted have been carried into effect.

The statute of William III., inflicting the punishment of death for the offence of privately stealing in a shop to the value of five shillings, was, at the commencement of the present reign, at length repealed,* and transportation or imprisonment substituted, though the house of lords had repeatedly rejected the repealing statute. The statute of George II., making it capital to steal goods to the value of forty shillings on board a vessel in a navigable river, was also repealed about the same time,† and transportation or imprisonment substituted. More recently, the value of the goods stolen in a dwelling-house, necessary to render the offence capital, has been raised from forty shillings to five pounds.‡ These ameliorations Sir Samuel Romilly in vain endeavored to effect. The system of raising money by way of lotteries, which Sir Samuel opposed, as materially conducing to the depravation of public morals, has been abandoned. The practice of placing spring guns for the protection of game, which he reprobated as both cruel and illegal, has been forbidden by statute. A general and effective revision of the criminal law has been commenced; and, lastly, the great question of catholic emancipation, which was ever near the heart of Sir Samuel Romilly, has been finally put to rest. In short, throughout all our institutions, a more liberal spirit has become visible, the growth and progress of which are to be attributed to the efforts of the men, who, like Sir Samuel Romilly, have never ceased, under all circumstances, to advocate the cause of freedom and of humanity.

On the dissolution of parliament, in June, 1818, Sir Samuel Romilly was put in nomination as one of the candidates for Westminster; and, after a most arduous contest, in which he personally took no part, his name was placed at the head of the poll; the numbers being for Sir S. Romilly, 5339; for Sir Francis Burdett, 5238; and for Sir Murray Maxwell, 4808. In this parliament he did not live to take his seat. The following distressing narrative is from the pen of Mr Peter, the author of the Memoir prefixed to the Speeches of Sir S. Romilly.

'The declining health of Lady Romilly, which had been to her husband for several months a source of uneasiness and anxiety, at length excited in his bosom the most serious alarms. During a residence of nearly two months at Mr Nash's seat in the Isle of Wight, where he had taken her for the benefit of a milder air, his mind continued in a state of unceasing agitation—fluctuating at each turn of her disorder between alternate tides of hope and despair. In a letter to his friend Mr Dumont, of the 27th of September, he says, 'Since I last wrote to you, Anna has been worse, and was certainly considered by both her medical attendants as being in some danger. She is at present a little better; but for myself I still apprehend the worst. I take care to let neither her nor the poor children see the anxiety I feel; but it costs me a good deal. With all this, do not suppose that I have not quite resolution enough to undergo everything, and to preserve my health for my children's sake.'

'A few days after the date of this letter, Mr Dumont arrived at Cowes, where he found Lady Romilly so much better as to be able to spend two or three hours each day in the society of her friends. This temporary improvement, however, was soon followed by a severe relapse, and by several days of acute suffering; during which the anguish of her husband could only be equalled by the pious fortitude and resolution with which he endeavored to suppress his feelings. Though for a long period he was either a stranger to sleep, or had his sleep disturbed by the most terrific dreams; though at times he believed his faculties to be impaired, and began even to entertain fears of mental derangement, he still recollected the duties which he owed to his family, to his country, and to his Creator. To the last moment of his reason, he continued to struggle with the sorrows which were overwhelming him. Whatever time remained to him from his attendance in the sick chamber of his wife, was devoted to his children and surrounding friends. With Mr Dumont, in particular, he frequently held the most intimate and unreserved conversations; entertaining him with prospects of the future, and with plans for the education and establishment of his children in life.

'About the middle of October, his sister, whom he tenderly loved, had come with her daughter to the Isle of Wight, at his own express desire, and was followed by the two sisters of his wife; but, though grateful for this proof of their kind attention and regard, he met them without a tear, or any visible emotion. Lady Romilly died during the night of the 29th of October; but the event was not communicated to her husband until the following morning. He heard it with apparent resignation, and without any violent effusions of grief. On the same day he was removed by his anxious friends from the scene of his sorrows, and arrived in London, by easy stages, on the 1st of November. During his journey he had been frequently much agitated, and as he approached home his feelings became more violent. On one of these occasions, as he was shutting his eyes and wringing his hands, Mr Dumont, who had accompanied him from the Isle of Wight, took the hand of his daughter, and placed it in his; upon which, opening his eyes, and casting on his friend a look expressive of gratitude and affection, he tenderly embraced his daughter.

'On his arrival at his residence in Russell Square, he made repeated but ineffectual efforts to compose his mind; and throwing himself on a sofa, joined his hands together for some moments as if in a state of prayer. He was now apparently calm; but his tranquillity was more frightful to his friends than even his former violence: it had the aspect of a man dying from some internal wound. Dr Roget, who had attended his uncle from the commencement of his illness, and watched over his couch with all the pious care and devotion of a son, was, soon after their arrival in London, joined by Dr Marcet, and on the following morning by Dr Babington. But their efforts were vain: long suffering had suspended the faculties of their unhappy patient. His mind became deranged—his heart was broken—and in the violence of frenzy he terminated his own existence.

'In person,' continues his biographer, Mr Peter, 'Sir Samuel Romilly was tall and justly proportioned, with a countenance regular and pleasing; but tinged with deep shades of thought, and susceptible of the greatest or tenderest emotions. His manners were distinguished by singular modesty, unaffected simplicity, and the kindest attention and regard to the wishes and feelings of others. His habits were temperate, studious, and domestic. No man ever indulged less in those pursuits which the world calls pleasure. He rose regularly at six o'clock; and was occupied, during the greater part of the day, and frequently to a late hour at night, either in study or laborious attendance to his professional and parliamentary duties. What little intervals of leisure could be snatched from his toils he anxiously devoted to domestic intercourse and enjoyments. Moderate in his own expenses, he was generous, without ostentation, to the wants of others; and the exquisite sensibility of his nature was never more strikingly displayed than in the fervent zeal with which his professional knowledge was always ready to be exerted for the destitute and oppressed, for those who might seem, in their poverty, to have been left without a friend. Even to the last, when sinking under the weight of domestic affliction, when anticipating as its probable result a wretched life of mental malady and darkness, he was still intent on the welfare and happiness of those around him. The religion of Sir Samuel Romilly was, like his life, pure, fervent, and enlightened. Unclouded by superstition or intolerance, it shone forth in pious gratitude to God, and in charity to mankind.'

To be continued.

* 1 G. 4. c. 117. 4. G. 4. c. 53. 7 & 8 G. 4. c. 29. § 15.
† 4 G. 4. c. 53.
‡ 7 & 8 G. 4. c. 29. § 12.

## NATURALIZATION LAWS.

In a country which affords a welcome asylum to all whom inclination or oppression may lead to seek its protection, a summary view of the existing state of the laws regulating the naturalization of aliens, can neither be uninteresting nor unprofitable. In this country, all the rights and immunities of citizenship, with the exception of eligibility to the presidency, are extended equally to the native and the adopted citizen; and these high privileges are bestowed on the most liberal terms, no more being exacted than fidelity to the constitution and laws demands. At a future time we propose to notice the subject of expatriation, which is intimately connected with that of which we are now treating,—the adoption of aliens as members of our family, implying an equal right in our citizens, if choice should impel them to abandon it, to become naturalized elsewhere. By the constitution of the United States, power is delegated to congress 'to establish a uniform rule of naturalization throughout the United States,' and congress first legislated on the subject in March, A. D. 1790. Since the exercise of this right by congress it may be considered that the several states are excluded from all power to legislate on the subject. The first act of congress now in force, was passed on the 14th of April, 1802, and is entitled 'an act to establish a uniform rule of naturalization, and to

repeal all acts heretofore passed on that subject.' Since that time five different laws have been enacted, the last of which was passed on the 26th of May, A. D. 1824. We shall now proceed briefly to consider the operation of these laws.

In the first place, we may notice that the right to become citizens is granted to none but 'aliens being free white persons.' These may be arranged in four classes.

First. Aliens who have arrived since the 18th of June, 1812.

Second. Aliens who arrived between the 14th of April, 1802, and the 18th of June, 1812.

Third. Aliens who arrived between the 15th of June, 1798, and the 14th of April, 1802.

Fourth. Aliens who arrived before the 29th of January, 1795.

First. An alien who has arrived since the 18th of June, 1812, must have complied with these conditions.

1st. He must have declared on oath or affirmation, before a circuit or district court of the United States, or of the territorial districts of the United States, or before a court of record in any state, having common law jurisdiction, and a seal and clerk or prothonotary, or before either of the clerks of any of the said courts, two years at least before his admission, that it was, bona fide, his intention to become a citizen of the United States, and to renounce forever, all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name to that whereof he may at the time be a citizen or subject, and a certificate from the proper clerk or prothonotary, of the declaration of intention thus made, must be exhibited on his application to be admitted a citizen, and must be recited at full length, on the record of the court, otherwise such admission shall be of no validity.

2d. He shall at the time of his admission, declare on oath or affirmation, before the court, that he will support the constitution of the United States, and that he will absolutely and entirely renounce and abjure all allegiance and fidelity in the manner set forth in the first condition, which proceedings must be recorded by the clerk of the court.

3d. The court must be satisfied that he has resided in the United States five years at least, next immediately preceding his admission, without being, during any portion of the said time, out of the territory of the United States, and the court must be farther satisfied that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. The oath of the applicant shall in no case prove his residence.

4th. In case he shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he must expressly renounce such title or order of nobility in the court in which he may be admitted, which renunciation shall be there recorded.

5th. He must have made registry and obtained a certificate in the following manner. If of the age of twentyone years, he must have reported himself, if under that age, or held in service, he must have been reported by his parents, guardian, master, or mistress, to some one of the courts above named; and such reports must have ascertained his name, birth, place, age, nation, and allegiance, together with the country whence he emigrated, and the place of his intended settlement. It is made the duty of the clerk of the court to fusnish to every individual concerned a certificate under his hand and seal of office, of such report and registry; for receiving and registering each report of an individual or family, he is entitled to charge fifty cents, and the like sum for each certificate; and such certificate shall be exhibited to the court as evidence at the time of the applicant's arrival within the United States, and must be recited at full length in the record of the court admitting him, and without such recital his admission shall be of no validity.

If the certificate of citizenship were obtained prior to the 26th of May, 1824, it shall not be invalid in consequence of an omission to insert therein the certificate of report and registry, and of the declaration of intention.

Second. An alien who arrived between the 14th of April, 1802, and the 18th of June, 1812.

1st. He must have made a declaration of intention two years before, as above mentioned.

2d. He must take the oaths or make the renunciation above prescribed, which must be recorded.

3d. The court must be satisfied that he has resided within the United States for five years at least, and within the state or territory where the court to which he applies is held one year at least; and the court must be farther satisfied that during that time he has behaved in the manner required, as set forth heretofore: provided that the oath of the applicant shall in no case be allowed to prove his residence.

4th. He must have made registry and obtained a certificate in the manner above stated, and this registry must have been made five years antecedent to his application, and is the only evidence of the time of his arrival. This certificate of report and registry, and of the declaration of intention, need not be recited at full length in the record as in the previous class.

Third. An alien who arrived between the 18th of June, 1798, and the 14th of April, 1802.

1st. No declaration of intention is required.

2d. The oath or affirmation and renunciation of allegiance and titles, required in the other cases must be made.

It must be proved to the satisfaction of the court, that the applicant was residing within the United States before the 14th of April, 1802, and has continued so to do, which residence, for at least five years, must be proved by citizens of the United States, who must be named in the record as witnesses, and the facts must also be set forth therein; otherwise he shall not be considered a citizen of the United States. He must also have resided in the state or territory where the court is held, one year at least, and the usual proof of good moral character, &c, must be exhibited.

Fourth. An alien who arrived before the 29th of January, 1795.

He may be admitted to become a citizen on proof that he has resided two years at least within the United States, and one year immediately preceding his application in the state or territory where the court is held—he must take the oaths prescribed, renounce his former allegiance and any title he may have held, and make the requisite proof of good moral character, &c, all which must be recorded by the clerk of the court.

No person proscribed by any state, or who has been legally convicted of having joined the army of Great Britian during the revolutionary war, can become a citizen without the consent of the state in which he was proscribed. An alien enemy cannot be admitted to become a citizen, but happily none are excluded by this exception, as our country is blessed by peace with all mankind.

It now only remains for us to notice the provisions of the naturalization laws relative to widows, children, and minors. The children of persons naturalized under the laws of the United States, or of those who, previous to the passage of any law on the subject by the United States, were naturalized under the law of any state, being under twentyone years of age at the time of their parents' naturalization, shall, if dwelling in the United States, be considered as citizens thereof; and any alien having declared his intention, made report and registry as prescribed, and having died before he was naturalized, his widow and children, on taking the oaths required by law, shall be entitled to all the rights of citizenship: and the children of citizens, though born out of the United States, shall be deemed such, provided that the rights of citizenship shall not descend to any person whose father never resided in the United States.

Any alien being a minor, under the age of twentyone years, who has resided in the United States three years next preceding his arrival at that age, and who shall have continued to reside therein up to the time of his application, may, after he shall arrive at the aforesaid age, and shall have resided in the United States five years, including the three years of his minority, be admitted a citizen, without having declared his intention previously, provided he shall make the declaration required, at the time of his admission, and shall declare on oath, and prove to the satisfaction of the court, that for three years next preceding, it has been, bona fide, his intention to become a citizen of the United States; and shall in all other respects, comply with the laws in regard to naturalization. —*Jour. of Law, No. 5.*

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We inserted in the fifth number of this journal an article on the naturalization laws of the United States. In that article no notice is taken of an act of congress passed the twentyfourth of May, A. D. 1828, entitled 'An act to amend the acts concerning naturalization.' Our apology for this omission, to which our attention has been kindly drawn by a correspondent, is the difficulty which exists in procuring access to the pamphlet laws of the United States; a difficulty which we have found considerable, even since we have been in pursuit of this particular—and one which ought to be remedied. Others, equally called upon to be accurate, have been drawn into the same or even a greater error on this subject. By the first section of the act referred to, the second section of the act of the fourteenth of April, A. D. 1802, is repealed. That section requires every person who may arrive after its passage, and be desirous of becoming a citizen, to make report of himself, or if under age, that he shall be reported by his parents, guardain, master or mistress—which report must be recorded—and the certificate thereof must, on his application to be naturalized, be exhibited to the court, as evidence of the time of his arrival in the United States By the act of the twentyfourth of May, 1828, the first section of the act of March twentysecond, 1816, is also repealed. By this section it is required that any alien who shall have arrived in the United States since the 18th of June, 1812, shall exhibit in his application to be made a citizen, the certificate and report of registry, required as evidence of the time of arrival, and also the certificate of his declaration of intention, which shall be inserted at full length in

the record of the court, and declaring of no validity the admission of any such alien to be a citizen, after the promulgation of that act, who shall not have complied with these conditions.

These provisions being thus repealed, the second section of the act of May twentyfourth, 1828, then enacts that an alien residing in the United States, between the 14th of April, 1802, and the 18th of June, 1812, and who has continued to reside there, may be admitted to become a citizen without any previous declaration of intention, provided, that in cases where there is no certificate or declaration of intention, it shall be proved to the satisfaction of the court, that the applicant was residing in the United States, before the 18th of June, 1812, and has continued to reside there since, which residence for at least five years immediately preceding his application shall be proved satisfactorily by the oath or affirmation of citizens of the United States, which, together with the place or places where the applicant has resided during that time, and the names of the witnesses, shall be set forth in the record of the court, otherwise he shall not be deemed a citizen of the United States.

It will, therefore, appear that in the case of a free white alien who has arrived in the United States since the 18th of June, 1812, and is desirous of becoming a citizen, he is no longer required to report himself, and no certificate need be set forth in the record of the court, further than is required in the law above noticed.—*Ibid. No.* 7.

## RECENT AMERICAN DECISIONS.

### PRINCIPAL AND AGENT.

5. A remitted from the United States to W, his general agent in London, certificates of shares in the United States Bank which stood in A's name, and the usual blank powers of attorney to transfer them. W sold the stock to C, and at the bottom of the bill of parcels delivered C, signed an agreement, by which, in consideration of the purchase money, he guarantied the regularity of the documents, and promised 'to be accountable for such dividends as may become due and be received by me or my agent from the first day of January 1825, until transfer, provided such transfer be made within twelve months from this date.'—After this sale, on May 13, 1825, W wrote to A, requesting him if the stock was not transferred by July 1st, to receive the July dividend, adding, 'which I must pay to the purchaser.' A accordingly received the July dividend, and by the next packet remitted to W funds to a much larger amount than the dividend, intending them for the payment of the dividend and other mercantile uses, though nothing was specified as to the mode of appropriating the funds. This remittance made W indebted to A, and he continued to be so until he became bankrupt in October 1825, never having paid the dividend to C. C in May, 1826, demanded this dividend of A, who had never before known who purchased the stock. In an action brought by C against A for money had and received, to recover the amount of this dividend, it was *held*, that A was originally accountable to C for the dividend, and consequently that the remittance to W exonerated A from any claim by C; and that as the remittance brought W into A's debt, it was not necessary to specify the object of the remittance in order to produce this effect. *Cropper vs. Adams.* 8 *Pick.* 40.

6. The rule, that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds and not to simple contracts. *New England Mar. Ins. Co. vs. De Wolf.* 56.

7. I. C., who was duly authorized by J. D. to guaranty two notes, wrote on one, 'By authority from J. D. I hereby guaranty the payment of this note. I. C.'; and on the other, 'By authority from J. D. in a letter dated September 24, 1824, [from which C derived his authority] I hereby guaranty his payment of the premiun on policy No. 10,079 [for which the note was given.] I. C.' *Held*, that J. D. was bound as guarantee of the notes, and not I. C. *Ibid.*

8. The letters from J. D. to I. C. and from I. C. to J. D. and from J. D. to the person whose notes were guarantied, and from him to J. D. and to I. C., written before and soon after the guarantees were made, and in relation thereto and to the transactions in which they originated, being part of the *res gestæ*, are admissible evidence in an action against J. D. as guarantee of the notes. *Ibid.*

9. If goods consigned to a commission merchant for sale, and on which he has a lien for a balance due to him from the owner, are attached as the property of the factor, the owner of the goods may maintain trespass againnt the officer who made the attachment. *Holly vs. Huggeford.* 73.

10. The lien of the factor is a personal privilege, and cannot be set up by any other person in defence of an action by the principal. *Ibid.*

11. A commission merchant, who had sold an article consigned to him, afterwards purchased it back at a reduced price on his own account, but it proving defective, the original owner who had made consignment agreed to take it back, and it was accordingly charged to him in account by the factor, though it still remained in the factor's possession, without any other act to invest the property. *Held*, that the property was revested in the original owner who might maintain trespass against any wrong-doer who took the article from the possession of the factor. *Ibid.*

### PRINCIPAL AND SURETY.

1. A creditor who has his debt secured by a surety, and has also property pledged to him by the principal debtor as security, is bound to keep the property for the benefit of the surety as well as himself, and if he surrender the property without the knowledge and consent of the surety, he loses his claim against the surety to the amount of the property given up. *Baker vs. Briggs.* 122.

2. A surety, who is sued alone, is entitled in this state to the same defence in law which he would have in equity. *Ibid.*

3. Whether the surety can set up such equitable defence when he and his principal are sued in a joint action, *quære.* *Ibid.*

4. If the creditor inform the surety that his debt is paid, and the surety thereby loses an opportunity of securing himself against his principal, the surety is discharged, although the debt was not in fact paid, and the creditor acted under a mistake in the declaration which he made. *Ibid.*

5. Where the creditor received from the principal debtor the note of a third person to a larger amount than the debt, and gave a receipt which stated that the note was received 'in security for all notes signed' by the debtor, it was *held*, in an action against the surety, that parol evidence might be received to show that the note of the third person was received in payment by the creditor, and with intent to discharge the debtor and his surety. *Ibid.*

6. Where a promissory note was signed by B and H as principals, and by the defendant as surety, it was *held*, that the reception of interest in advance, of the principals, by the holders, after the note was overdue, did not discharge the surety. *Oxford Bank vs. Lewis.* 458

### SALE.

1. Where one purchases goods upon an examination of a specimen taken by him out of a small aperture in the case in which the article is contained, this is a sale by sample. *Williams vs. Spafford.* 250.

2. Where an article was purchased in that manner, as a seroon of indigo, but the greater part of the contents of the seroon proved to be a different substance, and the remainder to be indigo of a quality inferior to the specimen, it was *held*, that the seller was liable to the purchaser in assumpsit on a warranty, that the article sold was indigo of the same quality as the sample. *Ibid.*

3. In the case of a sale of chattels *bonâ fide* and for a valuable consideration, slight evidence of a delivery is sufficient; and if the vendee, with the consent of the vendor, obtain possession before any attachment or second sale, the transfer is complete, without a formal delivery. *Shumway vs. Rutter.* 443.

4. Thus where furniture in a tavern was sold and the vendee took a lease of the house and went to live there and used the furniture in common with the vendor, who had occupied the house under a previous lease, and who continued to live there and keep the tavern, and afterwards the vendor removed to another house, carrying the furniture with him and using it as his own, and it was there attached as his property, it was *held*, that there was sufficient evidence of a delivery, to make the sale complete *Ibid.*

5. The plaintiff contracted to make some pew pannels for J, who was building a meetinghouse, to be paid for in cash on the delivery of the pannels. The plaintiff made the pannels and brought them to the meetinghouse, and deposited them there, but J was not there, being absent from town, but only some of his workmen. *Held*, that the pannels were not liable to attachment as the property of J. *Woodbury vs. Long.* 541.

### SHIP.

1. A bill of sale is not necessary to transfer property in a ship. *Bixby vs. Franklin Ins. Co.* 56.

2. The bill of sale and custom-house register or enrolment, are not conclusive evidence of property in a ship. *Ibid.*

3. In assumpsit, to recover one quarter of the proceeds of the sale of a vessel and of her earnings previously to the sale, the plaintiff, in support of his title, produced a bill of sale of one quarter thereof from S, who with three others was the first owner of the vessel. The defendant produced a paper, executed previously to the sale to the plaintiff, by all the first owners, whereby they agreed to 'pledge' to the defendant the vessel, then building, as security for his advances thereon and to allow the defendant to buy any part of the vessel, at a certain rate per ton. The vessel was afterward sold by the defendant; but his advances amounted to more than the proceeds of the sale

and earnings. *Held*, that the last mentioned instrument was not an absolute transfer, nor a mortgage, nor a pledge; and that it was incompetent to avoid the subsequent transfer to the plaintiff *Bonsey vs. Amee.* 236.

TROVER.

1. A tortuous taking is, in an action of trover, proof of conversion. *Woodbury vs. Long.* 543.

2. If the goods of the plaintiff are attached as the property of J, the plaintiff may maintain trover against the attaching officer, without proving any demand, even where the goods are so situated as that the officer might have fairly supposed them to be the property of J. *Ibid.*

## ENGLISH CASES.

PREROGATIVE COURT.—JUNE.

Before Sir John Nicholl.

*Chandless vs. Howe.*

The arguments in this case were resumed this morning, and Dr Adams was heard at great length on the part of Mr Rowe.

Dr Lushington proceeded to reply, but was interrupted by

Sir John Nicholl, who said he should not be justified in wasting the time of the Court, after the ingenious arguments which had already been advanced, by delaying to hear the Learned Counsel in reply, before giving judgment in a case which to him was perfectly clear. The present case arose out of a will, and two codicils to that will, made by Mrs Isabella Chandless, in favor of her sister-in-law, Mrs Elizsbeth Chandless, and to the prejudice of Mr Rowe, the brother of the testatrix. The Learned Judge then proceeded to state the provisions contained in the will, and those also contained in the codicils, both of which we have already stated in the report of the former proceedings in this cause. He then went on to say that the testatrix was the widow of a lawyer, and prided herself on her knowledge of legal business; and the will proved not only that she was a shrewd and clever woman, but that she was also very warmly attached to Mrs Elizabeth Chandless, both of them being the widows of brothers, and that her brother held but a secondary place in her affections, for she ultimately left the whole of the residue to her sister-in-law, who was not so well on in point of fortune as the testatrix. The testatrix was irritable, and quick to take offence, and this disposition was increased by the complication of disorders under which she latterly labored. To assuage the pain she suffered she was advised to drink brandy, but she carried the remedy too far. She was attended by Mr Wilmer, her apothecary, and Dr Davis who attended her in Nov. 1827, in Oct. 1828, and in March and April 1829, a short time prior to her death, which took place on the 17th of May following, somewhat unexpectedly. On the 2d of May and on the 13th of May she executed the disputed codicils, by which she revoked the moiety of 6,000*l.*, which, by the will, she had left to her brother during his life, and gave the whole sum absolutely to Mrs Chandless. She revoked various other legacies also, and gave an additional legacy to Mary Carter, who had given evidence in the cause—Mr Rowe opposed the codicils on the ground of unsoundness of mind on the part of the testatrix, and he had put in an allegation stating that in March, 1829, the testatrix was seized with a species of insanity denominated delirium tremens, which rendered her childish, incoherent, and irrational, and that she was not, at any subsequent period, of sound mind, or capable of managing her affairs, or of making a testamentary document. This account of the state of the testatrix was supported entirely by the evidence of Mr Wilmer, the apothecary, and or Mrs Miller, the cook; but the Court could place little reliance upon the evidence of Mrs Miller, contradicted as it was by the testimony of persons far more worthy of attention, and being also at variance with the testimony given by Mr Wilmer himself. According to her evidence, the testatrix was wholly incapable of managing her affairs from March until her death; but Mr Wilmer deposed that in April he was sent for to the deceased, whom he found in a high state of excitement, which he at once perceived to be the precursor of a delirum tremens. He urged the discontinuance of the brandy. In the first few days of May, he was again sent for, and found the deceased laboring under delirium tremens, from which she was never free until her death. In another part of his evidence he stated that he believed she was laboring under attacks of this kind, which usually came on at night, but that in the day-time she was rational and tranquil. He further stated that delirium tremens was an unnatural excitement of the brain, which would leave the patient in a sound state of mind as soon as the exciting cause was removed. Why this amounted to little more than a proof that the deceased was occasionally intoxicated by drinking brandy.—What the Court had to look to was, whether there was any appearance of delirium tremens at the time the deceased was making these codicils. The principal witness to the state of the deceased on that occasion was Mr Wilson, one of the executors appointed by the codicils, a gentleman upwards of 60 years of age, formerly a practising Barrister and King's Counsel in one of our colonial possessions.

[To be concluded next week]

THE JURISPRUDENT.

BOSTON, SATURDAY, DECEMBER 11, 1830.

## CAPITAL PUNISHMENTS.

'I shall ask for the abolition of death—until I have the infallibility of human judgment demonstrated to me. The punishment of death has always inspired me with feelings of horror.'—[LAFAYETTE, on the proposition of M. De Tracy in the Chamber of Deputies.

The sentiment so boldly and humanely expressed by the venerable friend of universal liberty—to whom America owes much, and France more—was fully and readily responded by the King of the French, when addressed on the subject of M. De Tracy's motion, by the head of the deputation, expressing a hope that the country would owe him the boon of the abolition of the punishment of death, to whom France owed the extinction of civil war. To this the King replied, that he desired the abolition from a conviction which he had entertained through life, and added 'I will do all in my power to realize your wish, which is also mine.'

This subject has deeply occupied the attention and called forth the exertions of the friends of humanity and justice in England, for years past. France, in this respect, at least, seems to be outruning our own country in the race of liberal principles. And even in England, whose criminal code has been sanguinary beyond that of any other civilized nation, the Statute Book is yielding to public sentiment on this subject. It must yield still more, since this sentiment is sustained and aided by all the principles of morality, philanthropy and religion.

The spirit of reform has begun, where it should always begin, with the people; and the time is not far distant when those measures will triumph there and everywhere, which 'have engaged the deep attention of the enlightened and lamented Romilly—have had the aid of the splendid reasonings of McIntosh—the logical and resistless eloquence of Brougham—the moral and intellectual energies of the most distinguished and enlightened Statesmen, with the evidence of practical men and the voice of universal opinion.'

We design again to return to this subject. For the purpose of showing the state of feeling, now existing in England, and the progress which is there making towards a more mild and humane penal code, we insert the following remarks from a late English paper.

'Our readers will recollect that the Forgery Bill was introduced by Sir Robert Peel in the House of Commons, on the principle of revising, consolidating, and *ameliorating* the laws relative to a crime which, though of great moral guilt, and of pernicious consequences, has been visited with such disproportionate severity by a multiplicity of penal statutes as to prevent, in a great measure, their own execution. It was admitted by the Right Honorable Secretary, on moving for leave to bring in his Bill, that the Legislature, in treating of this offence, from the eighth year of the reign of King William to the present day, had added upwards of sixty *capital* enactments to the Statute-book; thus including a multitude of offences coming within the definition of forgery, of various degrees of moral and social delinquency, under the one sanguinary denunciation of death! The feelings of society have long been disgusted with the spectacles of extermination which these laws have produced. The repeated executions, some years ago, for the forgery of 1*l.* notes, in consequence of prosecutions by the Bank of England, are fresh in the recollection of the public, who saw, at that time, that the crime, instead of being repressed, became alarmingly more frequent, as one batch of victims after another was offered up to the vengeance of the law! These executions only ceased when the small notes were withdrawn from circulation, so much stronger was the temptation to the crime than the terror of the punishment. Society saw with that horror which, under such circumstances, must ever characterize the feelings of a civilized community, that so much blood was shed in vain. Nor is it to be wondered at that the terrible examples of the law were ineffective, when the severity of the punishment caused the odium of the crime to be lost in sympathy for the offender. Since that time the public aversion to the law of forgery has become more strong, and the expression of that sentiment more loud and general. In compliance with the public call for an alteration of the law, which was growing too powerful to be much longer resisted, Sir Robert Peel commenced his work of revising the statutes relating to this offence. From the manner in which he had executed his task of revising the criminal law in general, we were not led to expect much from him, as his statutory repeals went no further than to lop off some of those ferocious enactments which had fallen into humane disuse, and which, in a practical

point of view, had already ceased to exist. In his Bill to amend the law of forgery he pursued the same plan. His own words will justify what we assert. Here is his exposition of the provisions of his Bill, as it stood before the third reading. 'My great principle (said the Right Hon. Secretary) in this Bill is to retain the capital penalty for the crime of forgery of those documents or instruments which may be considered in the light of negotiable and transferable securities, and to remit it to others, where, though continued, this view does not appear to me to be fitly taken. Keeping this principle then in view, I shall now proceed to enumerate the cases in which I propose to *remit* and *retain* the *capital* punishment for the crime of forgery. I shall retain it in all forgeries of the Great Seal, Privy Seal, and Sign Manual; in all forgeries on the public funds, on Bank or money notes, or orders for the payment of money—in short, as I before said, of all documents which represent money, and are negotiable and transferable for it. I also add the forgery of wills relating to personal property.' After some observations, he proceeds to the other branch of his subject—the remission of capital punishments. 'I propose to except from the punishment of death all forgeries of receipts for money or goods—all issuing of forged stamps, or forgeries of stamps—all attempts to defraud by forged orders—all fabrications of Bank paper—that is, the paper on which notes are stamped;—all forgeries of deeds and bonds, and every document which, in short, does not come under the class I have already named, and which are not in the nature of negotiable or transferable securities.

For these offences death, be it borne in mind, is now very *rarely* inflicted, and I am ready to admit that it ought not to be inflicted.' For the word 'rarely,' in the last sentence, the Right Hon. Secretary ought to have said 'never.' We defy him to point out a single instance of the judgment of the law being, in modern times, carried into execution in the cases of forgery which he has enumerated as those that are to be exempted from the punishment of death. What then was the improvement of the law proposed to be effected by his Bill? Merely to prune away what may be called the dead branches of this portion of our penal system, while the main stem and living arms of the destroying *upas* were left to flourish in all their fatal vigor and baneful luxuriance! In fact, this Bill would not have the effect, if it passed into a law as introduced by its author, of instigating the practical severity of the law to the amount of a single execution. Yet there were Journals, and among them one which had formerly urged in strong language the necessity of abolishing the capital punishment in all cases of forgery, that praised this Bill as a complete and finished specimen of judicious legislation. We felt it our duty to undeceive the public on the matter. The decision of the House of Commons on the third reading of the Bill has proved that opinion was not erroneous. By that decision an amendment, moved by Sir James Mackintosh, had been introduced into the Bill, which has the effect of repealing the penalty of death in all cases of forgery, except the forging of wills—an exception which the Hon. and Learned Mover of the amendment accounted for by stating that it was a concession which he made to the opinions of others, to whose views he sacrificed, in this instance, his own judgment. Should the Bill, in its amended shape as it now stands, pass into a law, we should still regret that a single fragment of the sanguinary code remained to blot the new Statute-book of a better era of legislation; but it was, perhaps, necessary to give up something to secure the remainder. The reasoning that applies against inflicting the penalty of death for the forging of bonds, bank notes, bills of exchange, &c,—namely, that it is not effective in repressing the crime, and that it confounds a fraudulent invasion of the right of property with offences of violence and blood, is as applicable to the forgery of wills as to the other cases just mentioned. At one time the great argument on which the advocates of the sanguinary principle relied, was the necessity of protecting, by the severest penalty known to the law, the banking and commercial interests; which, they alleged, would be subjected to ruinous depredation, if any punishment short of death was annexed to the crime. That argument has been shown by bankers and merchants to be a gross and pernicious fallacy. Upwards of 200 petitions, we must again remind the supporters of exterminating Statutes, have been presented to the Legislature in the present Session, praying for the abolition of capital punishment for forgery, on the various grounds—that it is opposed to revealed religion—to reason—to the natural sentiments of humanity, and to public opinion; that it is, in consequence of its extreme severity, of *uncertain* execution, thereby encouraging crime, by holding out the hopes of impunity to the offender, and, consequently, rendering peculiarly *insecure* the property which it was intended to protect. But, in addition to this mass of petitions, to which appeared the signatures of bankers, merchants, clergymen, barristers, solicitors, and private gentlemen, was one petition, which afforded the best evidence that could be given to Parliament touching the single point of the insecurity of bankers' property, in consequence of the cruelty of the law producing a conscientious disinclination to prosecute offenders.

This petition was presented by Mr Brougham. By whom was it signed? By *one thousand bankers!* What was the language which they addressed to the Legislature? Here it is—'That your petitioners, as bankers, are deeply interested in the protection of property from forgery, and in the conviction and punishment of persons guilty of this crime—that your petitioners find, by *experience*, that the infliction of *death*, or even the probability of the infliction of death, *prevents* the prosecution, conviction, and punishment of the criminal, and thus endangers the property which it was intended to protect—that your petitioners, therefore, pray that your Honorable House will not withhold from them that protection which they would derive from a more *lenient* law.' Here, in the simple and forcible language of truth, gathered from long experience, is the appeal to Parliament of one thousand bankers of the United Kingdom, supplicating for the abolition of the capital law of forgery on the interested principle of the insecurity of their property under the existing laws. Such are the witnesses—such the evidence! Leaving religion and all moral and humane considerations out of view, here is the testimony of cold, and even selfish, calculation. It shows the injurious consequences resulting from the present state of the law in a commercial point of view. Bankers do not *theorise* for the sake of *humanity* to their own pecuniary prejudice; nor are they exactly the class of men who prefer sentiment to self-interest. It happens, however, in this case, that their particular interests coincide with the view of this question which is derived from the higher considerations of religion, reason, and humanity. Can the Legislature refuse to listen to the evidence of those who know the working of the law best—whose property is most affected by its operation—and whose demand of an efficient law to guard their property against depredation goes not to destroy, but to save, the *lives of men?* The House of Commons have listened to their appeal—they have decided in favor of the calculations of commerce, and the rights of humanity equally demand it. We hope those who have hitherto opposed the mitigation of the criminal code in the other House will recollect that this is not a question of politics, in which men may safely indulge in speculative opinions even against the sense of a great proportion of the community, but that it is a question of justice, and that life is at stake. In such a question an error on the side of humanity is easily recalled, while on the opposite side it is irreparable. The vote of the House of Commons is now on the records of history, and will assuredly, one day or other, if defeated now, become the law of the land. But we will not anticipate a decision at this time that would severely disappoint the country; we would rather encourage the hope that the House of Lords will make the inchoate triumph of civilized law over cruel prejudices complete, and accede to the earnest supplications of practical men, backed by the highest considerations that can operate on the minds of dispassionate and enlightened legislatures.

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*Answer in Chancery—New Doctrine.* The London Law Magazine states a case, Stanbury *vs.* Gordon, which recently came before the vice chancellor, where the bill charges that the defendant Gordon, had employed the plaintiff to procure his, the defendant's, return to parliament from the borough of Tregony, and that Gordon had advanced several sums to the plaintiff, as agent in this business, for which the plaintiff had made mortgages, and the prayer is for a redemption and discovery. Gordon denies the agency, and objects to answering, on the ground that a disclosure would subject him to a criminal prosecution. The vice chancellor decided that he should answer, and said that the defendant cannot protect himself from answering *even where he may criminate himself by the discovery.* See contra Redesdale's Tr. 249; 19 Ves. 225; 1 Mer 391; 1 Swanst. 192, 305.

The law promotions to take place on the first day of Michaelmas Term are the subject of general conversation. In addition to three new Judges for the Courts of King's Bench, Exchequer, and Common Pleas, there will be a new batch of King's Counsel.—*London Morning Herald.*

*Butler's life of D'Aguesseau.* It will be recollected, perhaps, by the readers of Butler's Reminiscences, that he consulted Sir Samuel Romilly on some occasions, as to the manner of amusing himself in the country during the vacation, and Sir Samuel recommended to him to occupy himself upon the life of the celebrated Chancellor of France, D'Aguesseau. Mr Butler, it seems, followed the suggestion, and the result is a recently published Life of that eminent jurist.—*English paper.*

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*Westville, Mi.* Chas. R. Brown.

[To be continued.]

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# THE JURISPRUDENT.

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## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

The general doctrine is thus oracularly delivered by Lord Coke:—'By the civil law, every person is bound to warrant the thing that he sells or conveys, although there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or in law, for *caveat emptor*.'* Of warranty in deed, or express warranty, little need be said. It differs in no respect from every other positive agreement, and must be governed, therefore, by the rules which have been laid down as applicable to contracts generally. Thus, the warranty must be given at the time of the sale,† or at least must be connected by direct reference with the sale;‡ else it forms no part of the bargain, and is a mere naked undertaking, unsupported by an adequate consideration.§ Again, questions may arise, and have frequently arisen, as to the import of the expressions used, and consequently as to the extent of the warranty; and they have been, and must continue to be determined, according to the established rules of legal construction; or, what is the same thing, the presumable intention of the parties. A ship, for instance, is warranted tight, or copper-fastened; a horse sound or free from blemish. Whether the warranty has been fulfilled, depends, of course, upon the meaning of these words: and this can only be ascertained by an inquiry into their acceptation among skilful persons conversant with the subject matter.‖ To those who have paid attention to the preceding chapter, it may also be unnecessary to say, that a warranty by word of mouth cannot be appended to a written contract of sale; neither can a written warranty be qualified, extended or explained by representations previously made and not reduced into writing, unless there has been fraud on the part of the seller. On this subject the words of Lord Tenterden are as follow:—'A matter antecedent to, and dehors the writing, may, in some cases, be received in evidence, as showing the inducement to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist.'¶

It has been said, and repeated from one text-writer to another, that if the defect be palpable, even an express warranty does not bind.* The case must necessarily be of so rare occurrence, that it is hardly worth while to question the soundness of the proposition. It seems to have originated partly in the well known distinction of the Roman law between latent and manifest defects, and partly in the nature and form of the action once adopted in cases of a breach of warranty. That action was founded on an allegation that the seller had deceived the buyer; and it might, therefore, not unreasonably be questioned how such an allegation could be supposed, when the fault was visible to every eye. But there seems no reason for extending the rule to an action for the breach of a positive undertaking; for to answer that such a bargain never could have been in the contemplation of the parties, is to set up an inference against express ambiguous words, which, as we have seen, the law does not allow. If a man be foolish enough to give such an undertaking, why should he be exempted from the consequences of his folly?

But the warranty in law, of which Lord Coke speaks, is a matter of much greater difficulty. Indeed, in the whole range of mercantile law, there is scarcely any subject more perplexed and unsatisfactory than this. We have taken some pains to trace out the origin of this uncertainty, and a careful investigation of the cases has enabled us, we hope, to explain, if not to remove the difficulty. Anciently, as we have just hinted, the almost universal remedy for the breach of an express warranty was an action, technically called an action on the case, founded upon the wrongful act of the seller in warranting a commodity to be what in reality it was not. Now precisely the same remedy was applicable, upon the most common principles of law,† when the seller, without actually warranting, had *knowingly* made a false representation of such a kind, as might well elude the caution of the buyer, and by that deception had induced him to purchase. It was, in fact, the ordinary case of a fraud occasioning an injury. The *effect*, therefore of two cases was the same. The fraudulent misrepresentation, though not in strictness a warranty, was in its consequences tantamount thereto; and hence it received the designation of a warranty *in law*. The only important difference was this: that in the latter case it was essential to allege and prove that the seller *knew* the falsehood of the representation which he was making, and that the buyer was actually deceived by it; whereas if the warranty were express, the mind of the seller, and the effect upon the buyer, were equally immaterial.

The ancient doctrine of warranty is so well illustrated by an early case, that we do not scruple to transcribe it *verbatim* from the report.* 'Chandelor v. Lopus. Action on the case: Whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar's stone, and sold it unto him for 100*l.*, *ubi revera* it was not a bezar's stone. After verdict and judgment for the plaintiff in the King's Bench, error was brought in the Exchequer Chamber. Because the declaration contains not matter sufficient to charge the defendant, viz. that he *warranted* it to be a bezar's stone, nor that *he knew* that it was not a bezar's stone, for it may be he himself was ignorant whether it was a bezar's stone or not. And all the justices and barons (besides [except] Anderson) held that for this cause it was error; for the bare affirmation that it was a bezar stone, without warranting it to be so, is no cause of action. And [even] although he knew it to be a bezar stone, it is not material, for every one, in selling of his wares, will affirm that his wares are good, or the horse which he sells is sound; yet if he warrant them not to be so, it is no cause of action. And the warranty ought to be made at the same time of the sale. Wherefore forasmuch as no warranty is alleged, they held the declaration to be ill. But Anderson to the contrary, for the deceit in selling it for a bezar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and the judgment was reversed.'

Now whether Anderson was right or not, is little to the purpose. For ourselves, we should be inclined to agree with him that the declaration was sufficient; for it alleged that the defendant had skill in jewels, from whence it might, without any great strain, have been inferred that he knew the nature of the property; and if so, we confess it seems to us more like a case of downright fraud, than of venial puffing. However this may be, it is clear that without proof of knowledge on the part of the seller (technically styled the *scienter*,) the warranty in law did not arise. The case, moreover, serves to shew, what was then considered as amounting to a deception of which the law would take notice, and how closely the maxim of *caveat emptor* was adhered to. Even now, though the rule has been much relaxed, it is not every misrepresentation which makes the seller answerable. As in the civil law, so in ours, '*simplex commendatio non obligat*.' Every man, as the court remarked in the case which we have quoted, will trumpet forth the goodness of his wares, and it is the buyer's own folly if he be imposed upon by idle declamations of this kind.* And, generally, a false affirmation of a matter, about which the buyer might, by ordinary diligence, have informed himself correctly, will not amount to

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* Co. Lit. 102. a.

† 2 Ld. Raym. 1120. 1 Str. 414. Dyer, 76 a. Cro. Jac. 197. 630.

‡ 1 Roll. Abr. 96. 1 Salk. 211.

§ It has been said, and Plowden has been quoted as authorizing the position, 308 b. 309 a. that 'if a warranty be given *in writing*, the consideration is not inquirable.' We know not how such a position can be maintained, because even though it might be unnecessary in an action on the case, strictly speaking, to prove a consideration, yet if the purchase were not connected with the representation, we apprehend no action would lie. At all events, the circumstances of its being written or unwritten can make no difference.

‖ 5 Dow. 164. 1 Campb. 361. 5 B & A. 240. 1 R. & M. 136. 290. 2 Chitty's Rep. 425. 3 Campb. 523.

¶ 2 B. & C. 684. Ch. J. Gibbs also, in the case of Pickering v. Dowson. 4 Taunt. 779. says: 'If a representation be made before a sale of the quality of the thing sold with full opportunity to the purchaser to inspect the article, and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for deceit will lie against the vendor on the ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not, unless there have been fraud on his part.

* See 10 Ves. 505, where this doctrine is cited as law by Sir Wm. Grant, Master of the Rolls.

† Dyer 75. Roll. Abr. 91. tit. Action sur Case. 3 T. R 56.

* Cro. Jac. 4. See also Springwell v. Allen, Aleyn, 91.; and 2 East, 449. (n;) and the observations of Buller, J. in his elaborate judgment in Pasley v. Freeman, 3 T. R. 56.

† Roll. Abr. 101. pl. 6. 1 Sid. 146. 1 Stark. 75. Yelv. 20. 2 Ch. Ca. 204. 1 Levinz 102.

such a deception, as to impose on the seller the obligation of a warranty.*

With respect to the *concealment* of defects, the rule has always been that the seller, however in conscience bound, was not required by the law to disclose a defect, which the purchaser himself by exercising due caution might have discovered; but if the fault be *latent*, and such as the purchaser could not by the greatest attention detect, then, if the seller be aware of it, he is bound to make it known. And, even though the defect be apparent, yet if the seller has used artifice to conceal or disguise it, the rule of *caveat emptor* will not protect him from the consequences. Now, all these cases, whether of wilful misrepresentation, or studied concealment, or mere suppression, obviously fall within the general doctrine as to fraud, rendering the seller liable to an action on the case for deceit; and these alone are, in our opinion, properly comprehended within the term 'warranty in law.'

In process of time, however, a notion sprung up, that in certain cases a warranty might be implied from circumstances and expressions accompanying the sale. It must be inferred, it was said, that it was the intention to warrant, though no formal words of warranty were made use of. This innovation (for although the doctrine of implied warranty has been absurdly confounded with that of warranty in law, an innovation it unquestionably was) seems to have been first introduced by Ch. J. Holt. He laid down a principle, which has ever since been uniformly adopted, that an affirmation at the time of sale is a warranty, provided it appear in evidence to have been so intended. The question of intention thus let in, was soon pushed to an absurdity. It became an established maxim, applied indeed for the most part, if not solely, to sales of horses, but in principle applicable to every other sale, that if the price paid were equal to the worth of a good and perfect commodity, the seller *must be understood* to have warranted it such. But this notion of a sound price, as it was called, was exploded by Lord Mansfield, as resting on too loose and unsatisfactory a foundation: he might have added, that it was at variance with the established principles of our law.

Not many years after this, the action on the case for a breach of warranty, began to be superseded by the more convenient form of an action of *assumpsit*, which founded itself on the undertaking of the seller, and complained of the non-fulfilment of his contract. Now, the notion of an *implied undertaking* had long been familiar to the lawyers; and it is no wonder, therefore, that with the adoption of the form, the doctrine also began to be applied more generally to the subject of warranties. Indeed, there is little doubt that, to this change in the formal remedy the change in the law is mainly attributable, although it is true, that when once the doctrine had gained a footing, the distinction between the two kinds of action was no longer regarded.

A brief review of the modern cases on the subject of implied warranty, may, perhaps, enable us to lay down a few plain rules for practical guidance. The first in order of time, is that of Parkinson v. Lee.† A quantity of hops had been sold by sample, with which, as was found by the jury, the bulk at the time of delivery corresponded. There was, however, a latent defect, of which, neither the seller nor the buyer was, or could be then aware, but which, ultimately, rendered them worthless. The buyer thereupon brought an action of *assumpsit*, alleging a promise, on the part of the seller, that the hops should be good, sound and merchantable. There was no evidence that any such warranty was given in fact; and the question therefore was, whether it could be implied from the circumstances of the case. Le Blanc J., who tried the cause, thought that the defect being one against which the buyer could by no precaution protect himself, the rule of *caveat emptor* did not apply, and that the seller therefore must be answerable for the loss. But the court, upon mature consideration, decided, with the concurrence of Le Blanc himself, that no such warranty as that alleged could be inferred—that the buyer might have protected himself, if he had been so minded, by requiring an express warranty, but that not having done so, and having had an opportunity of exercising his judgment on the commodity, he had bought it at his own risk with all its imperfections.

Jones v. Bowden,* was an action on the case for deceit in the sale of some pimento, which the declaration alleged to have been put up as not sea-damaged, whereas, in reality, it was so. At the trial it was proved, that when sea-damaged pimento was offered to sale by auction, it was usual in the trade to state, that it was so damaged; and that, if nothing were said with respect to its quality, it was understood to be sound. In this case nothing had been said, and the action, therefore, was held to be maintainable. Now, this decision carried the doctrine of Lord Holt one step farther. There was no affirmation at the time of the sale, that the pimento was not sea-damaged, but there was that, which by the usage of trade, was equivalent to such an affirmation. It was evidence, therefore, of an intention to warrant.

But the court, if the report be correct, took a far greater leap in the case of Laing v. Fidgeon,† which occurred soon afterwards. It was an action of assumpsit laid before Chief Justice Gibbs. The plaintiff had bought from the defendant a number of saddles for exportation, of which, samples had been previously sent. It was proved that those delivered were of very inferior materials and workmanship, and that they were in fact useless and unmerchantable. It appeared moreover that they did not correspond with the sample. After verdict for the plaintiff, a motion was made for a new trial on the ground that there was no undertaking proved, as alleged in the declaration, that the saddles should be merchantable. But the court said, *that it resulted from the whole transaction that the article was to be merchantable:* the defendant might have rejected the order, but having accepted it, he ought to furnish a merchantable article. As the saddles were intended for exportation, it is probable that the buyer might not have had an opportunity of inspecting them at the time of delivery; and if so, the decision of the court may be supported without adopting its reasoning. It was a bold novelty if they meant to say that in every such transaction there was an implied warranty that the goods should be merchantable.

To be continued.

*10 Ves. page 505. Sugd. Vend. & Purch. 282, and 19.

†2 East, 314.

*4 Taunt. 847.

†6 Taunt. 108.

## SAMUEL ROMILLY.

Concluded from page 155.

There is no wisdom more to be desired than that which enables us to estimate, at their true relative value, the various objects of human ambition. The highest and noblest minds, deficient in this knowledge, have too often wasted or abused their powers, by devoting them to the vainest or the wickedest purposes. The sanction of public applause to actions indifferent or injurious, has misled many from the pursuit of purer and more excellent objects; and the world has been justly repaid for its false and dangerous adulation, by the scourging vices of those whose ambition it has depraved. Some men, indeed, with a deeper insight into their own nature, and into the true ends and aims of their being, have proposed to themselves a higher and a nobler course, and have found no object worthy of their ambition, unconnected with the happiness, with the improvement, and with the virtue of mankind. To reform and to instruct the human mind, to purify it from the mean and wicked passions which debase it, to purge it of its weaknesses and its errors, and to fill it with all noble views and aspirations, has, in every age, been the object of that small band of good and virtuous men, the

'Salt of the earth, the virtuous few
Who season human kind.'

Among these truly excellent and exalted persons, Sir Samuel Romilly has every claim to be ranked. He was, in the highest sense of the word, a philanthropist, loving mankind with wise and constant affection, not misled by any false sensibility, yet tremblingly alive to their best and truest interests. Without displacing for a moment the beautiful affections of domestic life, the welfare of his fellow creatures ever lay next to the heart of Sir Samuel Romilly; and the feelings which in weaker and meaner minds extend only round the small circle which blood or friendship draws, were in him diffused with undiminished warmth over the wide orbit of human existence.

How noble and pure was the ambition of Sir Samuel Romilly, we may learn from the following beautiful passages, where he has explained the motives by which he was actuated in his proposed reforms of the criminal law. 'It was not,' said he 'from light motives, it was from no fanciful notions of benevolence, that I have ventured to suggest any alteration in the criminal law of England. It has originated in many years' reflection, and in the long-established belief that a mitigation of the severe penalties of our law will be one of the most effectual modes to preserve and advance the humanity and justice for which this country is so eminently distinguished. Since the last session of parliament, I have repeatedly reconsidered the subject: I am more and more firmly convinced of the strength of the foundation upon which I stand; and even if I had doubted my own conclusions, I cannot forget the ability with which I was supported within these walls; nor can be insensible to the humane and enlightened philosophy by which, in contemplative life, this advancement of kindness has been recommended. I cannot, therefore, hastily abandon a duty which, from my success in life, I owe to my profession; which, as a member of this house, I owe to you and to my country; and which, as a man blessed with more than common prosperity, I owe to the misguided and unfortunate.

'Actuated by these motives, it is not to be imagined that I shall be easily discouraged by any of

the various obstacles so commonly, and perhaps with propriety, opposed to every attempt to alter an established law; upon such a resistance I calculated, but am not to be deterred. I knew that my motives must occasionally be misunderstood by many, and might possibly be misrepresented by others. I was not blind to the road where prudence pointed to preferment; but I am not to be misled from comforts which no external honors can bestow. I have long thought that it was the duty of every man, unmoved either by bad report or by good report, to use all the means which he possessed for the purpose of advancing the well-being of his fellow-creatures: and I know not any mode by which I can so effectually advance that well-being, as by endeavoring to improve the criminal laws of my country. It has been insinuated, that, indebted as I am to the law, commendation rather than censure ought to be expected from me; and it has been asserted, that under the pretext of proposing apparently immaterial alterations, my real object is to sap and undermine the whole criminal law of England. Such insinuations and assertions have not, I am well aware, been made by any of my honorable and learned friends by whom I am now surrounded, and who have witnessed my whole professional life; but they have been made, and I must of course suppose, have been really believed.'*

In another speech on the Catholic question, Sir Samuel Romilly has, in the same lofty spirit of philosophical benevolence, described the true objects of human ambition:—

'What! is it no hardship to the catholics of Ireland to be told, "You may enter, indeed, into professions which are highly honorable to others, but by *you* they must be followed merely as the means of gaining a subsistence. As to all the proud objects of honorable ambition; as to everything which can ennoble your labors in your own eyes and in the eyes of others; as to the hope of ever rendering yourselves eminently useful to mankind, or gloriously distinguishing yourselves by services to your country; as to the prospect of establishing a reputation which shall live in the memory of a grateful posterity, of becoming an example which shall serve to kindle the virtues of a future generation, and of leaving a name which your children shall never hear pronounced but with a glow of honest pride and pious exultation; as to all these animating hopes and prospects, they must be by *you* forever relinquished. You may toil on in the humble situation where gain must be your only object; you may see honors and distinctions distributed to those around you; but you must be forever precluded from them. That profession which to your colleagues leads to the most eminent station, shall be to you an unhonored though profitable trade." '†

The eulogy pronounced by Sir S. Romilly on Mr Horner is full of the same noble sentiments, and well expresses the motives by which his own life had been guided. 'Of all the estimable qualities which distinguished his character, I consider as the most valuable that independence of mind which to him was so remarkable. It was from this feeling, and from a just sense of its importance, that at the same time that he was storing his mind with the most various knowledge on all subjects connected with our internal economy and foreign politics, and that he bore a conspicuous and most successful part in all the great questions on which it was his duty as a legislator to form or to express an opinion, he laboriously devoted himself to all the painful duties of his profession. Though his success at the bar was not at all adequate to his merits, yet he steadily persevered in his labors, and seemed to consider it as essential to his independence that he should look forward to his profession alone for the honors and emoluments to which his extraordinary talents gave him so just a claim.

'But I should very ill express what I feel upon this occasion, were I to consider the extraordinary qualities which Mr Horner possessed, apart from the ends and objects to which they were directed, The greatest eloquence is in itself but an object of vain and transient admiration. It is only when ennobled by the uses to which it is applied, when directed to great and virtuous ends,—to the protection of the oppressed, to the enfranchisment of the enslaved, to the extension of knowledge, to dispelling the clouds of ignorance and superstition, to the advancement of the best interests of the country, and to the enlarging the sphere of human happiness,—that it becomes a national benefit and a public blessing. It is because the powerful talents, of which we are now deprived, have been uniformly exerted in the pursuit and promotion of such objects, that I consider our loss as one of the greatest which in the present state of the country, we could possibly have sustained.'*

Among all the qualities which combine to form a great and powerful character, there is none more strikingly excellent than that constancy of purpose which, through difficulties and defeats, still presses onward to its object. The mind inspired and strengthened by this lofty principle regards every obstacle that would turn it from its settled purpose, not only without dismay, but with exultation, as conferring additional honor upon the struggle which it is so well prepared to sustain. Maturely weighing the means which it possesses for the accomplishment of its great designs, it finds in the strength of its own unswerving resolution the confidence and the promise of success. The misfortunes, the failures which would deter weaker minds, are turned into instruments of power; and, as difficulties multiply around, they but unite more firmly the energies before which they are destined at length to yield. A man of the most ordinary powers, animated by this principle, will perform a giant's labors; while without it the noblest intellect may expend itself in the triflings of a dwarf. Throughout the whole of his life Sir Samuel Romilly was remarkable for the earnest perseverance with which he applied himself to the accomplishment of his designs. In the various attempts which he made to improve the criminal code, his resolution was frequently put to the severest test. Opposition, neglect, ridicule, and reproach, conspired to deter him from his great and excellent purposes; but never, for a moment, made an impression upon his firm and resolute mind. In one of his speeches on the subject of the criminal law, he manifests that unbroken energy of character which, even under the pressure of defeat, never doubts of success.

'From the spirit which I have seen, I shall not be surprised, and I certainly will not be deterred, by any vote of this night. I am not so unacquainted with the nature of prejudice as not to have observed that it strikes deep root; that it flourishes in all soils, and spreads its branches in every direction. I have observed also, that, flourish as it may, it must, by laws sacred and immutable, wither and decay after the powerful and repeated touch of truth. It was my lot to hear in parliament a negative upon that bill which was intended to deliver this enlightened nation from the reproach of the cruel and disgusting punishment of burning women alive. It was my lot, again and again, to witness in this house the defeat of those wise and humane exertions which were intended to rescue Englishmen from the disgrace of abetting slavery. But the punishment of burning is no more and Africa is free. No resistance, no vote of this night, shall prevent my again appealing to the good sense and good feeling of the legislature and of the country. If I live another year, I will renew this bill, with the bill for repealing the punishment of death for stealing a few shillings; and, whatever may be my fate, the seed which is scattered has not fallen upon stony ground.'*

The sentiments of Sir Samuel Romilly on the subject of parliamentary reform are explicitly stated in the following passages:—

'I give this vote, not from any vain hope of popularity,—not from an expectation of being able to gratify those who now influence the public opinion on this subject—but from a sincere and deep-rooted conviction that some reform is necessary. I am a friend neither to universal suffrage nor to annual parliaments. I even doubt whether I am prepared to go all at once so far as to make the right of voting at elections coextensive with taxation; but for some reform, for some material change in the present system, I am, and long have been, a zealous advocate. At at an early period of my life, long before I had a seat in parliament when, from the gallery of this house I first witnessed its deliberations, and heard Mr Pitt, with all the generous ardor of youth, and with the same eloquence which distinguished his maturer age, pleading the cause of parliamentary reform, I became sensible to the necessity of that measure. The impressions which were then made on my mind have never been effaced. Subsequent reflection and observations, more particularly since I have myself become a member, have only served to confirm them.'†

*Speeches, vol. i. p. 317.
†Speeches, vol. i. p. 393.

*Speeches, vol. ii. p. 167.

*Speeches, vol. i. p. 478.
†Speeches, vol. ii. p. 193.

## CHANCERY REFORM.

Instead of a reform in the practice of the Court of Chancery, which the public want, it is intended to burden the country with the expense of a new Judge in Equity, whom the public do not want. It was well observed by Mr Brougham, in the debate on the Bill relative to this subject some time since that the motion submitted to the House by Sir C. Wetherell put to the test all those persons who had hitherto professed themselves anxious for a reform in the Court of Chancery. It has done so, and Mr J. Williams, who first made himself known in the House of Commons by an elaborate speech, containing a volume of facts to prove the imperative necessity of Chancery reform, has not stood that test. He now supports a Bill, which, to use a similar phrase, 'gives the go-by' to the question of reform, and appoints an additional Judge to administer that very system which he formerly represented as being inadequate, under any Judge or number of Judges, to serve the purposes of justice, and give satisfaction to the country. Since the delivery of the speech in question Mr Williams was out of Parliament for a

time, and one would think he had taken advantage of his interval of political leisure to dip in that 'Bethesda' which cures patriotic lawyers of the fever of reform, and makes them treat their own former statements of intolerable abuses as the wild fictions of a diseased imagination! In allusion to the miraculous change which has been wrought in the opinions of the Learned Gentleman, Mr R. Grant rather sarcastically remarked that 'the memory of the Learned and Honorable Member bad slumbered while he had been absent from the House, and that he had taken no note of the progress of time while he had been away. The House, however, was not equally oblivious of him, and he might be assured no one was forgetful of a man who had so ably and so fearlessly done so much for the cause of legal reform.' The change, or conversion, or cure, or whatever it is to be called, of the Chancery reformer, excited no less astonishment in Mr Brougham, who said 'He was not a little surprised at the course taken that evening by his Honorable and Learned Friend, whom he might now call his successor for Winchelsea, and whose celerity in running after and detecting abuses on former occasions was only to be equalled by the speed with which he seemed anxious to run away from them now. His Hon. and Learned Friend, who from long experience, perfectly understood *both* sides of the question, told the House that they ought not to burden judicial officers with business, any more than other persons, to a degree beyond their powers. This course of argument was very new to his Learned Friend, who now, for the first time, discovered that the Chancery Judges were worked too severely!'—At the period when Mr Williams thought the Chancery Judges, like schoolboys in holiday time, had 'all play and no work,' Lord Eldon was in office. Censure was then unsparingly heaped both on the Lord Chancellor and the system of the Courts over which he presided; yet it is admitted that there never sat in the High Court of Chancery an abler Judge, and one more profoundly acquainted with the principles of Equity, than Lord Eldon—and since his time the system has undergone no reformation. What then is there to excite the praise of those who never before alluded to this department of Westminster Hall but in tones of the bitterest condemnation? We believe the present Lord Chancellor to be as just and impartial a Judge as any of his great predecessors, but he has certainly disappointed those who were sincerely anxious for a reform of the Chancery system by not redeeming the pledge which he gave, soon after his nomination to the Great Seal to submit himself a plan of effectual reform to Parliament. 'In 1827,' said Mr Brougham, 'the Lord Chancellor, shortly after his accession to office, pledged himself to effect reform, and seemed only desirous to obtain time for the purpose. "Give me," said he, "but a little time, but one season, and I pledge my reputation—I pledge myself on the faith of Parliament, on the faith of the Court of Chancery, and of the practitioners in that Court—that I will mature a plan for securing the discharge of all the business expeditiously and accurately." Such was the pledge of the Lord Chancellor. Well: they gave him not one year, but three; and during the lapse of that time, no change was thought of, no reform agitated by him.' To us it appears very unaccountable that the Lord Chancellor, even supposing he were not bound by any promise, should not undertake or encourage a thorough reform of the Chancery system, as all the delay and vexation which the unreformed system occasions are sure to be visited on himself in public opinion, as was the case with Lord Eldon. It is the interest of a Judge that the machinery of his Court should work well, and to the public satisfaction, otherwise it is impossible to prevent its having an injurious effect on his judicial reputation. We perfectly agree with Mr Harvey, that all the defects of the Court of Chancery, numerous and appalling as they were, were attributable, not to the Lord Chancellor, but to the system over which he presides; and we also agree with him that Lord Lyndhurst has been guilty of a strange inconsistency in abandoning, as Lord Chancellor, those propositions for the reform of the Court of Chancery which he advocated as Master of the Rolls. The ruinous delay and expense which suitors have to encounter in the Court, as at present constituted, is a cause of complaint which every body has either felt or heard.

As to the serious questions of real property, we admit that some part of the delay may be attributable to subtle refinements and metaphysical distinctions, connected with the doctrines of contingent remainders, executory devises, &c; and also to the modern absurd mode of conveyancing, which is as intricate and voluminous as it was formerly clear, concise, and simple; but such defects in the law cannot account for a Chancery suit being carried on, as it sometimes is, for two or three successive generations. Mr Cooper, in his treatise on the Court of Chancery, states that if a legatee entitled to 10,000*l.* under a will have the misfortune to have the testamentary disposition questioned, and that he get an adjudication in his case in eight years, he may consider himself a fortunate man! A delay of so many years in a case like this can only arise from the system of the Court being so constructed as necessarily to produce delay, and make suitors feel that 'sickness of the heart which ariseth from hope deferred.' This delay, in many cases, operates to the suitor as a denial of justice—death or ruin may overtake him before the decree is pronounced, and, as far as he is concerned, the fullest vindication of his right in the end cannot repair the mischief already suffered from the law's delay. The present Bill, it is said, will give relief to the Chancellor; but Mr Brougham asked 'Why should they now give relief to the Chancellor, when they ought to begin with giving relief to the suitors? Let the relief to the Chancellor at least go *pari passu* with that to the unhappy victims of his jurisdiction.' One cause of the delay in this Court is the payment of fees for judicial services proportionate to the prolixity of the proceedings, which Mr Brougham rightly describes as 'a defeat to justice—a bribe to delay.' Much of the procrastination also arises from the manner in which the Master's office is executed, who, as the same Learned and Hon. Gentleman observed, has all the characteristics of a Judge except his responsibility. Certainly, without corresponding responsibility, no such power as a Master in Chancery exercises ought to be intrusted to any man—'sitting in silence and the dark—seeing no one but the suitors who appeared before him—with no public to watch him—no newspaper to report his proceedings—solving the problem, not how he could expedite justice to the suitor, but how he could get his own salary.' These things, and others justly complained of in the Chancery system, must be remedied by a very different sort of Bill from that at present before the House of Commons.—*London Morning Herald.*

## ENGLISH CASES.

### PREROGATIVE COURT.—JUNE.

Before Sir John Nicholl.

### *Chandless vs. Howe.*

Concluded.

Mr Wilson gave an account of all the circumstances attending the making of these codicils and deposed to the expressions of the deceased at the time, to the effect that she would leave the whole 6,000*l.* to Mrs E. Chandless, who had been always her best friend, and not to Mr Rowe, who had never been a brother to her, and who hated the very name of Chandless. This proved that the testatrix was perfectly rational at the time, with mind, memory, and understanding, all complete. There was the evidence of Mr Bennet also, who attested the will; so that, taking the whole account together, unless it was all bottomed in fiction and perjury, there could be no doubt as to the competence of the deceased at the time of her giving Mr Wilson instructions to make these codicils. If further proof of her capacity was wanting, it might be found in the fact of her revoking the bequest to Mr Wilmer, to whom she had taken a dislike; and also in the fact, that, though she revoked the legacies she left by the will to Captain and Mrs Smith, she did not revoke the legacy to their child, Master Smith, who was her godson. Mr Wilson, it was also to be remembered, was corroborated in his statement by the evidence of a Mr Robson, who had no interest whatever in the case, for he derived no legacy nor benefit under the will. Against all this is set up a case of incapacity on the part of the testatrix, and of fraudulent influence on the part of Mrs Chandless. This was only supported by Mr Wilmer and the cook Miller. On the 14th of May, Mr Wilmer wrote to Mr Rowe at Brighton, giving a description of the state of the deceased. This was the day after the last codicil was executed, but whether that fact had transpired or not, was left entirely to be surmised. Mr Rowe immediately came to town, and visited his sister. She died on the 17th, rather suddenly, and a few days after the will was read. Mr Rowe was present, and though he expressed his disappointment at its provisions, though not his dissatisfaction as to its validity. A few days afterwards a suggestion came from some quarter that the deceased had died by poison, and on the Sunday following there was a post-mortem examination, in consequence of this suggestion. Dr Davis, who had attended her for some days prior to her death, attended, when the body was opened by Mr Henry Earl and Mr Bennett, the anatomist, when it appeared, after the most careful investigation, that there was no appearance whatever of poison in the stomach. Dr Davis was of opinion that the disorder was not delirium tremens, and an opinion that she was laboring under that disorder could not have been entertained, or surely her head would have been opened in order to ascertain the fact. Notwithstanding this investigation, Mr Rowe had been induced to set up an allegation, containing various imputations against Mrs Chandless, which appeared to be wholly groundless. Indeed if it had not been for the disinterested conduct of Mrs Chandless, it appeared as if the deceased had an inclination to go further, and take from her brother his life interest in the houses, which she left him by the will itself. As to her being under undue control, she appeared to be of a temper by no means likely to submit to control of any kind. The grounds of opposition, therefore, were not only in

the opinion of the Court unfounded, but insinuations were thrown out of a most unwarrantable nature against Mrs Chandless. Although, therefore, Mr Rowe stood before the Court in the favorable situation of next of kin, and of a disappointed brother, yet he chose to throw out the most cruel insinuations, and at the same time, as appeared by the evidence, the most unfounded; and the Court, in pronouncing for the validity of the codicils, felt bound to condemn him also in the costs of the suit. Parties should take care how they put in bitter interrogatories. They were always dangerous weapons, for the party against whom imputations were thus thrown had no notice, and of course were unable always to repel them. The Court, considering how little founded was the opposition, and the manner also in which it had been conducted, felt bound, however reluctant, to condemn Mr Rowe, though next of kin, in the costs of the suit.

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ROLLS COURT—JUNE.

*Bull vs. Johns.*

Mr Bickersteth, for the plaintiff—This was a bill filed to obtain the opinion of the Court upon the true construction of the will of Mrs Polly Bull, of Cheltenham. The will having commenced thus. 'This is the last will and testament of me, Polly Bull,' proceeded to direct the payment of the debts of the testratrix and certain legacies, and then devised the residue in trust for the children of her elder brother, John Bull, and the children of Mary M'Cormick Johns, to be divided amongst them at the age of 21 years; until which time she desired that 'not one penny should be laid out on their board or education.' Now Mary M'Cormick Johns was one of the children (a married daughter) of John Bull; and it happened that both those persons had children born to them subsequent to the death of Mrs Polly Bull, the testatrix. From hence arose the ambiguities which occasioned this bill; the first of which was whether Mrs Johns was to take as one of the children of John Bull; and, secondly whether the children born after the testatrix's death, should come in for a share with their brothers and sisters.

Mr Tinney contended, in opposition to the latter, that the bequest to the children was confined to a particular class, in whom alone it would rest at the time of the death of the testatrix.

Mr Garret opposed this construction, on the authority of the case of Leake vs. Robinson, in 2 Merrivale, from which he concluded that the Court always was glad to take advantage of such ambiguous language in a will as that in dispute, to open to all the children the advantages which otherwise would be partially conferred. Against the claim of Mrs M'Cormick Johns, he submitted that the testatrix only contemplated such children of John Bull as, from their youth, required maintenance and education, and that 'a married woman was a person requiring neither board nor education.'

Other Learned Gentlemen followed on the same points.

His Honor said it was quite plain that it had not been the intention of the testatrix that Mrs Johns should take with the other children of J. Bull, since she speaks of them as requiring board and education until 21. There was no expression in the will to enable a Court to conclude that the interest given by the will was not to vest at the death of the testatrix. He was therefore of opinion that Mrs M'Cormick Johns was excluded from the benefit conferred by this part of the will, and that the interests of the children vested at the death of Mrs Polly Bull.

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Notes of Judgments pronounced by the Hon. Chief Justice Reid, in the Court of Appeals, sitting for the hearing of Appeals from the District of Quebec, the 17th November, 1830.

*Montgomery, App. vs. Executors of D. David, Resps.*

This was an action of debt instituted by the Appellant as Executor of the last will and testament of the late M. M'Clure, against Francis and William Hunter, as co-partners, on their Notarial obligation dated 1st June, 1811. In consequence of an execution sued out on the judgment rendered against the Defendants in the cause, several lots of land the property of the said co-partnership were seized and sold. An opposition was filed by the Respondents, Executors of the late D. David, claiming the moneys levied, founded on a Notarial obligation executed by Francis Hunter, one of the Defendants, individually on the 7th Nov. 1794, which had been assigned to the said D. David. It was considered by the Court of K. B. that there being a priority of mortgage in favor of D. David, it would attach upon the property of the partnership which had been seized and sold uuder the execution sued out in this cause, and thereupon the Court below adjudged the moneys levied to the Respondents.

But it was held by this Court that partnership property was not liable to the payment of the debts of individual partners—nor could a partner have any separate disposable interest in the partnership property over which his creditors could exercise any control until it had been first ascertained what was the separate interest of that partner in the partnership concern, after the debts were paid. The judgment of the Court of King's Bench was therefore reversed, and the moneys levied, ordered to be paid over to the Appellant.

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*Paterson et al*, Apells. *and McCallum et al*, Resps.

In this case the Appellants and several others, had sued out writs of execution against the lands and tenements of John McCallum, by virtue whereof several lots of land were seized and sold, belonging to him in the Township of Tring, held in *free and common soccage*. The Respondents, as assignees of one James Thompson, claimed a balance due to them on Notarial obligation, bearing date 27th Nov. 1816, granted by James McCallum, the former proprietor of the lots of land, in consequence of the *hypotheque* or mortgage, which by virtue of the said obligation it was contended attached thereon.

It was considered by the Court of King's Bench, that the claim of the Respondents was well founded, and the balance of moneys levied was awarded to them. But the Court here held, that the Notarial obligation in question, could be considered only as evidence of a debt, but could create no mortgage upon lands held in free and common soccage. That by the statute 14, Geo. 3, chap. 83, it was declared that lands of this description, then granted, or thereafter to be granted by His Majesty, his heirs and successors, should not be governed by, or be subject to the laws of Canada, touching civil rights, which necessarily implied, that such lands should be subject only to the laws of England, as the law regulating the other domains of the Crown—And to settle all the doubts and differences of opinion which are said to have arisen on this subject, the declaratory act of the 6th Geo. 3, chap. 50, has confirmed this interpretation of the above statute—That a Notarial obligation executed under the laws of Canada, stipulating in general terms a mortgage on the lands of the debtor, cannot create a mortgage on lands in free and common soccage, as according to the laws of England, a mortgage is considered to be a conveyance of lands by a debtor to his creditor as a pledge or security for the payment of money due with a proviso, that such conveyance shall be void, when that payment is made. This conveyance is in the nature of a sale executed, and must have all the properties and qualities incidental to the validity of an absolute disposition. The Court therefore reversed the Judgment of the Court of King's Bench, and ordered that the record should be remitted for further proceeding.

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*Fournier*, Appellant, and *Oliva*, Respondent.

This was an action by the Appellant, Plaintiff in the Court of King's Bench, against the Respondent *en complainte*, for having trespassed on the Plaintiff's land, and erected on the front thereof, adjoining the River *Vase*, a certain fence, to the damage of the Plaintiff ten pounds, with the usual conclusions. The Respondent pleaded the general issue. It appeared, that to a certain extent, the river bounding the front of the Appellant's land, was a navigable river, and that in the place where the fence was erected, the ordinary tides came nearly to the bottom of the pickets, but that the highest tides rose nearly to the top of the pickets—that the Appellant and his predecessors had for 30 years and upwards been in the possession of the land where this fence was erected, and had usually cut hay upon it. The Court of King's Bench dismissed the action, considering the place where the fence was erected to be public property in which the Appellant could have no right of possession to entitle him to maintain his action. But this Court held that the Appellant was entitled to maintain his action—that the banks of navigable rivers belong to the persons whose lands adjoin those rivers, subject however to the servitude to all his Majesty's subjects the free communication with the river for all public or useful purposes. That by the Roman law the banks of navigable rivers belonged to the proprietors of the lands adjoining such rivers, and previous to the Ordinance of 1669 no statutory Law in France to the contrary could be found—but it was held by some writers, on the interpretation of this Ordinance, that as a road of 24 feet was thereby reserved on the banks of navigable rivers for public purposes, to this extent the bank of the river was to be considered as public property and vested in the Crown, but this opinion had been controverted by so many other writers of greater weight that the Court could not hesitate in rejecting it—and therefore they reversed the Judgment of the Court of King's Bench and entered Judgment for the Appellant.

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*Routier & al*, Appellants, and *Robitaille*, Resp.

This was an action instituted by the Respondent in the Court of King's Bench against the Appellants, *en delivrance de legs* under the last Will and testimony of the late Frans. Bonneville, the Respondent's husband. The Appellants filed an *inscription en faux* against the Will, as not having been made and executed in the manner prescribed by law for a *testament solemnel* and in the manner certified by the Notary in whose possession the *minute* was deposited. In support of the *moyens de faux* several witnesses were adduced

by the Appellants, and among others, the two Notaries before whom the Will was made—The Respondent, as well as the Notaries themselves objected to their being examined touching the validity of the Act which they had executed as public officers—but the objection was over-ruled and they were examined. The Court of King's Bench however considered that the Will had been regularly made, and rejected the *inscription en faux*. The Court confirmed the Judgment of the Court of King's Bench but held that according to the decisions under the Law of the Country, the Notaries could not be examined as witnesses, and that as public officers they could not by law be compelled to give evidence to controvert the truth of what they had certified as such touching the execution of any Act passed before them.

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## ADMINISTRATION OF THE LAWS.

Next to the making of good laws, the administering them, in such a manner as to obtain the confidence of the people, is the first object of a wise Government. It is not enough to put a good law on the Statute-book; to devise the means of effectually carrying it into execution is a no less important part of the duties of the Legislature. The benefit of an excellent system of laws may be counteracted by an injudicious mode of reducing them to practice; in which case the disrespect which the people are led to entertain for the administration of justice will attach to the laws themselves. This has long been exemplified in England, where good laws are brought into disrepute by one of the worst systems of practice ever invented. When we speak of good laws we allude only to the civil jurisprudence of the country, for the criminal code is a reproach to a civilized age; nor do we mean to say that our civil system might not be improved; but what we do assert is, that the laws which govern civil actions are, in general, founded on just and wise principles, and yet are so administered as frequently to appear neither wise nor just. What does this arise from? The practice of the Courts where fiction and form are allowed a most dangerous latitude in defeating substantial justice, and pleadings are so framed as to serve little purpose but to add to the delay, prolixity, and expense of legal proceedings. A judicious and sound administration of the laws would make justice equally accessible to the rich and the poor; but the practice of our Courts is eminently calculated to operate as a denial of justice to all but those who can afford to purchase the luxuries of life, of which law is one of the most costly. It is, indeed, a maxim of our law that there is no wrong without a remedy; but the practice of our Courts makes it too often advisable for those whose means are not very abundant to put up with the wrong rather than go to the ruinous expense of purchasing the remedy. Justice, as well as gold, may be bought too dear. For more than a hundred years past there have been various attempts made to reform the administration of the laws, by making its process cheap and expeditious, but, unhappily, without effect. Public opinion has at length become so loud and urgent upon this subject, that Government has thought it expedient to hold out promises of reform from time to time, and at length to pledge the word of a King in confirmation of such promises, in a speech from the Throne. Government have, however, submitted nothing to the Legislature yet in the nature of a plan for the reformation of justice. Certainly, neither the Bill for appointing a new Judge in Equity, nor that for appointing three new Common Law Judges, and for demolishing the Welch Jurisdiction, which dispensed justice on cheaper and more expeditious terms to the natives of Wales than they can obtain it under the English system, are to be considered as measures of legal reform. The only measure which has been heard of in Parliament this Session for the purpose of diminishing the delay and expense of law, and making justice more accessible to those whose means are limited, is the Bill of Mr Brougham, who, in the midst of his many and arduous professional and Parliamentary labors, has undertaken a task which the Government was pledged to perform, and which, as far as we are acquainted with the outline of it, we think he has executed in a manner which ought to cause it to be put to the test of practice without delay. The Hon. and Learned Member does not ask, in the first instance, to make it a general measure; but as every innovation, however good it may seem *a priori*, requires the confirmation which experience alone can give to theory, he proposes that it should be first tried in two parts of the kingdom, remote from each other; and then, if it answer the public expectation, the provisions of the Bill can be extended to other places, as soon as the limits of each juridical district shall have been defined. A Bill, the object of which is to afford the means of trying causes at as little expense, and with as little delay and inconvenience as possible to the suitors, must be admitted to be framed upon a principle which, if efficiently reduced to practice, must entitle its learned author to the gratitude of his country. We stated on a former occasion that the old county courts, before our Saxon institutions were broken down to erect upon their ruins the Norman innovations of the feudal system, were so contrived and administered as to bring home justice to every man's door. The District courts proposed by Mr Brougham's Bill are a different sort of institution from what the county courts formerly were, yet the principle is, to a certain extent, the same. In the county courts, indeed, the civil, criminal, and ecclesiastical jurisdiction were originally combined, but the district courts are not to have cognizance of any criminal business, nor are they to interfere with the ecclesiastical courts, any farther than by being empowered to try certain cases of legacies. The Judge, who must be a Sergeant-at-Law, or a Barrister of 10 years' standing, and is to be called the Judge in Ordinary, is to sit once a month, to try all such causes as are set down for trial in different parts of the district. The jurisdiction of his court will extend to the cognizance of all actions where the defendant resides within the district, and the cause of action, if on a *debt*, does not exceed *one hundred* pounds—or on a *tort fifty* pounds, and where title to real estate, tithe, or by bankruptcy, or to toll, market, or other franchise, does not come into question; but it may try all actions at law of all kinds, and to any amount by *consent* of parties. It will have authority to try, in a *summary* way, small debts, not exceeding five pounds, under similar restrictions, as to titles to real estates, &c, as in the case of actions to a larger amount. The claims of legacy coming within its jurisdiction are to be limited to 100*l.* which will save much expense and vexation to persons entitled to small legacies, and who are obliged to abandon their claims, or proceed for them according to the expensive and tedious process of the ecclesiastical courts. Besides these powers, the district courts will have authority to try all matters at *law* or in *equity*, by way of *arbitration*, the parties consenting. This provision may prevent many a chancery suit, which might end in the ruin even of the victorious party. They will also have authority to hear and advise on all disputes, by consent of parties with a view to *reconcilement*—an excellent provision calculated to prevent much litigation, both at law and equity. One of the greatest improvements, however, contemplated by this Bill, is the introduction of a plain, short, simple mode of pleading—just what is necessary to make the matters in dispute intelligible, and bring the points to be tried fairly in issue, and nothing more; thus making law and common sense mutually assist each other, without any disgraceful fictions, sham pleas, or expensive technicality, to convert justice into an engine of rapacity and oppression. It should also be mentioned that, by consent of parties, a Jury may be dispensed with. But not only are sham pleas and unnecessary length of pleading prohibited, but the Judge has the discretionary power, in cases of prolixity and misstatement of facts in the pleadings, of ordering attorneys to pay the costs out of their own pockets. It is likely that, under such a system, fiction and surplusage will be altogether extirpated, as they can no longer be a source of profit to the practitioners in the law. In most cases the superior courts will have a power of revising the decisions of the district courts; and any matter tried before the Judge in Ordinary, whether of law or fact, may be revised by the Judges of Assize; and the sentence of the Judge in Ordinary, or verdict of the Jury, may be set aside, and a new trial ordered by the same Judges. Powers are also given, under certain restrictions, to both the Judge in Ordinary and Judges of Assize, to reserve points, and order cases for the opinion of the courts in Westminster Hall. Such are the principal features of the Bill, which will shortly, we expect, come before Parliament more in detail. It is our opinion, taking it altogether, that it is the best plan that has been proposed in modern times for making justice accessible to the humbler classes of society, and cutting down the ruinous expense and delay, which, where small sums were disputed, or minor grievances were to be redressed, made justice always difficult, and frequently unattainable. We therefore wish that the state of public affairs may not deprive the country of the opportunity of seeing it put to the proof of experience at the close of the present session.—*London Morning Herald.*

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## COURT OF CRIMINAL APPEAL.

A great defect in the administration of justice in England is the want of a Court of Criminal Appeal. In this respect the rights of property are more strictly guarded against the consequences of ignorance, passion, or inadvertence, in the tribunals that decide upon cases in the first instance, than life itself. This ought not to be so. The life of the poor man ought at least to be as sacred in the eyes of the law as the property of the rich. There is no appeal from the tribunals of criminal justice, by which the doom of a convict is first pronounced, to any superior Court; while there is more than one appeal in cases of property, of which he who has the pecuniary means to enable him to protract litigation may avail himself; as, for instance, from the inferior Courts in Equity to the Court of Chancery, and from the latter to the House of Lords. Likewise from the Courts of King's Bench, Common Pleas and Exchequer, to the Court of Exchequer Chamber, and from

that to the House of Lords, which is in questions of property, the Court of Appeal in the last resort. New trials are also granted, sometimes as many as two or three, before a claim of property is finally decided—so tender is the law of every valuable possession of the subject, with the exception of liberty and life! It is true that in cases of misdemeanor, where the punishment is less penal than in cases of felony, a new trial is occasionally granted, but in capital charges a new trial is never heard of. In such cases, indeed, a point of law may, if the Judge pleases, be reserved for the consideration of the twelve Judges, before whom it receives the most considerate attention: but it forms no part of the duty of this tribunal to go into the merits of the case; so that if the technical point, upon being nicely scrutinized and examined by the assembled Judges, be not in favor of the convict, anything that in the eye of reason throws suspicion on the evidence, or tends to impeach the accuracy of the verdict, cannot avail him, because the twelve Judges can only determine points of form and questions of law, but must take the facts according to the evidence and the finding of the Jury. Frequently has it happened that the lives of poor and friendless men have been sacrificed by perjured witnesses for the sake of the reward, or what is vulgarly called the blood money; and a memorable instance occurred a few years ago in the city of London, when four men, who were convicted on such evidence, would have been executed but for the praiseworthy exertions of one individual, who brought the conspiracy to light. Others have been executed under similar circumstances, and the foul contrivance to perpetrate judicial murder for the sake of gain only discovered when it was too late to repair the dreadful consequences. Of this we could give a remarkable case from the books, if space would allow. But it may be asked has not the Secretary of State for the Home Department the power to investigate every capital case regularly brought under his cognizance, and, if he finds cause, can he not recommend the convict to his Majesty's mercy? Undoubtedly he has this power; but, instead of this being an argument against establishing a Court of Criminal Appeal, it only proves the necessity of it. We have the twelve Judges to examine points of law reserved at the trial; and we have one of the Ministers of the Crown, who, as constituting a part of the Executive Government, ought not to have any right of interference in judicial matters, to examine into matters of fact; or, in other words, to investigate the merits of the case when it is the opinion of the Judge who tried it that it requires revision. If this be not a second trial of the case it is nothing; and if it be a second trial, it ought not to be heard in secret and upon irresponsible evidence by a Minister of the crown, but it ought to be regularly tried in open court as is the case in the French Courts of Criminal Appeal, by competent Judges, that the confirmation of the guilt or vindication of the innocence of the party who is the subject of the appeal, might clearly appear. If the administration of justice is to be reformed, this anomalous power of the Secretary of State ought to be superseded by a responsible and competent judicial authority.—*London Morning Herald.*

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*An Excellent Law.*—The Vermont Legislature after a session of five weeks adjourned *sine die.* A law was passed at this session, authorizing insolvent debtors to take the poor debtor's oath immediately upon the rendition of judgment.

**THE JURISPRUDENT.**

BOSTON, SATURDAY, DECEMBER 18, 1830.

## CAPITAL PUNISHMENTS.

'I shall ask for the abolition of death—until I have the infallibility of human judgment demonstrated to me. The punishment of death has always inspired me with feelings of horror.'—[LAFAYETTE, on the proposition of M. De Tracy in the Chamber of Deputies.

At a court lately held in Middlesex County, of twelve jurors selected to try a capital case, three made oath that they could not conscientiously find a verdict of guilty in any capital case short of murder. They were accordingly excused from serving in that case. These feelings are gaining ground in this Community, and the time apparently cometh when it will be difficult to find men who will be willing to take upon them the responsibilities of such offices. Many of our best citizens cannot feel assured that the regulations and enactments of civil government will discharge them of individual responsibilities. They feel that there are cases where no human institutions can justify the infliction of capital punishment. There are such cases in the English penal code. Few, if any men here, can be made to believe that the counterfeiting of a *one pound* note, or the commission of a petty larceny can justify such a sentence. The English nation feel it to be so. The voice of public opinion declares it to be so.—Humanity, religion, philanthrophy join it and give the aid of their principles. The tables of Legislation there, groan under the weight of the Petitions, Remonstrances and Prayers of the nation for an amelioration of their penal laws. Juries will not convict—men will not prosecute—witnesses cannot be obtained. In 1828, of four hundred persons indicted for forgery, only ninetynine were convicted and but a part of those executed.

Experience proves that there are fewer crimes here than in England;—and that there are quite as few, in those states where there are the smallest number of capital punishments as in others.

In most of the United States there are not more than 8 or 10 capital offences, and in some of them not more than 2 or 3; while in England, until a recent Act, there were two or three hundred. The removal, of late years, of the terror of death has not been followed by an increase of crime. The laws have been invigorated by such a relaxation of their severity. 'Experience has confirmed the great axioms, which speculative philosophers and practical moralists had long ago inculcated—namely—that capital punishments rarely hinder the commission of crime—but prevent its detection.' Many crimes are now more frequent in England than they were before the punishment of death was annexed to them. Besides, there should be a just proportion between *punishment* and *crimes.* The punishment should be in proportion to the moral turpitude of the offence. Montesquieu remarks that, it is an essential point that there should be a certain proportion in punishments; because it is essential that a great crime should be avoided rather than a lesser: and that which is more pernicious to society rather than that which is less. It is a great abuse to condemn to the same punishment a person that only robs on the highway and another that robs and murders. Surely for the public security, some difference should be made in the punishment.

In China, those who add murder to robbery are cut to pieces, but not so the others. To this difference it is owing that 'though they rob, in that country, yet they never murder. In Russia, where the punishment is the same they always murder. The dead, they say, tell no tales. In England they never murder on the highway, because robbers have some hope of transportation, which is never the case in respect to those who commit murder.'

The indignation at the crime should always exceed the public compassion produced by the punishment.

Penal laws should never violate the distinctions of moral guilt.

What coincidence is there between the moral turpitude of many of the crimes, made capital by our laws, and that of murder? And yet the boy of fifteen, who assaults his companion with a deadly weapon and robs from his person the smallest article, is sentenced to the same scaffold with him, who hires to be done, and who aids and abets in the perpetration of the blackest midnight assassination. And the offender who commits an aggravated trespass upon the person, perishes, under the same condemnation, with him who imbrues his hands in the blood of his victim. Is there no difference in Law or morals between the crimes? Do they cry with equal voice, for the retributions of divine and human Laws?

Whatever Legislatures may do, men will judge of crimes by other standards. They will not in this day, respect or give aid to a 'vindictive system of laws, which attempts the suppression of crimes by a violation of those moral distinctions, which are as firmly established by God and nature, as the foundations of the Universe.'

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Our friend of the *Newburyport Herald* entirely mistakes our motives in supposing we had any intention of being 'facetious' with him on the subject of an exchange of Papers. As we did not receive his paper we had pretty good reason for supposing the 'declining' to be on the other side. We assure him, however, that we shall be glad to send him our little 'Law paper' weekly, in return for the Herald, which is conducted with *considerable* ability, and to which we are indebted for several kind words and wishes heretofore. Touching the matter of the *List of Lawyers*, to which he refers; it is just as we supposed it would be; the shrewd ones will take our idea without any formal promises, or ceremonious annunciation of our plan.

We intend to insert, in our List, the names of all those who patronize our Paper, and such others as may seem to us meet and proper. We shall not forget, next quarter, to add one to the number of the Newburyport 'candidates for professional business.' Many of our brethren, we have reason to think, will be gratified by being thus noticed, and we hope benefited thereby; and none will have any just cause to complain.

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George Custis, Esq. has been appointed Attorney General of the State of Louisiana.

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ADVERTISEMENT.

A gentleman in the city, who has been seven or eight years in practice, and can furnish the best recommendations, would be glad to connect himself with some person of advanced standing and full business in the profession, as a partner or otherwise, on reasonable terms.—Address to A. B., at this office, with real name.

Dec. 4, 1830.

This day received by GRAY & BOWEN, 141 Washington Street.

THE WESTMINSTER REVIEW, No XXV. for July 1830.

Contents: 1, The Ballot: 2, Carwell: 3, Government of Lower Canada: 4, Wilson's life of Daniel de Foe: 5, Greek Lexicons: 6, Physiology and Cultivation of Trees: 7, Game of Life: 8, Dobell's Siberia: 9, Bishop of London and Sabbath Breaking: 10, Three Courses and a Dessert: 11, Clarendon: 12, Moorsom's Nova Scotia: 13, Religious Disabilities: 14, Stamp Act and Synod of Somerset House: 15, Patronage of Art, and the President of the Royal Academy: 16, Distress of the Country: 17, Egyptian Notation: 18, Great Britain and France: Postscript to the Article on the Ballot.

The Westminster Review has existed long enough, to see the cause in which its efforts were begun, make a notable advance in the opinions of mankind. Its proposed object was to prove, that the interests which were supposed confined to the wretched and weak, are in reality those of all ranks and orders in the state; and if the course has been successfully shaped, it is unnecessary to discuss what portion of the progress has been consequent on the efforts of the rowers, and what on the general tide which carried them upon their way. The term which was once employed as a name of low reproach, has found its way into high places, and is gone forth as the title of a class, who glory in their designation, and are not afraid to speak with their enemies in the gate. Like the early Christians, they may say to their opponents—Hesterni sumus, et vestra omnia implevimus, urbes, insulas, castella, municipa, concilabula, castra ipsa, tribus, decurias, palatium, senatum, forum.—They cannot even add the Sola vobis, relinquimus templa. What has been gained by reason, will never be wittingly abused; and it will be fame enough for common men, if what they have hitherto defended they hereafter can assist. Oct. 23.

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DANE'S ABRIDGMENT OF AMERICAN LAW, in 9 vols. with an appendix. A few complete sets for sale by HILLIARD, GRAY & Co. H., G. & Co. will also supply the ninth vol. and the appendix to those who are owners of the eight volumes, and the appendix separate to those who have the ninth. Oct. 23.

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ENGLISH LAW BOOKS. This day received and for sale by HILLIARD, GRAY & Co.

Browne's Chancery Practice, under the New Orders with the Sanction of the Court, in 2 vols. 8 vo.

Willoch on the Laws of the Medical Profession, 1 vol. 8 vo.

Finelly's Law and Practice of Elections, 1 vol. 12 mo.

Crabbe's History of the English Law, 1 vol. 8 vo.

Oct. 23.

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PRINTING. The Printing House of I. R. BUTTS, corner of Washington and School Streets, is supplied with materials suitable for Book, Job, and every other description of Printing. Oct. 23.

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DISTRICT OF MASSACHUSETTS, TO WIT: District Clerk's Office.

BE it remembered, that on the seventeenth day of August, A. D. 1830, in the fifty-fifth year of the Independence of the United States of America, Lewis Bigelow of the said district, has deposited in this office the title of a Book, the right whereof he claims as author in the words following, to wit:

'A Digest of Pickering's Reports, volumes II.—VII., being a Supplement to the Digest of the previous volumes of the Massachusetts Reports. By Lewis Bigelow, Counsellor at Law.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act entitled, 'An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS, *Clerk of the District of Massachusetts.*

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GRAY AND BOWEN, No. 141, Washington Street, Boston, have recently published the following valuable works.

I. A DESCRIPTION OF TREMONT HOUSE; WITH ARCHITECTURAL ILLUSTRATIONS.—4to.

'Jam scires ab introitu primo—herculentum et amvenum videre et diversonium.' APULEIUS, M. A V.

This work is embellished with a copper-plate engraving, representing the front of the house, and thirty lithographic prints, exhibiting the details of the structure. Its object will be understood by the following extract from the preface.

'The present publication is intended to satisfy a curiosity, which frequent inquiries for a description of Tremont House were supposed to indicate.

'Its original plan was to furnish such particulars relative to this establishment as strangers might wish to possess, but it has been extended so as to comprehend many architectural details, which will probably be interesting to mechanics; as much of the ornamental work of Tremont House was copied or adopted from books, not commonly in their hands, and has not before been executed in this country.

II. AN EPITOME OF UNIVERSAL GEOGRAPHY; or, a Description of the various Countries of the Globe; with a view of their Political Condition at the present time. With sixty Maps. By NATHAN HALE.

III. A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By GEORGE CRABB, A. M., Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

IV. THE VESTAL—A TALE OF POMPEII. 1 Vol. 12mo.

'Oh Time, thou beautifier of the dead,
Adorner of the ruin.' CHILDE HAROLD.

V. AUTHORSHIP. A Tale. By a New Englander over Sea. 1 Vol. 12mo.

VI. AN ORATION; Delivered before the Phi Beta Kappa Society, Cambridge, Mass. August 26th, 1830. By the Rev. ORVILLE DEWEY.

VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished bear.
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

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BIGELOW'S SUPPLEMENT. HILLIARD, GRAY & Co. have just published A Digest of Pickering's Reports, Volumes 2—7, being a Supplement to the Digest of the previous volumes of the Massachusetts Reports.—By Lewis Bigelow, Counsellor at Law. Oct. 23.

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PICKERING'S REPORTS, Vol. 8th. This day published and for sale by HILLIARD, GRAY & CO. Oct. 23.

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THE PROBATE DIRECTORY. Just received and for sale by GRAY & BOWEN, The Probate Directory: or a Complete System of Forms for the use of Probate Courts, and those who transact business therein: together with Directions for proceeding in the various stages of administering and settling Estates, according to the laws of New Hampshire; and containing also, the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those States. By a Counsellor at Law. Price $1,25.

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BIGELOW'S DIGEST OF PICKERING'S REPORTS. This day published by HILLIARD, GRAY, & Co. By Lewis Bigelow, Counsellor at Law: being a continuation of the Digest of Massachusetts Reports; and also a continuation of Metcalf's Digest of the same work. Neatly bound in Sheep, 3,50.—Calf, $4,00

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LAW BOOKS.—HILLIARD, GRAY & Co. 134 Washington Street, have on hand a large Stock of *American and English Law Books*, comprising a complete assortment of the best editions of all works in general use. They also purchase and sell second hand Law Books—terms liberal.

H., G. & Co. supply any volumes that may be wanted of Massachusetts or Pickering's Reports.

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HILLIARD, GRAY & CO. No 134 Washington Street, Boston, have in press a Trearise on Corporations, with an appendix of the Corporation acts of each state, by Joseph K. Angell, author of a Treatise on Water Courses, Tide Water, Limitations, &c. Oct. 23.

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GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Europe possess Dictionaries, which have kept pace with the advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is trusted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

It will be comprised in one large volume, 8vo. Oct. 23.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, JANUARY 1, 1831. NO. XXIII.


## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

We proceed, as was proposed at the close of our last article, to separate the contract from the performance, and to consider the various relations which may intervene. Henceforth, the word 'sale' must be understood as applying to the bargain, without importing either that the price has been paid, or the commodity delivered.* And this, indeed, is not only the legal, but the ordinary signification of the term. We say, in common speech, 'I have *sold* my horse,' though he be still in the stable, and no part of the money have been received. It should seem, therefore, a matter of no great difficulty to determine what constitutes a sale, although in this, as in all other definitions, cases will be found on the border-line to which it is difficult to assign their true position.

As it is a *bargain*, it must of course, be mutual. One party cannot hold the other bound, and leave himself at liberty to be off. If a commodity be offered me for sale, and I say, 'I will think of it, and make known my determination in a day or two;' this is is no bargain, because *I* am not bound, and there is, therefore, no mutuality. But although, in cases where an interval takes place between the offer and the acceptance, the transaction is no bargain until acceptance, yet it becomes so at the moment of the assent given (if given within a reasonable time) though as yet unknown to the proposer. In this trading community, where numberless sales are concluded by means of letters, this is a rule of much practical importance; and it may be useful, therefore, to give an example of actual occurrence. A, by letter, offered B a commodity at a certain price. The letter was misdirected, and, in consequence, delayed; but when received, the offer was immediately accepted, and a letter sent off by the next post, communicating the acceptance. A, not receiving an answer so soon as he had expected, had, in the meanwhile, but after B's answer had been despatched, sold the commodity to another; whereupon B brought an action against him for the non-delivery. The question was, whether the bargain with B was complete before the second sale; and the Court held, that it was so from the moment when the letter, containing the answer, was sent away.† If there had been delay on the part of B, it would, of course, have been otherwise.

Again, it is no bargain, unless the *price* is agreed upon. If a man offer to sell me his horse, and I agree to take him for such a price as on inspection I shall think him worth, I can hardly be said to have *bought* the horse. It is, in fact, merely a promise that I will buy him, if at some future time we can agree about the price. It is not necessary, however, that any precise sum should be fixed; it is sufficient, if the amount can be ascertained without further negotiation between the parties.* Thus, an agreement to give the market price, or so much as a third person shall estimate the commodity to be worth, is undoubtedly a sale.

And, as the price, so the *commodity*, must be certain. It must be some specific thing, pointed at by both. It follows, therefore, that, if the subject of the dealing do not exist at the time in the form, or under the denomination spoken of in the contract—if, for instance, it be an article, which is yet to be made or manufactured—the transaction, in that case, is not a sale. So far, indeed, as the personal obligation is concerned, the precise character of the agreement is not very material: because, whether I order a chariot to be built for me, or buy one already built, I can equally insist on performance of the contract. It has, however, as will presently be seen, other and very important consequences; and it is necessary, therefore, that the distinction should be borne in mind. Messrs Bell and Co. manufacturers, wrote to a Mr Kaye, the patentee of some improved machinery for the spinning of flax, requesting him to get made for them two spinning frames on the new construction [illegible] necessary directions were accordingly given to one Sleddon, a machine-maker. After some delay the frames were completed, and packed up for carriage, a letter being dispatched to Bell and Co., requesting instructions, as to the mode of forwarding them. They, however, declined to receive them, and the frames, in consequence, remained on Sleddon's premises, till a fire broke out, and consumed them. An action having been brought against Bell and Co. for the price, treating the frames as goods bargained and *sold*, the Court were of opinion, that it could not be maintained in that form, inasmuch as the transaction was not a sale, but an order.† On reference to that case, it will be found, that the argument turned mainly on the question, whether Bell and Co. had either themselves, or by their agent, adopted the frames when made, so as to appropriate them specifically to themselves. And it must be remarked, generally, that a transaction of this nature *may* subsequently be converted into a sale, upon delivery and acceptance, or by any other act on the part of the orderer, which fixes the individual commodity destined for himself.

To take the instance above quoted, so long as the agreement would have been fulfilled on the part of Sleddon, by the delivery of *any* two frames of the kind and quality ordered, there was no *sale*; but if two frames in particular had been sent to Bell and Co. and accepted by them, or if they or their agent had seen and approved of two in particular, even before delivery, thenceforth, those two might have been treated as goods *sold* to them. The principle of this, and the like cases, is intelligible enough, although difficulties have occasionally arisen in the application of it, and very nice distinctions have been drawn, both as to what may be considered as subsisting in specie at the time of the contract, and as to what will constitute an appropriation. The following rules may, perhaps, be useful. At all events, they will be found substantially correct.

With respect to the first point: if the commodity bargained for have at the time an existence independent of any will of man—if, to borrow a convenient phrase of the schoolmen, it be in *esse* and not merely in *posse*—then the transaction is a sale: otherwise not. Two cases will illustrate the distinction, which, it must be confessed, is somewhat subtle. A. bargains with B. for a quantity of oak pins at a great price, *to be cut out of slabs*, and delivered to the buyer. This is not a sale—because it is impossible to say that the oak pins have at that time an existence. To resume our scholastic phrase, they exist in *posse* in the slab, but it depends on the will of another, whether they shall ever have a real existence as oak pins.* But a contract for so many bags of flour, known at the time to be unground, has been considered as a contract of *sale*, because the flour had an actual existence at the time, though something remained to be done before it was deliverable in the state contracted for.†

As to the second point: whenever there has been on the part of the orderer such an adoption of the thing contracted for, that the contract thenceforth can only be satisfied by the delivery of that individual article, the order may from that time be considered as converted into a sale.‡ In strictness, indeed, it is a *new* bargain, having reference to and embodying the terms of the former contract.

It has been already stated that a sale can only be of things in possession. There is however a recognised mode of dealing apparently inconsistent with this rule. It is a practice by no means uncommon among mercantile men to enter into bargains for the sale of goods expected from abroad, long before their arrival. These contracts have sometimes been treated as agreements for a future sale, rather than actual sales. But this construction is at variance with another position, which seems however to be generally admitted, that on arrival of the goods the agreement at once becomes a complete sale, provided that the person who has contracted for the purchase, perform or offer to perform his part of the bargain. Now if the transaction were merely an agreement for a future sale, the assent of *both* parties would be necessary

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* Emptio et venditio contrahitur simul atque de pretio convenerit. Inst. 1. 3. tit. 24. So in the law of Scotland 'Sale is a consensual contract completed by covenant alone.' 1 Stair, 14. s. 1. 3 Ersk. 3. s. 2.

And in that of France. La vente est une convention par laquelle l'un s'oblige a livrer une chose et l'autre a la payer. Elle est parfaite entre les parties, des qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée, ni le prix payé. Code Civile 1582, 1583.

† Adams v. Lindsell, 1 B. & A. 681.

* Certum est quod certum reddi potest. And see Inst. 1. 3. tit. 24. Kit. 181 a. Graham v. Jackson, 14 East, 498.

† Dan. and Lloyd, Merc. Cases, 93. And see Towers v. Osborne, 1 Str. 506. Dunmore v. Taylor, Peake, N. P. C. 41. Mucklow v. Mangles, 1 Taunt. 318.

* Groves v. Buck, 3 M. & S. 178.

† Garbutt v. Watson, 5 B. & A. 613. These cases were considered with reference to the statutes of frauds in the interpretation of the words 'no contract for the sale of any goods, &c.' But a contract for the sale means, we apprehend, a contract of sale.

‡ Compare Mucklow v. Mangles, 1 Taunt. 318, with Woods v. Russell, 5 B. & A. 942. Both were cases of a barge built by order, and in both money was paid as the work advanced. But in the latter case the payments were made by instalments at times previously fixed, on the completion of certain stages of the work, and at each of these periods there was an appropriation of the barge in its then state, by the person for whom it was building.

before it could be changed into an actual sale; and on the other hand, if it be a present sale it seems, as we have said, to violate the rule which forbids the transfer of things not in possession. This dilemma can only be avoided by considering the transaction as a sale of goods, assumed to be, at the time of the contract, in the possession of the agent or carrier of the seller, and therefore constructively, though not actually, in his own possession, *upon condition* that it is to take effect, entirely or partially, or not at all, according as the fact shall afterwards turn out. And this construction will, as it seems to us, be warranted by the cases which have been decided, notwithstanding an occasional looseness and want of precision in the expression. Thus, in an action for the non-delivery of certain hemp, the broker's note proved at the trial was in these words:—'Sold for Mr H. Siftkin to Mr M. Boyd, about thirtytwo tons, more or less, of Riga Rhine hemp, on arrival, per Fanny and Almira, at 82*l.* 10*s.* per ton, &c.' Lord Ellenborough, in deciding that the action could not be maintained, said, 'I clearly think "on arrival" means on arrival of the hemp. The parties did not mean to enter into a wager. By "bought" and "sold" in the note must be understood "contracted to sell and buy." *The hemp was expected by the ship; had it arrived, it was sold to the plaintiff.* As none arrived, the contract was at an end.'* It is true, that the question there considered was, whether the *arrival* of the hemp was a condition precedent to the obligation of the seller? Still the language of Lord Ellenborough imports that he considered the transaction as a sale on condition, and not an agreement for a future sale. Whether the personal obligation of the seller attaches, independently of the arrival, is a question to be determined by the language of the bargain, and not immediately connected with the present subject; because, however that may be, it is quite clear that there is no *complete sale* until arrival of the goods. Still, as it is a question of not unfrequent occurrence, it may not be thought out of place if we give one or two examples for practical guidance.

In one case† the bargain was stated to be for a certain quantity of hemp sold by the defendants to the plaintiffs, *to be shipped on or before the 31st August.* A full cargo had in fact been prepared by the agents of the vendors; but before shipment it was seized and confiscated by the Russian government. An action was brought for the non-delivery, pursuant to the contract, and the defendants were held liable, as having positively undertaken that the hemp should at all events be shipped. But where the agreement was in this form:—'Sold for Messrs Scougall and Co. to Messrs Hayward and Co. all the hemp *which may be loaded* by certain ships now at Riga (not exceeding 300 tons) by Messrs Schmids and Co., the agents of the concern,' Lord Ellenborough construed the contract thus:—'We will sell you all that our agents at Riga ship for us,' [His lordship should rather have said, 'We sell you all that our agents at Riga shall ship for us'] 'to the amount of 300 tons.—If they send us so much you shall have it.—If they send us none, we have sold none to you.'‡

It should be observed that, in these and in other cases of conditional sales, although the transaction is complete, so far as the agreement of the parties is concerned, by the conclusion of the bargain, it does not take effect as an absolute sale, until the determination of the contingency. In the instances which have been given above, until the arrival of the goods it was impossible to say whether anything, much less what quantity had been in fact sold; and it may be laid down as a general rule, that so long as the terms of the contract are floating and unascertained, either as to the commodity or as to the price, the transaction is not a perfect sale.* Thus, if goods, subsisting at the time in bulk, are sold by number, weight or measure, as one hundred measures of wheat in a granary, one hundred gallons of whiskey in a vat, the sale is not complete until the quantity contracted for has been counted, weighed or measured, so as to be specifically appropriated to the buyer. We shall have occasion to allude to this subject hereafter; for the present it is enough to state the rule.

A sale *on trial* is *ex vi termini* conditional; and so also are sales by *sample*, in which it is an implied term of the bargain, that the purchaser shall not be absolutely bound until he has had an opportunity of inspecting and comparing the bulk.† Under this head also may be classed the transaction by which a commodity is delivered to another at a stated price for *sale* on *return*. If the person to whom it is delivered (who is at first a mere bailee) either dispose of it to a third, or not having done so, fail to return it within a reasonable time, it may then be considered as sold to him for the price which was named on delivery. In the meanwhile it is entrusted only, and not sold.

To be continued.

* Boyd v. Siftkin, 2 Campb. 326.
Splidt v. Heath, 2 Campb. 57, n.
‡ Hayward v. Scougall, 2 Campb. 57.

* Withers v. Lyss, 4 Campb. 237.
† Lorymer v. Smith, 1 B. & C. 1.

## LORD KEEPER GUILFORD.

Continued from page 172.

'Another proposition came to his lordship by a city broker from Sir John Lawrence, who had many daughters, and those reputed beauties, and the fortune was to be 6000*l.* His lordship went and dined with the alderman, and liked the lady, who (as the way is) was dressed out for a muster. And coming to treat, the portion shrank to 5000*l.*; and upon that his lordship parted, and was not gone far, before Mr broker (following) came to him, and said, Sir John would give 500*l.* more at the birth of the first child; but that would not do, for his lordship hated such screwing. Not long after this despatch, his lordship was made the king's solicitor-general, and then the broker came again with news, that Sir John would give 10,000*l.* No! his lordship said, after such usage he would not proceed if he might have 20,000. So ended that affair, and his lordship's mind was once more settled in tranquillity.

'It is said that marriages are made in heaven, and if frequent and unforeseen accidents (often to be observed productive of them) are any argnment, the proverb hath countenance; for so it happened in his lordship's case, for out of a contingent interview, a proposition sprung pregnant with all advantages of honor, person, and fortune, more than which was not to be desired or expected. And it was for a match with the Lady Frances Pope, the middle daughter of three co-heirs of Thomas, Earl of Down, who lived at Wroxton, in Oxfordshire. The eldest was married to Mr Soames, of Thurlow, in Suffolk, within four miles of Catledge, the seat of his lordship's father. And, as the use is, the grave Countess of Down, with her two younger daughters, attended the new-married couple to their habitation, and made some stay there; during which the visits of joy came in, and among the rest the family from Catledge made their appearance; and the countess and her daughters in due time made their return, which happened to be at a time when his lordship was at Catldege. His mother laid her eyes upon the eldest unmarried daughter, and when they were gone, turned about and said, "Upon my life this lady would make a good wife for my son Frank." And, in short, at the next visit, with his lordship's fair consent, she moved it to the countess, who consented that his lordship might make his advances. His next business was to muster what sum of money he could, in order to make an honourable proposition, and with 600*l.* borrowed of a friend, he could compass but 6000*l.* in all to join her fortune, which was estimated at 14,000*l.* for making the jointure and settlement intended to be 1000*l. per annum.* After this he ventured down with a decent equipage and attendance, and in less than a fortnight fixed his point with the lady, and appointed another time to come and finish what was so auspiciously begun. And then his lordship went with full attendance and some friends and after the necessary meetings were sealed, the lovers were happily married in Wroxton church.'

While Sir Farncis North held the office of solicitor-general, he was returned to parliament as member for Lynn; but he had neither the inclination nor the leisure to devote himself to parliamentary business. On the promotion of Sir Heneage Finch to the woolsack, Sir Francis succeeded him as attorney-general, and his practice, which had before been very considerable, now received a sensible increase.

'His business increased, even while he was solicitor, to be so much as would have overwhelmed one less dexterous; but when he was made attorney-general, though his gains by his office were great, they were much greater by his practice, for that flowed upon him like an *orage*, enough to overset one that had not extraordinary readiness in business. His skull-caps, which he wore when he had leisure to observe his constitution, as I touched before, were now destined to lie in a drawer to receive the money that came in by fees; one had the gold, another the crowns and half-crowns, and another the smaller money. When these vessels were full, they were committed to his friend (the Hon. Roger North), who was constantly near him to tell out the cash and put it into bags according to the contents, and so they went to his treasurers', Blanchard and Child, goldsmiths, Temple-bar.'

Even at this busy period of his life, Sir Francis North did not neglect his more liberal studies, and acquired a general knowledge of the modern languages, French, Italian, and Spanish, and even made some progress in the study of the Dutch. In the pursuit of his professional knowledge he was as diligent as ever, noting down in 'his solemn common-place book,' every matter of importance, and making a copious index of any valuable treatise in MS. which fell in his way. To preserve his knowledge of real property law, he was accustomed every Christmas to peruse Littleton's Tenures.

On the death of Sir John Vaughan, the chief justice of the common pleas, Sir Francis North was promoted to the vacant dignity. The leisure and ease which this change procured him compensated for the pecuniary loss which he sustained by it, his profits as attorney-general being about 7000*l.* per annum, while the office of chief

justice produced only 4000*l*. One of the first acts of the new chief justice was to introduce the clause of *ac etiam* into the process of the common pleas, in accordance with the alteration lately made in the king's bench, by which the practice of the former court was considerably increased. Upon another matter of practice he had the misfortune to offend the bar of his court; an incident which is thus related by his biographer:—

'There was an incident that happened not long after his lordship came into the place of chief in that court, which, though in itself and in the end of it ridiculous, yet being an affront to the court, and in particular to the lord chief justice, and by the whole bar of serjeants, all in a lump together, ought to be related, as I shall do, really as it was acted by them. It had been the usage of the king's bench, at the side bar below in the hall, and of the common pleas, in the chamber within the treasury, to hear attorneys and young counsel that came to move there about matters of form and practice. His lordship had a younger brother (Hon. Roger North), who was of the profession of the law: he was newly called to the bar, and had little to do in the king's bench; but the attorneys of the common pleas often retained him to move for them in the treasury such matters as were proper there, and what they might have moved themselves. But, however agreeable this kind of practice was to a noviciate, it was not worthy the observation it had, for once or twice a week was the utmost calculate of these motions. But the serjeants thought that method was or might become, prejudicial to them, who had a monopoly of the bar, and would have no water go by their mill, and supposed it was high time to put a stop to such beginnings, for fear it might grow worse. But the doubt was, how they should signify their resentment so as to be effectually remedied. At length they agreed for one day to make no motions at all, and opportunity would fall for showing the reason how the court came to have no business. When the court (on this dumb day, as it was called) was sat, the chief justice gave the usual signal to the eldest serjeant to move. He bowed, and had nothing to move; so the next, and the next from end to end of the bar. The chief, seeing this, said, "Brothers, I think we must rise, here is no business." Then an attorney steps forward and called to a serjeant to make a motion, and after that turned to the court and said, that he had given the serjeant his fee and instructions over-night to move for him, and desired he might do so. The chief looked about, and asked what was the matter? An attorney that stood by, very modestly said, that he feared the serjeants took it ill that motions were made in the treasury. Then the chief scented the whole matter: and "brothers," said he, "I think a very great affront is offered to us, which we ought for the dignity of the court to resent. But that we may do nothing too suddenly, but take consideration at full leisure and maturely, let us now rise, and tomorrow morning give order as becomes us. And do you, attorneys, come all here tomorrow, and care shall be taken for your despatch; and rather than fail, we will hear you or your clients, or the barristers at law, or any person that thinks fit to appear in business, that the law may have its course;" and so the court rose. This was like thunder to the serjeants, and they fell to quarrelling one with another about being the cause of this great evil they had brought upon themselves; for none of them imagined it would have had such a turn as this was, that shaked what was the palladium of the coif, the sole practice there. In the afternoon they attended the chief and the other Judges of the court, and in great humility owned their fault, and begged pardon, and that no farther notice might be taken of it, and they would be careful not to give the like offence for the future. The chief told them that the affront was public and in the face of the court, and they must make their recognitions there next morning, and in such a manner as the greatness of their offence demanded, and then they should hear what the court would say to them. Accordingly they did; and the chief first and then the rest in order, gave them a formal chiding with acrimony enough; all which with dejected countenances they were bound to hear. When this discipline was over, the chief pointed to one to move, and which he did (as they said) more like one crying than speaking: and so ended the comedy as it was acted in Westminster hall called the Dumb Day.

The conduct of Sir Francis North while upon the bench was in many points worthy of great commendation. Like Sir Mathew Hale, he applied himself to the reformation of the abuses which existed in the law; his mode being to note down the point which appeared to require amendment; and afterwards, when at leisure, to reduce his observations into such a form that an act of parliament might be founded on them. It is supposed by his biographer, than the first idea of the statute of frauds proceeded from him; and he also asserts, that several other alterations, which afterwards passed into laws, arose from his suggestions. Another proposal of the chief justice was a general register for lands; a scheme upon which 'he worked sincerely.' He had proceeded so far in these proposed amendments as to prepare several draughts of bills, which, after his death were found among his papers. In presiding at the trial of causes the chief justice exerted himself to confine the counsel to the point in question, and to cut down that redundancy of speech, which, he used to observe, 'disturbed the order of his thoughts.' 'He was,' says his biographer, 'very good at waylaying the craft of counsel; for he, as they say, had been in the oven himself, and knew where to look for the pasty." Upon one difficult occasion his conduct on the bench was entitled to the highest commendation. 'At Taunton Dean,' says Roger North, 'he was forced to try an old man for a wizard; and for the curiosity of observing the state of a male witch or wizard, I attended in the court and sat near where the poor man stood. The evidence against him was, the having bewitched a girl of about thirteen years old: for she had strange and unaccountable fits, and used to cry out upon him and spit out of her mouth straight pins; and whenever the man was brought near her, she fell in her fits, and spit forth straight pins. His lordship wondered at the straight pins, which could not be so well couched in the mouth as crooked ones; for such only used to be spit out by people bewitched. He examined the witnesses very tenderly and carefully, and so as none could collect what his opinion was; for he was fearful of the jurymens' precipitancy, if he gave them any offence. When the poor man was told he must answer for himself, he entered upon a defence as orderly and well expressed as I ever heard spoke by any man, counsel or other; and if the attorney-general had been his advocate, I am sure he could not have done it more sensibly. The sum of it was malice, threatening, and circumstances of imposture in the girl; to which matters he called his witnesses, and they were heard. After this was done, the Judge was not satisfied to direct the jury before the imposture was fully declared; but studied and beat the bush while asking sometimes one and then another question as he thought proper. At length he turned to the justice of peace that committed the man and took the first examinations. "And, sir," said, he, "pray will you ingenuously declare your thoughts, if you have any, touching these straight pins which the girl spit; for you saw her in her fit?"—"Then, my lord," said he, "I did not know that I might concern myself in this evidence, having taken the examination and committed the man. But since your lordship demands it, I must needs say, I think the girl, doubling herself in her fits as being convulsed, bent her head down close to her stomacher, and with her mouth took pins out of the edge of that, and then, righting herself a little, spit them into some bystander's hands." This cast an universal satisfaction upon the minds of the whole audience, and the man was acquitted. As the Judge went down stairs out of the court, a hideous old woman cried, "God bless your lordship!"—What's the matter, good woman? said the judge.—"My lord," said she, "forty years ago, they would have hanged me for a witch, and they could not, and now they would have hanged my poor son!"'

On the trial of Colledge* for high treason, the conduct of North, who presided as one of the Judges, has been the subject of severe and just observation. Certain papers belonging to the prisoner, and containing the heads of his defence, and suggestions relative to the proceedings, furnished to him by his legal advisers, had been forcibly taken from him, previously to his coming into court. He applied with great earnestness for their restoration; but the court, having pursued them, denied the request, on the frivolous and ridiculous ground that they contained matter scandalous to the government. Colledge, therefore, was only permitted to have the use of such portions of the documents as the judges were pleased to consider unexceptionable. His assertions, that without the assistance of his instructions he should not be enabled to conduct his defence, were met by a pertinent answer from Sir Francis North—that the judges were his counsel. A maxim which is, indeed, admirably illustrated by the trial in question.

Upon the experiment, made under the auspices of Sir William Temple, of a Whig administration, Sir Francis North was constituted a member of the privy council. A government formed so entirely in opposition to the king's dearest prejudices had little chance of stability; nor was it probable that the chief justice would act cordially with Shaftesbury, and Essex, and Russell. But the time was now approaching when he was to assume a still higher station.

The health of the Lord Keeper Finch having given way, the business of the cabinet which usually came before him was for the most part performed by Sir Francis North, who thus, in case of Finch's death, seemed evidently pointed out as his successor. When that event took place, he received an intimation, as his biographer supposes, from Lord Rochester, the lord treasurer, that the seals were within his grasp. The object of this hint is supposed to have been to induce the chief justice to prefer a petition for the vacant woolsack, that so the seals might be offered to him with a better grace, without the addition of a pension. But Sir Francis was not easily misled. He clear-

* State Trials, vol viii. p. 549.

ly foresaw that the office must be tendered to him, and he fully resolved not to accept it without such a pension as should enable him to support the dignity in such a manner as he deemed suitable. Rochester and he now endeavored to outwit one another; but the chief justice was not 'a chicken that would peck at shadows;' and ultimately the king placed the seal in his hands, with this warning sentence:—'Here, my lord, take it; you will find it heavy!' To this appointment was added a passion of 2000*l.* a year. It is curious to observe what were the feelings of Sir Francis North after receiving the highest reward which his profession could confer.

To be continued.

## ENGLISH CASES.

### HIGH COURT OF DELEGATES.

Before the whole Commission.

*Fletcher vs. Le Breton—Appeal.*

This was an appeal from the decision of Sir John Nicholl, Judge of the Prerogative Court, by which a will, constituting Hester and Lucy Le Breton residuary legatees, had been pronounced valid, and a previous will, giving the whole of her property to her husband, the present appellant, had been adjudged to be null and void.

The deceased, Mrs Fletcher, had reserved to herself, by a clause in her marriage settlement, the power of disposing of her personal and funded property in case she should die before her husband. In 1826, the deceased had commenced a will, which was subsequently completed in January, 1829, leaving her husband universal legatee. In two months afterwards, a few hours before her death, she sent for Sir Thomas Harvie Farquhar, and gave him instructions to prepare another will, in which, after bequests of jewels, &c, to the Hon. Mrs Talbot and Sir Charles Ogle, she gave the residue of her estate between the Misses Le Breton, share and share alike. The usual proceedings in contesting this will had been taken by the husband in the Court below, and an allegation had been asserted, in which it was endeavored to be proved that, at the time of making the latter will, the deceased was not of a testamentary capacity. The Judge, Sir John Nicholl, in giving his judgment, had stated that so much credibility was attached to the testimony of Sir Thomas Farquhar, that, added to the balance of proof in favor of the latter disposition of her property, he was bound to pronounce for the will of April, 1829.

Dr Haggard, on behalf of the appellant, proved the admission of an allegation of 10 articles, containing fresh matter, which he considered necessary to the establishment of the former will. The substance of the articles went to prove the improbable disposition of her property, and the evident incapacity of the testatrix at the time of executing the latter will. The Learned Civilian referred to many written authorities on the Civil and Canon Law to prove that the admission of such allegations was perfectly consistent with the forms of the Court, and that in an appeal against a definitive sentence it was competent for parties to plead what had not before been pleaded.

Dr Phillimore opposed this allegation, reminding the Court that the invariable practice had been to refuse parties to plead facts which had come to their knowledge previous to publication in the original suit. Not only on this ground, but on the merits of the facts contain in the allegation, he would contend for its inadmissibility, as the matter pleaded was unimportant, and could not materially alter the conclusion which must be arrived at from the strength of the previous evidence in favor of the latter will. It was clearly established that Mrs Fletcher had entertained an aversion for her husband, and had been heard to accuse him of great extravagance; also, that he treated her with unkindness during her illness, frequently leaving her without common necessaries. The evidence of Sir T. Farquhar was strong and unimpeachable, from the high character of that gentleman.

The Judges directed the Court to be cleared, and, after remaining in deliberation some time, ordered the Counsel to be readmitted, upon which the Registrar announced that their Lordships had decided against the admissibility of the allegation.

The Learned Civilian, Dr Phillimore, was then proceeding to reargue the suit upon the evidence adduced in the Court below, when

Dr Haggard intimated that his party declined to offer further opposition.

The sentence of the Judge in the Prerogative Court was then affirmed, and the cause referred back, without any decree respecting costs.

### JOINT STOCK.

*Fox vs. Clifton.*

The decision in the Court of Common Pleas, in the case of Fox v. Clifton, and others, has excited a good deal of discussion among those persons connected with joint stock concerns. The decision alluded to arose out of a motion for a new trial. The action was against eight defendants, alleged partners in the Imperial Distillery Company, and was brought to recover the amount of goods sold and delivered, for the use of this company, which was one of those joint stock affairs that rendered the year 1825 so notorious. The case was tried some time since, and a verdict was given for the plaintiff. A rule Nisi was obtained to set aside the verdict, on the ground that there was not sufficient proof to show that the defendants were partners in the company at the time the contract was made. Chief Justice Tyndal, in pronouncing judgment said that at the trial, three questions were left to the Jury—first, whether the defendants were partners in this joint stock company; secondly, if they had held themselves out as partners, or allowed themselves to be held out in that character; and thirdly, admitting them to be partners, whether, before the time of the contract any of them had ceased to be partners; and in the latter conviction, the Jury were bound to find for the defendants. His Lordship then commented at some length upon the facts of the case, as proved in evidence, and observed that, as the Court was of opinion that the defendants only offered to become partners, and that, on finding that the thing was abortive, they were determined to have nothing to do with it, the rule for a new trial must be made absolute. To enable the general reader to understand the merits of this case, it is necessary to state that the defendants were persons who had written for shares in this Company, and who had obtained letters promising that a certain number should be allotted to them; that shares were allotted them, and that all the defendants had paid the first instalment on them. With the exception of one, however, none of them had executed the Deed of Settlement. But it was proved, that their names had been put forth as partners to the company, and that on their credit the managers had been enabled to incur debts, &c. The Learned Judge, on the trial, contended that this was quite sufficient to constitute them partners, and the Jury pronounced a verdict accordingly. The effect of this verdict—whether it was a legal one or not, was no doubt, highly beneficial to the public, inasmuch as it was calculated to prevent men of property from lending their names to joint stock bubbles, as they would thereby render themselves liable to any obligations which such companies might incur. If however, the decision of the Court of Common Pleas be good in law, it would seem that any man may allow his name to be sent forth as a subscriber to, or partner in a company, and that, on the credit of his name, debts may be cortracted, without rendering himself liable for their payment. It is obvious that the decision gives great latitude to wealthy and unprincipled men to defraud the public, as there is nothing to prevent such persons from putting forth men of straw in responsible situations, while they may reap the profits of transactions incurred on their credit, without being at all liable for the consequences. It should also be recollected that shares in such concerns as the Imperial Distillery Company are saleable, and that even the letters, promising shares, are sold, and frequently bring large profits to the sellers—so that it would appear a man may traffic in the property of a concern, and reap large profits, without incurring the risk of being a partner. We do not mean, however, to impute any blame to the defendants in the case of Fox v. Clifton and others. On the contrary, we believe, that no blame is imputable to them. Nor do we intend to call in question the judgment of the Court of Common Pleas—the object of our remarks being simply to put the unwary on their guard, with respect to joint stock companies in general.

## RECENT AMERICAN DECISIONS.

### TRESPASS.

A constructive ouster by an heir claiming the whole estate under a supposed devise, will not sustain an action of trespass brought against him by the co-heir. *Allen vs. Carter.* 8 *Pick.* 175

A mortgagee of personal property mortgaged to secure a debt, may maintain trespass against a stranger, who takes it from the possession of the mortgager, although the trespass be committed before the debt becomes due. *Woodruff vs. Halsey.* 333

A mortgagee of a building standing, not on land of the mortgager, but on that of a third person may maintain trespass against a stranger who pulls down and carries away the building, the building being unoccupied at the time of the trespass, and the mortgagee not having taken actual possession. *Ibid.*

Trespass may be maintained against a person who carries away the materials of a building, which has been pulled down by a trespasser, though the person carrying them away was not engaged in the pulling down. *Ibid.*

The plaintiffs being owners of a close and a mill thereon, on the north side of a river, and their milldam being rightfully extended to land on the other side, which they did not own, the defendants crossed the river below the plaintiffs' land and destroyed a part of the dam on the south side, and having effected their object, they recrossed the river at the same place and went upon the plaintiff's close. It was *held*, that the destruction of the dam and the entry upon the close were distinct

trespasses, so that a judgment in trespass *quare cl. fr.* for the latter would not not be a bar to a like action for the former. *White vs. Moseley.* 356

*Held*, also, that in a trespass *quare cl. fr.* for the destruction of the dam, the plaintiffs were entitled to recover consequential damages for the interruption of the use of their mill, this injury being set forth in the declaration. *Ibid.*

1. To excuse a trespass on the ground of accident, it must appear to have occurred without the least fault on the part of the defendant. *Jennings vs. Fundeburg*, 4 M'Cord, 161.

2. Thus, where the defendant, in an action of trespass was in pursuit of runaway negroes, who ran away from him, and he fired his gun towards them, intending to shoot over their heads, to induce them to stop, and one of the negroes was killed by a random shot, it was *held* that the owner was entitled to recover his value of the defendant. *Ib.*

3. Where a tract of land was sold by a sheriff under an execution against the defendant, in an action of trsspass to try title, by the purchaser against the defendant, the defendant will not be permitted to give evidence that the titles of the land was not in himself, but in another, whose tenant he was. *O'Neal vs. Duncan*, 4 M'Cord, 246.

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SALE.

Where one purchases goods upon an examination of a specimen taken by him out of a small aperture in the case in which the article is contained, this is a sale by sample. *Williams vs. Spafford.* 8 *Pick.* 250

Where an article was purchased in that manner, as a seroon of indigo, but the greater part of the contents of the seroon proved to be a different substance, and the remainder to be indigo of a quality inferior to the specimen, it was *held*, that the seller was liable to the purchaser in assumpsit on a warranty, that the article sold was indigo of the same quality as the sample. *Ibid.*

In the case of a sale of chattels *bonâ fide* and for a valuable consideration, slight evidence of a delivery is sufficient; and if the vendee, with the consent of the vendor, obtain possession before any attachment or second sale, the transfer is complete, without a formal delivery. *Shumway vs. Rutter.* 443

Thus where furniture in a tavern was sold and the vendee took a lease of the house and went to live there and used the furniture in common with the vendor, who had occupied the house under a previous lease, and who continued to live there and keep the tavern, and afterwards the vendor removed to another house, carrying the furniture with him and using it as his own, and it was there attached as his property, it was *held*, that there was sufficient evidence of a delivery, to make the sale complete. *Ibid.*

The plaintiff contracted to make some pew panels for J, who was building a meetinghouse, to be paid for in cash on the delivery of the panels. The plaintiff made the panels and brought them to the meetinghouse, and deposited them there, but J was not there, being absent from town, but only some of the workmen. *Held*, that the panels were not delivered, but still remained the property of the plaintiff, and were not liable to attachment as the property of J. *Woodbury vs. Long.* 543

1. Where a tract of land is sold in gross by a public officer, and the number of acres mentioned merely as a part of the description, without any warranty, or misrepresentation, no deduction *pro tanto* will be allowed if there is a deficiency in the number of acres. *Commissioners in equity vs. Thompson*, 4 M'Cord, 434.

2. But if in such sale the deficiency is so great as to amount to a failure of consideration, or to defeat the object of the purchaser, or to furnish satisfactory evidence of a total mistake in the character of the land, the purchaser is entitled to relief. *Ib.*

3. Where a tract of land was sold by a commissioner in equity, and described as 'all that tract of land *said* to contain four hundred and fortynine acres, more or less, situate,'&c, it was *held* that the purchaser was not entitled to a deduction *pro tanto* from the purchase money for a deficiency of twentynine acres. *Ib.*

4. If a vendor of chattels continue in possession, he is regarded, as to creditors or subsequent purchaser, as the owner, against the most solemn unconditional deed to a *bona fide* purchaser not in possession. *Hudnal vs. Wilder*, 4 M'Cord, 294.

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TRUSTEE PROCESS.

In a trustee process, no evidence can be admitted to charge the trustee, except what he discloses in his answers. *Hawes vs. Langton & Tr.* 8 *Pick.* 67.

In such a process the trustee is not obliged to disclose communications made to him by other persons, though it seems he may disclose them in his answers, if he is satisfied of their truth. *Ibid.*

Where a person summoned as trustee, disclosed an assignment to himself by the defendant, of property for the benefit of creditors, apparently valid; and the defendant made an affidavit of facts tending to show the assignment fraudulent, and the trustee refused to annex the affidavit to his answers, expressing his disbelief of the facts stated in the affidavit, the court refused to order the trustee to annex the affidavit to his answers. *Ibid.*

*It seems*, that where a debtor is summoned as trustee of his creditor, the court cannot compel him to disclose an assignment of the debt to a third person, where the trustee does not personally know the fact of the assignment. *Ibid.*

If the assignee should be injured by the trustee's refusing to state the assignment in his answers, *it seems*, that he would have a remedy by an action against the trustee. *Ibid.*

Where an assignee of the defendant's property for the benefit of creditors is summoned as trustee, the plaintiff is not, under *St.* 1817, *c.* 148, entitled to a trial by jury to try the validity of the assignment. *Ibid.*

One summoned and charged as trustee is not entitled to retain a part of the fund in his hands, for the payment of fees of his counsel. *Adams vs. Cordis.* 260

Where the property in the hands of the trustee is claimed by an assignee of the principal defendant, the trustee is not obliged to disclose the assignment and contest the right of the attaching creditor without an offer of indemnity against the expenses of the suit. *Semble.* *Ibid.*

H having in his hands goods of N for sale, on which H had made advances, N requested him to pay out of the proceeds of the goods a bill drawn by N which had been dishonored, and to inform S & Co., who had accepted the bill for the honor of an indorser, of this request. H accordingly informed S & Co. of this request, and promised them verbally to pay the amount of the bill as soon as he should be in funds from the proceeds of the property. H having been summoned in foreign attachment, as the trustee of N, it was *held*, that S & Co. had acquired a claim against H for the funds in his hands, and that he was therefore chargeable as trustee of N, only for the balance in his hands after deducting his advances and the amount of the bill. *Curtis vs. Morris.* 280

Choses in action assigned, are not, in the hands of the assignee, goods, effects or credits of the assignor, liable to the trustee process; even in case the assignee would be trustee after receiving money by means of the choses in action. *Lupton vs. Cutler & Trs.* 298

A debtor assigned goods and choses in action to assignees, for the benefit of such of his creditors as should become parties to the assignment. After some of the creditors had become parties, the assignees were summoned as trustees of the debtor; and it appeared from their answers, that when the writ was served on them, the goods were not sufficient to pay those creditors, though the proceeds of the whole funds, including the choses in action, would be more than sufficient. The court refused to direct the trustees to pay the creditors who had signed, out of the proceeds of the choses in action in the first place, and thus leave a part of the goods to be held by the trustee process, and discharged the trustees. *Ibid.*

A made an absolute deed of land to R, which was intended as a security for money to be advanced by R to and on account of A, and R, about a year after, gave A a bond to reconvey the land on payment of the money advanced in the mean time; R afterwards sold the land on a credit for an amount more than enough to pay all that was due to him from A; a part of the purchase money was secured by a mortgage of the land from the purchaser to R. R was afterwards summoned as trustee of A. At the time of the service the amount secured by mortgage had not been paid, and the remainder of the price for which R sold and which had been paid, did not amount to so much as was due from A to R. *Held*, that R was chargeable as trustee of A, for the difference between the price for which R sold the land, and the amount due to him from A. *Richards vs. Allen & Tr.* 405

Where a debt has been assigned by the creditor, and the debtor is afterward summoned as his trustee, in order to entitle the assignee to the benefit of his assignment, it is not necessary that he should give notice of it to the debtor before the service of the trustee writ on him; it is sufficient if the notice is given at any time before he has made his answer. *Ammidown vs. Wheelock & Tr.* 470

Where such an assignment is disclosed in the answer, and the assignee desires to become a party to the suit under *St.* 1817, *c.* 148, and the Court of Common Pleas refuses to let him become a party, he may bring the question before this Court by a bill of exceptions, and upon a reversal of the decision below, may have a jury trial before this Court. *Ibid.*

In order to entitle the assignee to become a party under the statute, it is not necessary that he should offer to the person summoned as trustee, any evidence of the assignment, beyond his own statement; it is sufficient if he gives the trustee, before his answer, notice of what appears to be a valid assignment. *Ibid.*

Where a note not negotiable is assigned, and the maker is subsequently summoned as trustee of the payee, in order to entitle the assignee to become a party to the suit, it is not necessary that he should exhibit the note to the trustee when he gives the trustee notice of the assignment. *Ibid.*

Neither choses in action nor land assigned, are, in the hands of the assignee, goods, effects, or credits of the assignor liable to the trustee process; even in case the assignee would be trustee after receiving money by means of the choses in action, or as the proceeds of the sale of the land. *Gore vs. Clisby & Tr.* 555

A debtor assigned goods, choses in action and land, to an assignee, for the benefit of creditors. After some of the creditors had become parties to the assignment, the assignee was summoned as trustee of the debtor, before money was collected on any of the choses in action, or the land was sold. The goods were not sufficient to pay the debts of those creditors who had become parties before the writ was served, but the proceeds of the whole funds, including the choses in action and the land would be more than sufficient. The court refused to direct the trustee to pay the creditors who had signed, out of the proceeds of the choses in action and the land in the first place, and thus leave a part of the goods to be held by the trustee process, and discharged the trustee. *Ibid.*

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PLEADING.

In a writ of entry, a plea that in a former writ of entry the tenant recovered judgment for costs, without stating that such judgment was upon the merits, is insufficient. *Wade vs. Howard.* 8 *Pick.* 353

Repugnancy between a protestation and an averment in a replication, is not a ground of demurrer. *Hapgood vs. Houghton.* 451

An assumpsit against an executor, the defendant pleads that the testatrix devised land to the plaintiff in lieu and satisfaction of his demand, and that the plaintiff accepted the devise; the plaintiff protesting that the testatrix did not make the devise in leiu, &c, and that the will was not proved, replies that he did not accept the land devised, concluding to the country. *Held*, that the replication was good. *Ibid.*

The executor pleads, that the plaintiff was requested to make his election to take or refuse the devise, but that he refused to elect; the plaintiff replies that he did refuse to accept the devise, traversing the allegation that he refused to elect; the executor rejoins that the devise has not been waived by the plaintiff, concluding with a verification. *Held*, that the rejoinder is bad, as being a departure, and because it does not join the issue tendered by the traverse. *Ibid.*

The executor pleads that the plaintiff did not waive or refuse the devise; the plaintiff, protesting as before, replies that he did waive and refuse to accept *any* devise contained in the will; concluding to the country. *Held*, that the replication was good. *Ibid.*

1. In a replication it is necessary that the facts in the plea should be traversed, or new matter in avoidance of them set up. *United States vs. Buford*, 3 Pet. 13.

2. Pleading to the merits is an admission of the capacity of the plaintiffs to sue. *The Society for the Propagation, &c, vs. Pawlet*, 4 Pet. 480.

3. The defendant, by an instrument purporting to be articles of agreement between himself and the plaintiff, but signed and sealed by the defendant alone, obligated himself to build a house for the plaintiff by a certain day, and acknowledged payment, and on failure to build the house within the time mentioned, was to forfeit $1200 to the plaintiff. The plaintiff brought an action of debt for the penalty, without averring in the declaration, the defendant had not performed the work. The defendant demurred, and the demurrer was sustained. *Salmon vs. Jenkins*, 4 M'Cord, 288.

4. If a contract be in the *disjunctive*, the breach ought to be assigned, that the defendant did not do the one act or the other. Until there is breach of both alternatives, there is no cause of action. *Ib.*

5. Where the penalty professes to be a subsisting debt, and the condition is added by way of defeasance, the plaintiff may sue for the penalty, without noticing the condition; but it is otherwise, where there is no subsisting debt or duty, and the obligation depends upon the performance or non-performance of some particular act. *Ib.*

6. In a suit on an administration bond, the declaration was on the penalty only, without setting out breaches; the defendant craved oyer, set out the condition, and pleaded performance. The plaintiff replied, that the administrator had not truly administered, because he had not paid a certain debt. On demurrer the replication was held to be insufficient, on the ground that it did not allege, that the administrator had assets to pay the debt. *Jones vs. Anderson*, 4 M'Cord, 113.

7. The plea of *nil debet* to an action of debt on bond, is irregular, but is a substantial plea; and if the plaintiff choose to go to trial on such an issue, he is bound by the result. *Belser vs. Irvine*, 4 M'Cord, 380.

8. A replication must not depart from the allegations set out in the declaration, in any material matter. *Lindsay vs. Jamison*, 4 M'Cord, 93.

9. In assumpsit an administrator alleged in his declaration a promise to his intestate, and the defendant pleaded the statute of limitations, and and the plaintiff replied a subsequent promise to the intestate and also to the administrator since the death of the intestate, within four years. A demurrer to that part of the declaration which alleged a promise to the administrator, was sustained. But a new trial was granted, and the plaintiff was allowed to add a count to meet the justice of the case. *Ib.*

10. A motion for a nonsuit will prevail, if the case is proved as stated upon the record, though that is defective. *Ib.*

11. There can be no such thing as a release after a conntract is broken, except by deed, and it must be so pleaded. *Corbett vs. Lucas*, 4 M'Cord, 323.

12. Thus in an action on promissory note, the defendant pleaded a release, but omitted to state that the release was under seal. On demurrer the plea was held to be bad. *Ib.*

13. And where the liability of the defendant depends upon the happening of a contingency, the plaintiff must aver that it has happened. *Salmon vs. Jenkins*, 4 M'Cord, 288.

14. In order to determine whether causes of action are the same, it must be ascertained whether the same evidence will be necessary to support them. *Crisp vs. Talvande*, 4 M'Cord. 20.

15 It is the wrong done and not the character or quantum of the damages, which constitutes the identity of the causes of action. *Ib.*

16. When the cause of action is entire, or, in other words, when the act complained of is indivisible, a plaintiff cannot separate it, and bring one action for one part, and another for another part; the first will be a bar to the second. *Ib.*

17. If the plaintiff omit in his declaration to aver a fact essential to his recovery, and the defendant demur to the declaration, the plaintiff cannot introduce into his joinder in the demurrer, an averment of such fact. The proper course, is to ask leave to amend the declaration; which if the court grant they will at the same time permit the the defendant to withdraw or insist on his demurrer. *Gibson vs. Todd*, 1 Rawle, 452.

18. In an action of debt for rent reserved by indenture, the plaintiff may state in his declaration the substance of the demise, and is not bound to declare upon the deed; and, if to such a declaration the defendant pleads *Nil habuit in tenementis; actio non accrevit infra sex annos*, or any plea which is *prima facie* a good plea, no estoppel appearing on the record, the plaintiff may reply that the lease was by indenture, and such a replication will not be a departure. *Davis vs. Shoemaker*, 1 Rawle, 135.

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## BAR ANECDOTE.

In a case recently tried at Philadelphia, in which several days had been occupied with the examination of the testimony, after it was closed, it was agreed among the counsel, with the consent of the judge, that the case should be submitted to the jury without the usual discussion, and without a charge. The jury retired, deliberated about two hours, then came into court, and propounded a question on a point of law. The Judge informed them that he could not answer their inquiry without a full argument; that in order to spare them from listening to speeches for several days, it had been agreed to leave the case to them; that if they wished they could retire and make another effort to agree. After a little consultation, the jury answered, that there was no probability of their agreeing. The case then proceeded, and they were thus, at their own instance, addressed by four gentlemen of the bar, charged by the judge. They again went out, and returned in less than a quarter of an hour, and gave their verdict. It is too common to complain of the speeches of the counsel, which though sometimes tedious and uninteresting, almost uniformly direct attention to the points really important, and can rarely fail to communicate information, and to facilitate a just decision. We believe, that in nine cases out of ten, whatever may be said to the contrary, respectable juries would prefer hearing the remarks both of the lawyers and the judge. One such instance as this is abundant, in answer to the common place remarks and taunts, frequently made at the expense of the bar, such as, that the jury had made up their mind on the evidence; that they did not regard what the lawyers said. If so in any case, it involved a manifest dereliction of duty, for it is the right of every man that he shall not be judged unheard. No case can suffer from the commentaries of men well versed in the law, and there is no enlightened judge, who will not bear witness to the importance of legal arguments. It may be justly said that, with but few exceptions, the members of the bar in our community deserve the respect in which they are held; and that, there is no class in which greater confidence is reposed in the most delicate matters, and in which fewer have betrayed the trust.

THE JURISPRUDENT.

BOSTON, SATURDAY, JANUARY 1, 1831.

## CAPITAL PUNISHMENTS.

Continued from page 175.

'I shall ask for the abolition of death—until I have the infallibility of human judgment demonstrated to me. The punishment of death has always inspired me with feelings of horror.'—[Lafayette, on the proposition of M. De Tracy, in the Chamber of Deputies.

In continuation of the same debate Mr Macauley said—'that when he considered how strong was the feeling through the country upon this subject, and how strong testimony they had by petitions and other evidence in favor of the repeal of the severer punishment, and how great a number of the House, on a former night, were on the same side, he could not doubt that, if no Ministerial influence were exerted, and if the House voted freely and fairly, they would vote in support of the proposition of his Hon. and Learned Friend. His reliance, he confessed, was somewhat shaken by the vote on the last night, which this question was debated; but he hoped that Right Hon. Gentleman would vote more freely. If those who voted for his Hon. and Learned Friend's motion that night should be again beaten, he should doubt whether the Administration did not use some indirect influence. The only proof that was yet given that this was not made a Government question was—one which could be well spared—that the Honorable and Learned Gentleman (the Solicitor-General) condemned the mitigations which the Right Hon. Baronet, the Secretary of State admitted into his Bill. It was charged on those who called for the otal alteration of the punishment, that they were influenced by a compassionate sentimentality; but that compassionate sentimentality was as decorous in legislators as the severer sentimentality of his Hon. and Learned Friend, the Solicitor-General. His own reason for supporting the motion of his Right Hon. and Learned Friend (Sir James Macintosh) was, that if we were to punish the crime of forgery at all, we must adopt a mitigated punishment, for we could not prevent it with death; and if we had no other punishment than death, we could not punish it at all. It was true they could make a severer law; but it was equally true that they could not enforce it. They had heaps of Statutes of this sort, inflicting the severest punishment, but those Statutes were not effective for any purpose, except for the purpose of evil. The punishment they contained were so severe, and so disproportioned to the offence, in the public opinion, that the laws were seldom enforced. Legislators ought not to forget that the laws did not execute themselves. The heaps of petitions that were laid on their table, as well as the evidence taken before their Committees, proved most clearly the reluctance of the people to prosecute for this crime. But it was said, and stress was laid on that argument, that the bank of England, which was most concerned in this subject, always prosecuted. But on the supposition that that was true—for a corporation it was said had no soul—in so large a body each person composing it had but little share in the prosecution, considering that what was done by the whole body did not belong particularly to any individual. The Right Hon. Baronet (Sir Robert Peel) said, in the discussion the other night, that the House might take the prosecutions of the Bank of England as a fair average of the prosecutions in cases of forgery. The staying back from prosecuting on the part of individuals, the Right Hon. Baronet said was to be attributed rather to a selfish feeling on the part of many individuals, who, to excuse their own sloth or selfishness, pretend that they kept back from conscientious scruples. That might be so with some, and then it was an evil; but if, with some who gave their conscientious scruples as an excuse, that excuse was false, it was yet true with others, and he had no doubt but the great majority were on the side of a true conscientious repugnance to prosecute, conceiving that the punishment was disproportioned to the offence. The repugnance of the Grand Juries was an evidence of this feeling, and he cited the fact of the London Grand Juries throwing out, in cases of forgery, bill after bill, till prosecutors said it was useless to present any. But supposing that the bill came down as a true bill from the Grand Jury, then it came from a reluctant Grand Jury to a still more reluctant Petty Jury, who had to hear the proofs and circumstances of the case, from equally reluctant witnesses and prosecutors.

By way of showing how much more effacacious a milder punishment would prove, he cited the number of trials which took place for nine years, from the year 1818, upon the capital charge and for the minor offence. In the nine years, 708 were committed on the capital charge, and of them 334 got off free, while in the same period 588 were committed on the minor offence of uttering only, and only seven of them got off—(hear, hear).—That was a proof of the superior efficacy of a milder punishment than that of death. Every one, except the Secretary of State, in his office as Secretary of State, was against this punishment. The Magistrates of the country were against it—the Juries, grand and small, were against it, and prosecutors and other witnesses were against it. Even of those who were convicted of the crime, only a few were executed. How then could an argument be drawn in favor of the severe punishment, from the terror it struck, since, of the many injured, few prosecuted, and since, out of those successfully prosecuted, so few were executed? They had far too few executions to deter persons from committing the crime; but they had enough to deter them from prosecuting—(hear, hear.) All that was accomplished by the rigor of the punishment was to gain impunity for 99 out of 100 guilty persons. He would name one of the worst cases—that of Mr Fauntleroy, who had not the excuse of ignorance or of distress, yet there were 8,000 persons of respectability in the city of London who petitioned for a commutation of the punishment in his case, so great was the public sympathy with him—an offender in the first degree, but still an offender in a way that the punishment of death was looked upon as too severe.

'He (Mr. Macauley) would not be considered to approve of the public feeling in this or the like cases. He would admit the public feeling to be sometimes wrong, but the question here was not how the people ought to feel, but what they actually did feel. Were they, by legislation, to compel men who were jurors—men of respectable and amiable feelings, to come forward, and, in spite of their inclinations, to convict offenders? The fact was that Parliament, it was notorious, neglected to legislate for the people and the juries took the laws into their own hands—(hear, hear). That was an evil; it was an evil that those persons, whose proper duty it was to consider as to the facts referred to them, should take upon themselves to consider, not those facts, but whether the punishment of the law was right or wrong. It was an evil to make the popular tribunals the arbiters of what ought to be law and what ought not, and to teach respectable Juries to practise a laxity in their oaths that they might not be cruel by their verdicts. The Hon. and Learned Gentleman referred to an event which happened at the Old Bailey a few days ago, and which would go to illustrate this case. It was a trial of a party charged with coining. The Counsel who had to prosecute thought necessary to begin by assuring the jury, that even though they should convict, the prisoner should not be hanged. He (the Counsel) told the jury so, that he might get them to convict, supposing that an acquittal would follow if the jury thought the punishment ordained by the law was carried into effect—(hear, hear). The fact was, that now it could not well happen that any twelve men could be found to convict for this offence: they might violate their oaths and reject the truth, but they were only responsible to their own consciences; and they thought by saving a man from a punishment far beyond his offence. was an atonement for what they did. Some desired the office of a public prosecutor; but a public prosecutor could not prosecute without witnesses and juries. If he desired to have the laws carried into execution by the aid of the public, we should make those agreeable to the public. Let them multiply their enactments as they would, but they should make them agreeable to the feelings of men. It was long the doctrine taught at the Treasury, that the heavier the tax the greater would be the revenue; it may also be the doctrine, that the greater the punishment the fewer the crimes; but time and experience had shown, and continued to show, that these doctrines were false. The fact was, that they (the Legislature) must yield, and the question was how much they must yield. They of that House were often towards the House of Lords what they were now to the people at large. The Lords had often sent back Bills to be amended or altered. All that he now asked the House to do for the people was what they so often did for the Lords. The people were growing as powerful as the House of Lords. They only sent back this Bill to be reconsidered by the House, and he implored the House in the name of the numbers of Bankers and merchants and traders of the country to put this law upon a proper system; the present mode of punishment, instead of deterring from crime, having become a matter of disgust to those who did well, but a alaughing stock to those who did evil.

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THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

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AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

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While many of the nations of Continental Europe possess Dictionaries, which have kept pace with the advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of attraction in many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

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## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

We have been thus particular in marking out the proper limits of a sale, because by the law of England, as we now proceed to show, it is attended with important consequences. It was the policy of the Roman law, that property in things moveable should not be separated from possession. 'Proprietas' and 'dominium' were therefore convertible terms; none being treated as the owner of goods, who had not the actual control and disposition of them. It followed that a commodity, though sold, continued nevertheless the property of the seller, until delivery.* To speak technically, the sale conveyed to the buyer *jus* ad *rem*, but not *jus* in *re*—a right to demand, which was personally binding on the seller, but no title or ownership derived from the thing itself. And this is still the rule in most of the European codes, which, as we have before remarked, are in general founded on the civil law.† But by the law of England the effect of the sale, when complete as a sale, is to transfer the property in the thing sold from the seller to the buyer, who is thenceforth entitled, for the most part, to deal with it as his own, and takes upon himself the liabilities as well as the rights which are incident to ownership. A distinction so material might be expected to have occasioned a total departure of the one code from the other in one of the most important subjects of jurisprudence; and it is by no means therefore an uninteresting fact, that the corresponding exigencies of society have, notwithstanding this original difference of principle, led to practical results almost exactly similar. The English rule, if unqualified, would certainly have been productive of some inconvenience. That the ownership of goods should be in one who had no visible token of the right, and conversely, that it should not be in him who had all the outward signs of property, together with the actual power of disposal, seems a clumsy if not a mischievous contrivance. But the truth is, that every precaution was adopted for securing that notoriety, which ought always to accompany a change of property. We have already mentioned the rule which forbade the transfer of things not in possession, and the direct encouragement which was given to sales in open market. Nay, so strict were our ancestors in this latter respect, that, according to the Mirrour, the sale of everything above the value of twenty pence, except in open market, was prohibited;* and every bargain was directed to be contracted in the presence of credible witnesses.† Indeed there was a law of William the Conqueror, that no one should buy either dead or live goods of the value of fourpence, without the testimony of four men either of the borough or vill; and if the thing was challenged and he had no such testimony, he should not be allowed to litigate the matter, but should restore the goods to the owner.* But another and a very wise precaution was this: no bargain unaccompanied by delivery was considered final, so as to bind the goods, unless either the whole or part of the price was paid, or at least some token passed between the parties by way of solemn assurance as well as evidence of the contract, and thence appropriately termed the *earnest*.† Not that this custom of giving earnest was by any means confined to England. On the contrary, it seems to have been a universal practice among all partly civilized nations,‡ and is indeed well suited to the simplicity of times when traffic is comparatively rare, and carried on for the most part in fairs and markets. Even at this day it is the usual mode of concluding bargains at such places among those who deal in cattle and such primitive articles of wholesale barter.

A moment's glance, however, at the vast and intricate transactions of modern commerce, in which bargains are made between parties separated from each other by half the sphere, will serve to show how little such a mode of assurance is adapted to present circumstances. If, indeed, what may well be doubted, the giving of earnest ever prevailed in what are now understood under the name of mercantile contracts, it soon necessarily fell into disuse; and the legislature was called upon to provide new methods, better adapted to the times, for securing that public evidence of a transfer, without which ownership ought not to be acquired, and for checking the frauds and perjuries resulting from private bargains, made, or alleged to have been made, by word of mouth only. For this purpose it was enacted, by the seventeenth section of the famous statute of frauds, (29 Chas. 2. c. 3.*) passed, as the preamble recites, 'for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury; that no contract for the sale of any goods, wares, and merchandizes for the price of 10*l.* or upwards, shall be good except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part-payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.'

Some of the requisites of this clause have evidently been adopted from the ancient rule of law, which we have alluded to above. But there is this material difference—before the statute, the bargain bound the *person* from the first, though it did not bind the *goods* until earnest or part-payment or delivery; whereas, now, unless the requisites of the statute be complied with, the contract does not impose even a personal obligation, and may, in fact, be avoided altogether. It must be recollected, moreover, that a verbal sale although subsequently attested by a written memorandum, or rendered valid by compliance with the statute in some other respect, is not complete so as to transfer the property until that requisite has been performed; in which respect, though with some additions, it substantially follows the rule of the common law.

In analyzing the members of this important clause, the first question which presents itself is—what is meant by the words 'no contract for the sale of any goods,' &c? To which the obvious answer is, a contract whereby goods are sold. This definition, of course, excludes all those cases which have been mentioned above, in which the subject of the contract is not some specific thing existing at the time as the thing contracted for, and includes all sales which may be properly termed executory or conditional.† Simple, however as it seems, this interpretation was not settled without a struggle. To use the language of Chief Justice Pratt, the statute was for some time supposed to 'relate only to contracts for the actual sale of goods, where the buyer is immediately answerable, without time given him by a special agreement, and the seller is to deliver the goods immediately.'‡ How such a narrow construction could ever have been admitted, may well be thought strange: it seems, however, to have arisen from this circumstance, that the earlier cases were of bargains, which were not strictly sales at all, but rather orders for things to be done; but the Court in deciding them, having used expressions

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* Traditionibus dominia rerum non nudis pactis transferuntur. Cod. de Pact. 1. 2. tit. 3. 1. 20. And see Bell's Comm. p. 166. et seq.

† Such was anciently the law of France, as appears by the following passage from Pothier, Traité du droit de propriété, tom. iv. p. 436. 'Les conventions seules et par elles mêmes ne produisent que des obligations: c'est leur nature; c'est pour cela qu'elles sont etablies. Ces obligations ne donnent a celui, envers qui elles ont été contractées, qu'un droit contre la personne qui les a contractées. Ce droit est bien un droit *par rapport* a la chose qu'on s'est obligé de nous donner; mais ce ne peutê tre un droit *dans* la chose; c'est encore moins le domain de la chose.' 'De ce principe que le domaine d'une chose ne peut ordinairement passer que par la tradition de la chose il suit que quelque convention que j'aie avé cune personne qui s'est obligée de me donner une certain chose, tant qu'elle ne m'en a pas fait la tradition réelle ou feinte, elle en demure toujours la proprietaire.' But the framers of the Code Napoleon have changed the law in this respect, and adopted the English rule. La propriété est acquise de droit à l'acheteur à l'égard du vendeur, des qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé. Code Civile, 1583. In Scotland the rule of the civil law still prevails.

* Mirrour, cap. 1. s. 3. p. 14.

† Ll. Ethel. 10. 12. Ll. Edg. Wilk. 80, cited in Ross on Sales, ch. 3.

* Ll. Wm. the Conq. 43. Ibid.

† Perficitur autem emptio et venditio *cum affectu* [qu. effectu?] ex quo de pretio inter contrahentes convenerit, *ita tamen* quod secuta fuerit rei emptæ et venditæ traditio, vel quod pretium fuerit solutum, totum sive pars, vel saltem quod arrhæ inde fuerint datæ et receptæ. Glanvil, 1. 10. c. 14. Emptio vero et venditio contrahitur cum de pretio convenerit inter contrahentes, dum tamen a venditore arrarum nomine receptum fuerit, quia quod arrarum nomine datum est argumentum est emptionis et venditionis contractæ. Bracton, 1. 2. c. 27.

‡ So in the civil law, 'Quod sæpe arrhæ nomine pro emptione datur non eo pertinet, quasi sine arrha conventio nihil proficient, sed ut evidentius probari possit de pretio. Inst. 1. 35. sec. De Contr. Empt. And see 2 Bl. Com. 446.

* Supposed to have been framed by Sir Mathew Hale. North's Life of Guilford, 109. A statute, which, if it had been adhered to in its original simplicity, might have deserved the eulogy of Lord Ellenborough, who pronounced it 'one of the wisest laws in our Statute Book.' 1 East. 194.

† Alexander v. Comber, 1 H. Bl. 20.

‡ Towers v. Osborne, 1 Str. 506.

larger than were necessary, the dicta were caught up and converted into precedents. We are indebted to the strong sense of Lord Loughborough for restoring the statute to its efficacy. In Rondeau v. Wyatt,* the defendant, a miller, had entered into a verbal agreement to sell and deliver to the plaintiff 3000 sacks of flour, to be put into sacks which the plaintiff was to send to the mill, and to be shipped on board vessels for exportation. It was said that the contract was executory, and therefore not within the statute of frauds, but Lord Loughborough, in giving the judgment of the Court against that position observed, 'It is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain from the words made use of, that it was meant to regulate executory as well as other contracts. And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains, to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent.' From that time the decision has been uniformly acquiesced in,† and consequently whatever is a contract of sale properly so called, falls within the provisions of the statute.‡

In this view, there would be little difficulty in determining *à priori*, that sales by auction were expressly included. Yet this also was long a matter of controversey. Lord Mansfield, regarding rather the supposed intention, than the plain words of the legislature, gave it as 'the inclination of his opinion,' that sales by auction were not contemplated, and therefore not included in the act.§ It was thought that 'the solemnity and publicity of that kind of sale precluded all perjury as to the act of sale itself;' but the fallacy as well as the danger of such reasoning was afterwards laid bare by Lord Ellenborough, whose manifest opinion it was, that there was no reason for the exception.‖ At length it became necessary that the point should be determined, and accordingly in Kenworthy v. Schofield,* the opinion of Lord Ellenborough was ratified by a decision of the Court.

To be continued.

* 2 Hen. Bl. 63.

† Cooper v. Elstone, 7 T. R. 15.

‡ Garbutt v. Watson, 5 B. & A. 613, which may be considered as having overruled Clayton v. Andrews: 4 Burr. 200 1.

§ In Simon v. Metivier, 1 Bl. Rep. 601. Mr Justice Wilmot strongly concurred in the reasoning of the Ch. Justice.

‖ In Hinde v. Whitehouse, 7 East, 568. There is so much excellent and masculine sense in the observations of the Chief Justice, that we shall do a favor by transcribing them. 'It has been said that sales by auction are not within the statute.' His Lordship then alludes to the opinions and reasoning of Lord Mansfield, and Mr Justice Wilmot, and continues thus: 'with all deference to these opinions, I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing, in a statute applying to all sales of goods above the value of 10*l.* without exception, merely because the *quantum* of parol evidence, in case of auction, is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt: and if we once get loose from the positive words of the statute, it will soon become a question only of the *quantum* and degree of perjury in each particular instance; which opens a door to an indefiniteness of construction, founded on all the varying circumstances of the time and frequency of the persons attending the place of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial, to the trading world who are to be governed by it.' Reflections such as these ought ever to be present to the minds of those, whose calling it is to administer and expound the laws.

* 2 B. & C. 945, per Bayley and Holroyd, Js. The same construction had before been put upon the words 'agreement for sale,' in the 4th section of the same statute. 12 Ves. 466, 13 Ves. 25. 1 B. & P. 206. 2 Taunt. 38. 4 Taunt. 209. 15 Ves. 516. 3 V. & B. 57.

## LORD KEEPER GUILFORD.

Continued from page 180.

'The evening that we went upon this errand to Whitehall,' says Roger North, 'some of us stayed in expectation of his coming home, which was not till near ten; little doubting the change that was to happen. At last he came with more splutter than ordinary, divers persons (for honor) waiting, and others attending to wish him joy, and a rabble of officers that belonged to the seal completing the crowd which filled his little house. His lordship, by despatching these incumbrances, got himself clear as fast as he could, and then I alone stayed with him. He took a turn or two in his diningroom and said nothing, by which I perceived his spirits were very much roiled; therefore I kept silence also, expecting what would follow. There was no need of asking what news when the purse with the great seal lay upon the table. At last his lordship's discourses and actions discovered that he was in a very great passion, such as may be termed agony, of which I never saw in him any like appearance since I first knew him. He had kept it in long, and after he was free it broke out with greater force, and, accordingly, he made use of me to ease his mind upon. That which so much troubled him, was the being thought so weak as to take ill usage from those about the king (meaning the Earl of Rochester), with whom he had lived well, and ought to have been better understood. And instead of common friendship, to be haggled withal about a pension, as at the purchase of a horse or an ox, and after he had declared positively not to accept without a pension, as if he were so frivolous to insist and desist all in a moment, and, as it were, to be wheedled and charmed by their insignificant tropes; and, what was worse than all, as he more than once repeated, "to think me worthy of so great a trust, and withal so little and mean as to endure such usage as was disobliging, inconsistent, and insufferable. What have I done," said he, "that may give them cause to think me of so poor a spirit as to be thus trifled with?" And so on with much more of like animosity, which I cannot undertake to remember. And, after these exhalations, I could perceive that by degrees his mind became more composed.'

Upon taking his seat in the court of chancery, the first object of the lord-keeper was to reform, so far as lay in his own power, the abuses of the court. 'The greatest pain he endured,' says his biographer, 'moved from a sense he had of the torment the suitors underwent by the excessive charges and delays of the court; for the easing of whom he was always in thought more or less, to contrive ways and means of expedition and retrenchment of charges.' The variety of opposing interests rendered this a difficult task; but the lord keeper proposed to accomplish it gradually, without alarming the officers of the court by the introduction of a sudden and violent reform. 'As occasion proffered, he declared his mind, and retrenched many superfluities, or rather nuisances, in the court.' One of his first measures was to put an end to the innumerable motions for speeding or delaying the hearing of causes. His next attempt was to reform the practice with regard to the masters' reports. 'His lordship also' says Roger North, 'set himself to stop the superfetation of orders: and they were a subject of his daily reprehension; for the causes often came to a hearing with a file of orders in the solicitor's bundle as big as the Common Prayer-Book, for commissions, injunctions, publications, speedings, delayings, and other interlocutories, all dear ware to the client in every respect. But in a few terms his lordship reduced the quantities, for he was strict to the observance of his rules; and for the most part refused to make orders *nisi*, &c, as commonly was prayed, when notice was not given of the motion.' Much delay was also prevented by refusing re-hearings and re-references except upon the most substantial cause. Lastly, the state of the register's office engaged his lordship's attention; but he found it very difficult 'to break the neck of those wicked delays used there.' It is not improbable, that if the lord keeper had held the seals a few years longer, he would have published a book of orders; which as his biographer observes 'would have gone a great way towards purging out the pecant humors of the court.' During his administration in the court of chancery, the lord keeper was not altogether free from suspicion of that corruption which was unfortunately not very rare at that period;* but there appears to be no sufficient foundation for such imputations.

At the period when the lord keeper ascended the woolsack, he found an administration with whose views, for the most part, he concurred. But on the accession of Sunderland and Godolphin, and more especially of the Lord Chief Justice Jefferies, to the cabinet, the position of the lord keeper became a very painful one. Being himself a resolute protestant, he ran counter to the designs of the other ministers; who, better acquainted than himself with the secret wishes of the king, were desirous of pushing the prerogative to its greatest extent, in defence of the persecuted papists. Accordingly, on a motion made by Jefferies to grant a general pardon to the imprisoned recusants, the lord keeper was the only member of the cabinet who opposed the design. 'That night,' says his biographer, 'his lordship came home full of melancholy; and it was some time before any person near him knew the occasion of it. But he would sometimes break out in exclamations, as—"What can be the meaning! Are they all stark mad?" and the like.' The policy observed by the lord keeper at court was that of the old English Tory; and he looked with great jealousy upon those intemperate advisers who would have persuaded the king to resort to measures of violence.

His mode of life at this period is thus described by his brother:—'His lordship's method of living, with respect to his great employment, was very commendable; for all his time was devoted to the business incumbent on him. He put but very little of it to his own use; and what passed in easy conversation, which was the chief of his pleasures, had still a regard to his employ, by inquiring, canvassing, and debating, with those of his society, such points as concerned the republic. He had no kind of vice or immorality within his walls; and of what sort his remissions were (for some are necessary to life) I shall give a fuller

* See the Lives of the Chancellors, vol. i, p. 178.

account afterwards. But it is decent here to name the chief, which was a solitary, or rather speculative, use of music, of which he commonly took a relish at his going to bed; for which end he had a harpischord at his bedchamber-door which a friend touched to his voice. But he cared not a set of masters to consort it with him. And, unless it were once under Purcell's conduct, I never knew him use such; for there was somewhat stiff in that way that was not easy. The mornings were for the most part devoted to the justice-seat of the chancery, either in the court at Westminster or in the cause-room at home, during the usual periods, and not seldom in attendances upon petitions, and despatching the perpetual emergencies of the seal. His house was kept in state and plenty, though not so polite as the court-mode was. The nobility and chief gentry coming to London were frequent at his table: and after a solemn service of tea in a withdrawing-room, the company usually left him, and then the cause-room claimed him, and held him in pain with causes and exceptions often till late. He had little time to himself, for he had this infirmity, that he could not bear to make any one wait; but if his servant told him of any person, great or small, that waited without, he could not apply to think of or do anything till he had despatched him. The interval between the business of the day and going to bed was his chief refreshment, for then his most familiar friends came to him, and the time passed merrily enough: and then it was that the court-spies found access to plumb his most free sentiments, but with small profit, he had the same face and profession in public as he had in private; they could discover only that he was an honest man: but more of this elsewhere. His attendances at Whitehall were chiefly at solemn times, as on Sunday morning to wait on the king to chapel. That was usually a grand assembly of the court, and the great men had opportunity to speak in discourse to the king as he gave them occasion, of which his majesty was no niggard; and very excellent things said there on the one side and on the other were a high regale to such as had the advantage to stand within hearing. On the week-days, those called the council-days always, and sometimes committees of council, required his lordship's attendance; and Thursday was always public; others for private business upon summons.'

On the death of Charles II., the prospects of the lord keeper suffered a material change. 'With the death of this good master and sovereign all his lordship's hopes and joys perished; and the rest of his life, which lasted not long after, was but a slow dying.' Although on the accession of James there was no appearance of displacing him, yet it was obvious to an accurate observer, that he could not, for any long space of time, be allowed to retain both the seals and the principles which he had hitherto professed. His unfitness for the part which it was expected he should act soon became apparent. On the question as to the levying of the tonnage and poundage, which had only been granted to the crown during the life of Charles II., the Lord Chief Justice Jefferies advised the king to issue a proclamation, commanding the collection and payment of the tax as before. To this proposition, so clearly illegal, the lord keeper would not consent, but proposed a course which, though not strictly constitutional, yet bore some semblance of a regard for the laws. He advised that the proclamation should require the duties to be collected and paid into the exchequer, there to await the disposal of parliament. 'But it seems,' says Roger North, 'that this was too low and trimming for the state of the court at that time, and a positive proclamation issued.' Upon another occasion the lord keeper rendered himself still more obnoxious to the court. At the elections for the new parliament he employed not only his private interest, but that which his office gave him, in procuring the nomination of persons ill calculated to forward the views of the sovereign. 'His lordship's design was to have the parliament truly church of England protestants, and loyal to the crown: which character he thought aptest to establish the religion and laws of the kingdom, and to resist all attempts of altering any of our fundamentals in church and state.' The displeasure of the court at this line of conduct was manifested on the opening of parliament, when the lord keeper, contrary to usual custom, was not permitted to prepare the king's speech, nor was he even consulted on that which was delivered. The feelings of a king are speedily communicated to his courtiers, and the lord keeper soon found himself in general discredit. His decrees were questioned or, as his biographer expresses it, 'most brutishly and effrontuously arraigned:' while at court and at council 'nothing squared with his schemes;' and he was, 'by Sunderland, Jefferies, and their accomplices, little less than derided.'—Declining thus in favor at court, disturbed with the measures which he there beheld in contemplation, harassed with the thankless toils of office, the lord keeper, dispirited and depressed, was unable to contend with the adverse circumstances by which he was surrounded. He was attacked by a severe illness, which yielded at last, in some degree, to medicine and he resumed his duties for a short time. But the fever from which he was suffering appears never to have been thoroughly subdued; and the following is the melancholy picture given by his brother of his state at this period:—'His feverish disease growing upon him, his spirits, and all that should buoy a man up under oppression, not only failed, but other things of a malign complexion succeeded to bring him lower: which may be fully understood by this circumstance. He took a fancy that he looked out of countenance as he as he termed it; that is, as one a shamed, or as if he had done ill, and not with that face of authority as he used to bear; and for that reason, when he went into Westminster hall, in the summer term, he used to take nosegays of flowers to hold before his face, that people might not discern his dejection; and once in private having told me this fancy, he asked me if I did not perceive it. I answered him, not in the least, nor did I believe any one else did observe any such thing; but that he was not well in health as he used to be was plain enough. His lordship in this state took a resolution to quit the great seal, and went to my Lord Rochester to intercede with his majesty to accept it, which had been no hard matter to obtain. But that noble lord had no mind to part with such a screen, and at that time (as he told me himself) he diverted him. But his lordship persisted as will be made appear afterwards, by a letter. Whereupon the Lord Rochester obtained of the king, that his lordship might retire with the seal into the country; and that the officers with their concerns should attend him there, in hopes that by the use of the waters and fresh air he might recover his health against next winter, when it was hoped he would return perfectly recovered. This was indeed a royal condescension and singular favor to him.'

The hopes of a recovery were vain. The lord keeper retired to Wroxton, in Oxfordshire, where he lingered some time, suffering much in body and temper from the effects of his disease. The closing scene of his life is thus described by his brother:—

'It was the opinion of the people about him, and the doctor's desire (who was the most afflicted man in the world), that Doctor Radcliffe, then in the neighborhood, should be called, in which was done; not that his friends expected any benefit, but to satisfy some of the living, who would not be convinced. The doctor came; and by his lordship's bed-side he asked him I am sure no less than fifty questions, which were a fatigue and trouble to him, and all that were in the room. The doctor had his fee, but not the ingenuity to say what he knew, viz. that there were no hopes; but talked of the lungs being touched or not, which signified nothing. His lordship afterwards showed much discontent that he was not well attended; and if Sir Dudley North or I was absent, he called it slighting him; and we were, indeed, glad sometimes to escape for half an hour to breathe. This confirmed the approach of death, of which the not caring to be left alone is a constant symptom. He began to agonise and be convulsed; and by virtue of the doctor's cordials lived longer than was for his good. After some striving, he would lie down, and then get up again. He advised us not to mourn for him; yet commended an old maid-servant for her good will, that said, 'As long as there is life there is hope.' At length, having strove a little to rise, he said, 'It would not do;' and then with patience and resignation lay down for good and all and expired 5th Sept. 1685.'

On the following day the executors carried the great seal to the king at Windsor, who observed that 'he had heard his lordship was much mended;' and asking whether there was not a purse to contain the seal, dismissed them without further remark.

To be continued.

## ENGLISH CASES.

### COURT OF KING'S BENCH—JULY.

Sittings in London before Lord Tenterden and Common Juries.

*Redden vs. Alexander.*

This was an action by the plaintiff, a merchant, against the owners of the Thalia, an East Indiaman, to recover the value of a cargo of provisions which were lost by the Thalia running down 'the Providence,' the vessel which was carrying it at sea. It appeared that the Providence, burden 136 tons, had been freighted by the plaintiff to carry a cargo of provisions from Limerick to London. On the 17th May, 1822, the Providence, was on her voyage, and at about 12 at night, the watch saw a vessel which proved to be the Thalia, coming across her course, the latter vessel carrying about 700 tons, and bound for the East Indies. It was proved that in the situation in which the two vessels were placed with respect to each other, the Thalia ought to have kept her course, and the Providence ought to 'bear up.' The Providence did so in the expectation that the Thalia would keep her wind. The latter, however, bore up as well, and the consequence was that both vessels came in contact with great violence, and in a few minutes the Providence went to the bottom. The mate of the Providence escaped into the forechains of the Thalia, and the crew of

the latter escaped with great difficulty by cutting away the jolly boat, and ultimately joined the Thalia. The mate of the Providence now deposed, that when the two vessels were entangled with each other, he desired the Captain of the Thalia to save the men, and he replied, 'Oh, boom her off and let them go to the devil.' In the concussion, one of the masts of the Providence broke and fell across the hatchway. One of the seamen who was below, stated in his cross examination by Sir J. Scarlett, that he had suffered much from the fright, as he was a fat man before the accident, and now he was a lean one.

It was contended for the defendant, that the mate of the Providence, who now deposed that he was at the helm, had admitted since the accident that he had gone below to look at the Captain's watch, and had left the care of the helm to a boy when the accident happened.

The Jury returned a verdict for the plaintiff, the amount of damages to be settled out of Court.

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ROLLS COURT—JULY.

*Livesey vs. Harding.*

Mr Agar stated the case for the plaintiff. This was a supplemental bill and bill of reviver, filed to establish the will of a person named Edmund Livesey, under the following circumstances. The testator, who died in the year 1816, had been a man addicted to drunkenness to an excess sufficient to reduce him to a state of almost constant derangement. In a lucid interval, he had made a singular sort of will, by which he devised his freehold property, after the death of his wife, to his eldest son in tail, with remainder to his daughters in tail, omitting, without any implied motive, his second and third sons. The original bill had been filed to establish this will, and the eldest son of the testator had not, in his answer, impugned it. He died, however, before the hearing or decree, and this bill had been filed to make the second son of the testator a defendant as heir at law. That person, finding himself ousted, by the will, of the freehold, determined to oppose its establishment on the ground of his father's derangement, or of improper influence exerted on him at the time of making it. He sought to obtain an issue of divisavit vel non, but, as the first heir at law had admitted the will, the Learned Counsel submitted that the Court would not permit his successor to retract that admission.

Mr Preston, on the same side, maintained that the object of the defendant was contrary to the decided practice of the Court, which at the most, would have allowed the first heir at law to retract his own admission.

Mr Duckworth, on the same side submitted that the defendant had acquiesced, during his brother's life time, in the provisions of the will, under which he, at least, had been entitled to 1,000*l.* and that the evidence of improper influence had endeavored to prove insanity had shown that on the day of signing the will the testator had been free from his usual visitation of inebriety.

Mr Treslove, for the defendant, said that this was a question of practice, and that, from the case of Sleeman v. Sleeman, in 2d Dickin's, 787, there could be no doubt that a second succeeding heir at law could retract the admission of a will's validity made by his predecessor. The circumstances of this case fully justified such a course. The testator had been reduced by habitual drunkenness to the lowest state of imbecility. Of this the strongest proof was that, in the year 1810, he had executed two deeds under the directions of some of the defendants in this case, the Messrs Harding of Liverpool—one a mortgage of his property to them for 3,000*l.* the other a deed by which he devised it to them in trust for his own maintenance during his life—thus leaving himself at their mercy, with other singular provisions which had given rise to the bill. He, in fact, from that time received only 60*l.* a year, and took up his abode at an alehouse.

Mr Ward followed on the same side.

His Honor said that, in this case, the heir at law had admitted that the will had been well executed; he had also admitted the sanity of the testator at the time of making it. Nothing had appeared in the case which would have induced the Court to have relieved him from the effects of his admission; all the statements had supposed him to have been aware of the chief circumstances which threw a doubt on the capacity of the testator to manage his affairs under ordinary circumstances—namely, the deed of 1810. If the heir at law could not have been relieved, how was it possible to suppose that the Court could relieve the defendant? He (the Master of the Rolls) could not assent to the case cited by Mr Treslove. Mr Dickens had not been a correct reporter. He should, therefore, refuse the relief sought by the defendant, and not allow the issue of devisavit vel non.

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*Greenwood vs. Taylor.*

Mr Bickersteth stated that the bill in this case had been filed by the creditors of the late Duke of York against his executors, and came on, on exceptions to the Master's report. On the 3d of February, 1827, the decree of that Court had been made, directing an account of the estates and debts of his Royal Highness. Among other claimants who came forward in consequence of the decree was the exceptant, Charles Davis. It appeared that, in January, 1801, the Duke of York executed a bond, in favor of this individual, for a sum of 5,350*l.*, to secure a debt amounting to one half this penalty. This remained in the hands of Davis till his death, which took place in 1822, when his executors instituted an action on it against his Royal Highness, and judgment was obtained on default, in Hilary, 1823. After the decree in this Court had been obtained, the executors of Davis carried his claim before the Master, who after some difficulty, and the confirmation of one affidavit, allowed the judgment. This not having satisfied the executors of his Royal Highness, a warrant to review the Master's decision was taken out, when a young gentleman, named Finmore, who from his age, could have known nothing personally of the matter, took upon himself to assert that the bond had been given to Davis for money lost at play, and consequently, the debt should not be allowed. It was thought extraordinary that the information of such a person should have been taken at all. The Master, however, thought there was sufficient ground to require evidence respecting his allegation; accordingly evidence was taken, and witnesses were examined, on interrogatories, without notice having been given to the parties chiefly interested, and the claim was finally disallowed. It was objected to the Master that the evidence was exparte, and could not be used. He maintained, however, that it could be taken as affidavits, and could be replied to by counter affidavits. The witnesses for the claimant were, however, voluntary, and he could not compel them to make affidavits. Besides this objection, the claimant submitted that the Master could not come justly to the conclusion against him, for it did not appear that any of the witnesses had a knowledge of the bond, the debt, or the transactions connected with it. The attesting witness to the bond had been Mr Greenwood, one of the plaintiffs; he only had been present at its execution—the other parties knew nothing of the matter. They deposed generally that Davis had been in the habit of attending the Tennis Court, St James street, kept by a man named Mucklow; that they had known the the Duke of York to frequent the same place in the year 1788, and 10 years subsequently; that the Duke used to bet with Davis and had no doubt given him the bond in question as security for his losses. Unfortunately for these surmises, the bond was dated in the year 1801, three years after the time alluded to by these witnesses. Unfortunately for them, also, they deposed that the Duke had not been in the habit of paying off his losses with money, but that Mucklow kept an account which he handed over to Mr Adams, the Duke's agent, who gave bonds in security to the claimants. In fact, many of those bonds, attested by Mucklow and Adams, were forthcoming; but the bond of the claimants in the present case had been attested by an agent of the Duke for matters very different from those in which Mr Adams appeared—by Mr Greenwood, of the firm of Greenwood, Cox, and Co.

His Honor—Was Mr Greenwood examined?

Mr Bickersteth—No, Sir, he is one of the plaintiffs to the bill. The Learned Counsel then read the evidence of John Mucklow, David Moor, W. Ellis, W. Clark, the Right Hon. the Earl of Cavan, and one or two others, which described Davis as a gambler, a haunter of cockpits, tennis courts and races, but which was vague in respect to the question at issue. This was the only evidence on which the Master had adopted his decision, and had thought proper to disallow this claim of Davis, or rather of his personal representatives, as that individual was dead. For all that had appeared before the Master the bond was perfectly unexceptionable. It stood thus on inquiry. The bond had been given in 1801; in 1823 the action had been brought on it, judgment had gone by default. His Royal Highness had made no defence, and had not paid, probably for reasons which every body could understand.

His Honor—I think, Mr Bickersteth, this is entirely a case of presumption, and for a Jury to decide. I think I shall direct an action.

Mr Bickersteth—If your Honor has any doubt.

His Honor—I am afraid, if I should indulge in conclusions I should have no doubt. Mr Greenwood should be examined. Probably he is the only person who can give an account of the transaction.

After some conversation between Mr Bickersteth and Mr Stewart, who appeared to support the Master's report, it was agreed, with the sanction of his Honor, that the question should be decided by a Jury in an action, without prejudice to the judgment of 1823.

Mr Wigram, who appeared for the executors of the late Duke of York, said he desired it to be expressly understood, that in this matter the executors had been quiescent. The creditors were the active opponents of the claimant.

COURT OF COMMON PLEAS.

Sittings at Westminster, before Chief Justice TINDAL and a Common Jury.

*Baker vs. Napper and Another.*

Mr Miller opened the pleadings. The plaintiff sought to recover compensation in damages for certain defamatory words uttered by the defendant.

Mr Sergeant Wilde stated the case. This action was brought against the defendant in consequence of his wife having used certain words, imputing to the plaintiff that he had murdered his wife. Mr Baker and the defendant were lightermen, and lived at Old Brentford. The plaintiff was a man advanced in years, and some time since, had the misfortune to lose his wife. Shortly after some dispute arose between the present parties, during which Mrs Napper accused the plaintiff of having murdered his wife. This having been said in the presence of several neighbors, and likely to injure the plaintiff's character, he insisted on Mrs Napper's retracting the charge; but she refused to do so; and, as the accusation was made in such a place as Brentford, it soon became scattered about, and was calculated to do the plaintiff a great deal of injury. The plaintiff, not being able to obtain a contradiction of the defamatory statement was under the necessity of bringing this action in order to clear his character; and he hoped the verdict of a Jury would have that effect.

Several witnesses stated that they were present at the dispute in question. It was a quarrel between the plaintiff and the defendant. While Mr Baker had hold of the defendant's hand Mrs Napper came up, and said to her husband—'Come away, my dear, or he (the plaintiff) will kill you as he did his wife;' and she added, addressing herself to the plaintiff—'Oh, you good-for-nothing gallant old dog, you know you murdered your wife!'—(laughter.)

A letter from the plaintiff's attorney to the defendant was read. It was written to request the defendant to retract the injurious expressions which had been used, but no answer was received by the plaintiff.

Mr Serjeant Taddy (with whom was Mr Comyn) in addressing the Jury for the defendant, observed that the last part of the plaintiff's case—namely, putting in the attorney's letter—was a mere flourish on the part of his Learned Friend, and showed the real object for bringing this action. If proceedings were to be commenced for all the vulgar words used in the creeks and narrow alleys of Old Brentford, this Court would have plenty to do to settle the various disputes between the waterman and their fair partners. The plaintiff did not complain of anything done to him by the defendant, but of what was said by his wife, and the question was whether she had received provocation for the language imputed to her. What was the fact? Mrs Napper, acting the part of a tender spouse, wished to prevent her husband from fighting; and when she went to separate him from the plaintiff, the latter addressed to her this complimentary salutation—'Go home, Mrs Crabshaw'—(a laugh). He did not know what was insinuated by Mrs Crabshaw, but he was told it meant Mrs Abershaw—(laughter). There was a great mistake about the meaning of the words used by Mrs Napper, for she never meant to charge the plaintiff with having murdered his wife in the felonious sense of the word, but probably insinuated, as the expression 'Gallant old dog' seemed to imitate, that the plaintiff's wife died of grief at her husband's gallantry with some of the fair ladies of Old Brentford—(a laugh).

Mr Sergeant Wilde—Then Mrs Napper meant that the plaintiff was to kill her husband in the same way, for she said, 'He'll kill you as he did his wife.'—(Much laughter.)

Mr Sergeant Taddy said it was not fair for his Learned Friend to interrupt him in that way, as it was now his turn to sit down and remain quiet. He was, however, certain that the Jury would see that this was a case from Old Brentford, where people were abusing each other from morning till night, and that they would not give the plaintiff more than a farthing damages.

The Learned Judge left the case to the Jury without any comment.

After a few moments' consideration the Jury found a verdict for the plaintiff—Damages, One Shilling.

Both parties will have to pay their costs, the verdict not being to the amount of 40s.

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VICE-CHANCELLOR'S COURT.

*Bradley vs. Heath.*

The question for the decision of the Court in this case was, whether the executors of a party deceased were liable for the payment of a certain rate of interest upon a debt due from the testator to the plaintiff, under these circumstances:—The plaintiff in the life-time of the testator, had done a considerable quantity of work, in his capacity as a blacksmith for the deceased's farm, and after the death of the testator, he also did some further work for the said farm. Having demanded from the executors of the deceased the payment of the balance of his account, they, not finding it convenient to pay him, agreed to pay him five per cent interest on his debt, until it should be paid off, and they signed a memorandum of an agreement to that effect. The question now was, whether that interest which they agreed to pay, and which was not an interest properly arising on the debt, should be paid out of the assets of the testator's estate; or whether the executors had not rendered themselves liable, personally, to the payment of it, by the memorandum which they had signed?

The Vice-Chancellor was of opinion that as the executors had in this case done that which, as executors, they could not have been compelled to do, the signing of the agreement must be taken as a contract by them to pay the interest, and they should be therefore considered as having made themselves personally responsible for the interest on the balance agreed upon.

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## RECENT AMERICAN DECISIONS.

SERVITUDES.

1. Every privilege in derogation of the rights of the owner of land is viewed with jealousy by the law, and is confined to the limits and objects prescribed by the grant. *Taylor vs. Hampton*, 4 M'Cord, 96.

2. Thus when a person claims the right of keeping up a pond of water, which overflows the land of another; the pond must be kept within its prescribed limits, that is, the height to which it was kept at the time of the purchase, and the use must be limited to the specific object to which it was then applied. *Ib.*

3. By the extinguishment of a servitude, is meant its annihilation, and not its suspension only. *Ib.*

4. A right to overflow the land of another is an incorporeal hereditament, and if extinguished for a moment, cannot be revived. *Ib.*

5. Servitudes may be extinguished, either by the act of God, operation of law, or the act of the party. If the act which prevents the servitude is the act of the party, it will effect an extinguishment of the right. But if it is prevented by the act of God, or by the operation of law, this will only cause a suspension of it; for the act of a party will be construed most strongly against himself, but he shall not be injured by an act of God, or the law. *Ib.*

6. A servitude is extinguished by any obstruction of a permanent nature by the party himself to whom the service is due, or by his consent, or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise of it. *Ib.*

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SET-OFF.

1. A debt barred by the statute of limitations cannot be set-off if objected to. *Trumbull vs. Strohecker*, 4 M'Cord, 210.

2. The assignee of the assignee of a bond, takes it subject to all the equities existing at the time of the assignment, between the obligor and the first assignee, notwithstanding such equities may have arisen before the bond came into the hands of the first assignee. *Metzgar vs. Metzgar*, 1 Rawle, 227.

3. An agent of a corporation, who has received money for its use, cannot, in an action for money had and received, brought against him by the corporation, prove, by way of set-off, that he has paid the debts of the corporation, without showing a special authority for that purpose. And it is not enough to prove, that the defendant acted for the treasurer, without showing some resolution of the board, giving the treasurer a right to delegate his power to the defendant. *Middletown and Harrisburgh Turnpike Road Co. vs. Watson*, 1 Rawle, 330.

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SHERIFF.

1. Where a debtor is in jail under a *ca. sa.* and escapes, the creditor has two remedies against the sheriff: 1. An action of *debt*, wherein he will be entitled to recover the whole amount of his judgment against the prisoner. 2. An action on the case for the damages sustained by reason of the escape, in which the jury may assess damages according to circumstances. *Boyce vs. Barksdale*, 4 M'Cord, 141.

2. In an action on the case against a sheriff for the escape of a debtor confined under a *ca. sa.*, evidence is admissible on the part of the sheriff to show the insolvency of the debtor, in mitigation of damages. *Ib.*

3. In an action by a creditor against the sheriff for an escape of the debtor from the jail bounds, the creditor is not bound to prove the insolvency of the sureties on the bond given by the debtor to keep within the bounds. *Yates vs. Yeader*, 4 M'Cord, 18.

4. The sheriff alone can sue on the bond; and the court, at its discretion, may stay the proceedings against the sheriff, until he can recover on the bond. *Ib.*

5. The sheriff can retake the prisoner, and put him into close confinement. *Ib.*

6. In an action against a sheriff for the escape of a debtor in custody on mesne process, evidence that the plaintiff, in the original suit, after the escape, suffered a nonsuit, is not conclusive evidence that he has sustained no injury. *Baker vs. Deliesseline*, 4 M'Cord, 372.

7. After an escape the plaintiff may proceed against the sheriff immediately, without further prosecuting his suit against the original defendant. *Ib.*

8. Although the sheriff may, in an action on the case against him for an escape, prove the insolvency of the debtor, to reduce the damages, yet he must also show some other circumstance in excuse or mitigation, or the jury must give damages to the amount of the whole debt. *Jones vs. Blair*, 4 M'Cord, 281.

9. Where a defendant is in custody on mesne process, and the plaintiff is nonsuited, the sheriff may discharge the defendant. *Baker vs. Deliesseline*, 4 M'Cord, 372.

10. If the sheriff misapply money that comes into his hands, by paying one execution, with the proceeds of property sold under another the party who receives the money is not bound, provided he has acted fairly, to refund it, either to the sheriff or to the party whose money has been improperly paid away. It is not necessary, on receiving a payment from the sheriff, to inquire out of what fund it is made. *Diechman vs. The Northhampton Bank*, 1 Rawle, 54.

11. A sheriff is answerable for the conduct of his deputy in taking goods of another person than the defendant, in execution. *Wilbur vs. Strickland*, 458.

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### TRUST.

A purchaser from a trustee without notice, will hold the property discharged from the trust. *Hudnal vs. Wilder*, 4 M'Cord, 294.

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### SLAVE.

Where a person who hires a slave, sends for a physician to attend him while sick, the person so employing the physician, and not the owner of the slave, is liable to the physician. *Wells vs. Kinnerly*, 4 M'Cord, 123.

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### SLAVE TRADE.

1. The offence against the law of the United States under the seventh section of the act of Congress of 2d of March, 1807, is, not that of importing or bringing into the United States persons of color with intent to hold or sell such persons as slaves, but that of hovering on the coast with such intent, and no further provision is made as to the disposition of the colored persons found on board, than to require the officers of the capturing vessel, to keep them safely to be delivered to the Governor of the state or the persons appointed by him to receive them. *United States vs. Preston*, 3 Pet. 57.

2. By the tenth section of the act of April, 1818, the six first sections of the act of 1807 were repealed, but no alteration is made in the disposition of the colored persons found on board of a vessel condemned under the seventh section. *Ib.*

3. The Josefa Segunda was on the eleventh of February, 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and persons on board libelled in the district court of Louisiana, under the act of 1807, and condemned, and an appeal claimed to the Supreme Court. After the decree of condemnation below, but pending the appeal, the sheriff of New Orleans sold, with the consent of all parties to the proceeding, the persons of color as slaves, and deposited the proceeds of the sale in the registry of the court, to await the final disposal of the law; the final condemnation of the Josefa Segunda in the Supreme Court took place on the 13th March, 1820; previous to which, Congress had passed the act of 3d March, 1819, which provided that persons of color, brought in under any of the acts prohibiting traffic in slaves, should be delivered to the President of the United States to be sent to Africa, and repealed all other acts repugnant thereto. It was *held*, that the persons of color found on board the Josefa Segunda, if they had been specifically before the court at the date of the final condemnation, must have been delivered up to the President of the United States, and that therefore the state of Louisiana had no claim to the proceeds of the sale of them; such sale having been unlawful. *Ib.*

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### STATUTE.

1. In the construction of the statute of a state, the Supreme Court adopts the construction given to such statute by the highest court of such state. *United States vs. Morrison*, 4 Pet. 124.

2. Where there is a provision in an act of incorporation, that it should be a public act; such provision must be regarded in courts of justice, and the enactments noticed, without being especially pleaded. *Beaty vs. Knowler*, 4 Pet. 152.

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### STOPPAGE IN TRANSITU.

If goods are shipped on credit, in a foreign port, on board the consignee's own ship, the master of which signs a bill of lading, by which they are to be delivered to his owner, the *transitus* is at an end by delivery to the master; and the consignor cannot afterwards stop the goods, in case of the insolvency of the consignee before their arrival. *Bolin vs. Huffnagle*, 1 Rawle, 9.

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### SURETY.

1. A surety is not discharged by the mere circumstance that time was given to the principal by the creditor, unless the creditor has, by some agreement, with the principal, precluded himself from suing him. *Treasurers vs. Johnson*, 3 M'Cord, 458.

2. If a surety require the creditor to sue his principal, and the creditor neglects so to do, and the principal afterwards becomes insolvent, the surety is discharged. *Ib.*

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### TENDER.

1. A tender of money in behalf of an infant, made by his uncle, the father being dead, but the mother living; *held* to be good, although the uncle had not then been appointed guardian. *Brown vs. Dysinger*, 1 Rawle, 408.

2. A tender, partly in silver coin, and partly in bank notes, offered to be converted into silver, but the opposite party refusing to accept any money, *held* to be good. *Ib.*

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THE JURISPRUDENT.

BOSTON, SATURDAY, JANUARY 8, 1831.

## NEW ENGLAND SHERIFF.

We think Mr Goodwin has performed a very acceptable service to the community generally, and to sheriffs and the profession particularly, in the 'Digest of the duties of civil officers,' which he has just published. A work of the kind was much wanted, and so far as we have had opportunity of examining it, we think his satisfactorily executed. It contains a compendium of the laws of Massachusetts, with references to those of other States upon the subjects embraced in it, together with a collection of cases from our own Reports and other sources, and the addition of convenient and useful forms.

The object and plan of the undertaking cannot be better expressed than in the words of the author's preface.

'No branch of the law presents subjects, calling for prompt and correct decision, more frequently than that relating to the various duties of civil officers. Questions involving the rights of persons and property, oftentimes must be determined by the ministers of the law, without an opportunity for deliberate inquiry, or for that patient investigation which is generally permitted in other departments of jurisprudence. Nor, is it the executive officer alone, that is called upon for a hasty determination. Inquiries are daily presented to members of the profession, upon this part of legal science, an answer to which cannot long be delayed, without jeopardizing valuable interests. To arrive to a satisfactory result, the statutes and adjudged cases of his own State, at least, comprised in more than a score of volumes, and those of no diminative size, must be consulted, and critically collated. The exigencies of the community, seemed therefore, to require a compendium of this branch of the law, systematically arranged, which would at once serve as a convenient manual for officers; and by furnishing an index to the statute books and reports, be not wholly useless to the more learned professional practitioner. But few are constituted with that happy temperament of mind and vigor of intellect, as not sometimes to feel the truth of the remark of the lugubrious lexicographer, 'That which is obvious is not always known, and what is known is not always present; and the student shall often in vain trace his memory at the moment of need, for that which yesterday he knew with intuitive readiness, and which will come, uncalled, into his thoughts tomorrow.'

'Gentlemen of the profession, in different parts of the commonwealth, have long felt the want of a work to supply this deficiency. The peculiar character of our attachment and jail laws—of the office of sheriff, and the novel relation in which he stands to his deputies, and those to each other—the frequency of legislative interposition, and of judicial interpretation, have rendered English books upon this subject, comparatively of little value. The learned work of Mr Backus, shows the impossibility of embodying the disjointed codes of this branch of American law, into a single treatise of any practical utility. The histories of the twentyfour States, composing the confederacy, show the impossibility of ever establishing an uniformity upon this subject.

'Massachusetts, New Hampshire, and Maine, having adopted nearly the same system; it was

supposed a treatise embracing the statutes, and adjudged cases of each jurisdiction, with particular reference to those of the parent government, might be of practical value in each of those States.—Such was the task the compiler of this work assigned to himself; how far the execution answers the design, is submitted to the judgment of his peers. He is already aware, that notwithstanding his endeavors, many defects will be discoverable, not only from the omission of valuable information, that has escaped his researches, but likewise from an imperfect use of such as have been retained. But it is confidently hoped, when the candid and judicious reader considers the great variety of topics introduced, and the multiplied sources from whence the materials were drawn, that a charitable allowance will be made for those inaccuracies, against which, the most unremitted vigilance cannot effectually guard.

'Similar compilations have been contemplated by gentlemen of the profession, but the inadequacy of the reward, when compared with the great expense of time and labor expended in collecting, arranging and condensing the various statutes and cases, it is believed, has heretofore deterred any one from the undertaking. A few years since, the task was commenced by a learned friend and neighbor, who made some progress in collecting materials for a similar compilation; but the pressure of less vexatious, and certainly not less profitable avocations, by which he is so honorably acquiring a high professional reputation, induced him to abandon the work, and with a generosity characteristic of his profession, he liberally bestowed upon the present editor, his manuscripts, the result of much labor, and great research.

'From this source, and from many others, the recollection of which will be cherished with gratitude, but of which our limits will not permit an enumeration, the compiler now presents this work, a humble offering to the great cause of public justice; hoping it may subserve in some small degree, to illustrate the science to which his life has been devoted, and lessen the labors of that meritorious class of his fellow citizens, without whose exertions, statutes would be but parchment, and civil security would resolve into anarchy.'

## BANKING SYSTEM OF MASSACHUSETTS.

We have examined a pamphlet with the above title lately published by Messrs Stimpson and Clap of this City. The object of the author of the pamphlet is to suggest the elements of a new system of banking to be established in this Commonwealth, which shall effectually secure the interests of the community against depreciated currencies and bank failures. He suggests the following as the principles of his system and enforces their application with much ability.

1. The only proper basis of bank circulation is a large monied capital, exclusively appropriated to the business of banking.

2. Public security requires, that the issues of a bank should bear a small proportion to its capital.

3. Bank notes, to constitute a sound medium of general circulation, must be payable in the central points of trade, the large commercial cities.

4. The profits derivable from the circulation of bank notes, are a legitimate source of revenue to the State; but,

5. A State tax upon *capital* employed in the ordinary business of banking, is both unjust and impolitic, good policy requiring that capital should be allowed to flow into that channel with perfect freedom.

The constitutionality of the present tax upon Banks is discussed at considerable length and the writer maintains that the only proper subjects of taxation is the *circulation* of Bank notes and not the *capital* employed in Banking. This whole subject is one with regard to which the community in general is in most decided ignorance. The revolutions and changes and fluctuations in the money market are looked upon with amazement and alarm without any comprehension of the causes which are bringing them about. Men who are extensively and constantly engaged in the operations of the trading community, often find all their efforts and calculations paralysed in a day, and stand by and see their gains and estates going down the current of disastrous circumstances and events, without the ability to impose the slightest check against it.

Every effort to call the attention of the public to this subject and to explain it, deserves approbation. The writer of this pamphlet appears to be well acquainted with his subject and discusses it in a plain and forcible manner.

## MASSACHUSETTS REGISTER FOR 1831.

We are among the unlucky *subscribers* to this catch-penny publication and have thereby lost a modicum of the circulating medium, which might have been more usefully appropriated. Our last year's Register, with a new paper binding, would have well enough supplied the place of the new edition; and, in truth, somewhat better than the new one itself, since we had made that tolerably accurate by a year's corrections, erasures and additions, with pen and pencil. Are Almanacs and Registers stereotyped? There is a wonderful resemblance in the matter and manner, and, but for the change of names and dress, we should certainly suppose we had many times and oft before seen the same 'useful calender'—which on the first of January was introduced to us, by the gentleman in drab, as a new acquaintance.

## WEBSTER'S SPEECHES, &c.

We would call the attention of our readers to the Speeches, &c, of Mr Webster, just published and for sale by Gray & Bowen, in Washington Street, and at the other Bookstores in the City. The volume is an octavo of between 5 and 600 pages, very closely printed, and executed in a very handsome style and is sold at a moderate price. A very good and finely engraved Portrait of Mr Webster, accompanies the work. All his published Speeches upon topics of permanent interest and importance are introduced, together with some hitherto unpublished addresses and writings which give an additional value to the book. We think every Professional man, in the country, will regard the addition of such a work to his library as an acquisition well worth the cost.

CONTENTS *of the Law Magazine, or Quarterly Review of Jurisprudence, No. X., for October*, 1830.

*Registration.*—Copy of the Second Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real property. Presented pursuant to an Address, dated 10th June, 1830. Ordered by the House of Commons to be printed, 29th June, 1830.

*The Life of Lord Mansfield.*

*Mercantile Law.*—No VIII. Contract of Sale—*continued.*

*On the interest necessary in a Life Insurance.*

*On the Duties to which the Estates of Testators and Intestates are liable.*

*Rights of the Peerage.*—A Disquisition on the Right of Jurisdiction in Peerage Successions, particularly the Peerage of Scotland.

*Sugden's Acts.*—The Acts relating to the Administration of the Law in Courts of Equity, passed in the Session 11, Geo. 4. and 1 W. 4., with an Introduction and Notes. By Thomas William Jemmet, Esq. of Lincoln's Inn, Barrister at Law. 1830.

*The Practice relating to Retainers.*

*Digest of Cases.*

Common Law.

Equity.

List of Cases.

Abstract of Public General Statutes.

The New Police.

Indian Appeals.

Letter to the Editor.

An Example of an Index to a Registered Title.

Events of the Quarter, &c.

Notices to Correspondents.

New Publications.

'American legislation is as bad as our own; a congress loses as much time as a parliament. When Captain Hall said so, he was not believed; we pin our faith upon less disputable authority: 'One short act respecting drawbacks is the only general law worth naming passed during the last session. If what the economists call *let-us-alone* policy, were the consummation of political science, we are in a fair way of surpassing all nations in the negative wisdom of our inconsequential doings.' (*The American Jurist and Law Magazine*, No 4,—a very talented work.) We cite this, in sober earnestness, as adding tenfold to the difficulties of our position; by showing that the favorite nostrum, a more popular representation, is not the political heal-all.'—*Law Magazine.*

## IMPRISONMENT FOR DEBT.

We extract the following remarks upon this subject from the Mayor's Speech delivered on Monday last on the occasion of the organization of the City Government. The topic is one of increasing interest and will no doubt receive, as it justly de mands, the earlyattention of our Legislature.

'The County jail is not under the immediate jurisdiction of the City Government, but from the reports and information derived through the County officers, no doubt is entertained that its prudentials are managed with a just regard to the security and comfort of the prisoners. It is most consolatory to discover, that while imprisonment for dept is still allowable by law, public opinion, and (as may be inferred) the feelings and habits of creditors as a class, have exceedingly diminished the practical evils and calamities incident to its rigorous execution. By a return made to me on the 27th of last month, it appears, the whole number of persons imprisoned for debt on mesne process and execution, in this city is eighteen, and no more. These are all males. The time has been when the number has averaged fourteen hundred, annually, and sometimes including two hundred females. Should the habit of resorting to this made of attempting to compel payment of debts have fallen into disuse in the same degree in other parts of the State, it would indicate that the time had come for the abolition of the laws authorizing imprisonment for debt, except in cases of fraud.'

WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN's, 141 Washington Street. Price 50 cents, bound. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix; containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

EVENTS IN PARIS, during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Europe possess Dictionaries, which have kept pace with the advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is trusted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

It will be comprised in one large volume, 8vo. Oct. 23.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

GRAY AND BOWEN, No. 141, Washington Street, Boston, have recently published the following valuable works.

I. A DESCRIPTION OF TREMONT HOUSE; WITH ARCHITECTURAL ILLUSTRATIONS.—4to.

'Jam scires ab introitu primo—herculentum et amvenum videre et diversonium.' APULEIUS, M. A V.

This work is embellished with a copper-plate engraving, representing the front of the house, and thirty lithographic prints, exhibiting the details of the structure. Its object will be understood by the following extract from the preface.

'The present publication is intended to satisfy a curiosity, which frequent inquiries for a description of Tremont House were supposed to indicate.

'Its original plan was to furnish such particulars relative to this establishment as strangers might wish to possess, but it has been extended so as to comprehend many architectural details, which will probably be interesting to mechanics; as much of the ornamental work of Tremont House was copied or adopted from books, not commonly in their hands, and has not before been executed in this country.

II. AN EPITOME OF UNIVERSAL GEOGRAPHY; or, a Description of the various Countries of the Globe; with a view of their Political Condition at the present time. With sixty Maps. By NATHAN HALE.

III. A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By GEORGE CRABB, A. M., Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

IV. THE VESTAL—A TALE OF POMPEII. 1 Vol. 12mo.

'Oh Time, thou beautifier of the dead,
Adorner of the ruin.' CHILDE HAROLD.

V. AUTHORSHIP. A Tale. By a New Englander over Sea. 1 Vol. 12mo.

VI. AN ORATION; Delivered before the Phi Beta Kappa Society, Cambridge, Mass. August 26th, 1830. By the Rev. ORVILLE DEWEY.

VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

LAW BOOKS.—HILLIARD, GRAY & Co. 134 Washington Street, have on hand a large Stock of *American and English Law Books*, comprising a complete assortment of the best editions of all works in general use. They also purchase and sell second hand Law Books—terms liberal.

H., G. & Co. supply any volumes that may be wanted of Massachusetts or Pickering's Reports.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, JANUARY 15, 1831. NO. XXV.

## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

We are now led by the order of the sentence to inquire what is a sufficient acceptance to satisfy that alternative of the statute. The words are 'except the buyer shall accept part of the goods, *and actually receive the same*'—words, which seem carefully selected for the purpose of excluding everything short of a literal taking into the buyer's own custody and possession. Much ingenuity, however, has been exercised by the court in refining upon this plain expression; and the doctrine of *constructive* transfer of possession has been carried to a point, which it is become alike difficult to maintain or to recede from. Acceptance, of course, implies delivery; a subject which it will be more convenient to treat of hereafter. For the present, therefore, we shall merely observe as to partial acceptance, that where at the time of the sale a *sample* is delivered to and taken by the purchaser or his agent, this will be such an acceptance as to satisfy the statute, if it were distinctly understood in the bargain that the sample so taken should form part of the whole commodity purchased:* if otherwise, not.†

Of *earnest*, something has been said already. It is remarkable that but one case has occurred since the framing of this act, in which this subject has been drawn into discussion. The question there was, whether a purchaser could be considered as having 'given something in earnest,' who had gone through the ceremony of drawing a shilling over the hand of the seller, and then returning it into his own pocket—a ceremony which, it seems, is practised in some parts of the north of England, and considered as concluding the bargain. This question, the court, as may be anticipated, decided in the negative.‡ The civil law recognised two kinds of earnest—the one a gage, by way of assurance, the other a deposit, as part payment;§ but in our law it is the former only which is properly denominated earnest.‖ The statute, therefore, expressly distinguishes it from part-payment, which is the alternative next in order, and the meaning of which is too plain to need either comment or illustration.

But the last requisite of the statute 'or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents lawfully authorized,' cannot be dismissed so easily. And, first, it is clear, that by the words, 'note or memorandum of the bargain,' the legislature did not intend a formal instrument of contract, on the face of which a mutual obligation should appear: it is enough of it show that a bargain has been made, which the party sought to be charged has recognised by his signature.* But it is essential that a *bargain* should be shown—the names, therefore, of both buyer and seller,† the commodity and the price,‡ must all distinctly appear. If any of these ingredients are wanting, it is impossible to say that the note or memorandum is evidence of a bargain. The bought and sold notes of a broker will, in general, as will presently be seen, satisfy the requisites of the statute; but then they must agree in their terms, for how can that be a bargain, the particulars of which are differently understood by the parties? Thus, where the note delivered to the buyer described the commodity by mistake as 'Riga Rhine hemp,' while that delivered to the seller, stated it to be 'St Petersburgh clean hemp,' it was considered insufficient, as evidence of the bargain.§

But, secondly, the note or memorandum must be signed by the party to be charged, or by his lawful agent. Now it is unnecessary here to enter into the general question who is an agent recognised by the law: because, for the purposes of this clause, any one will be an agent, who may fairly be considered as acting for the party in the particular transaction.‖ Thus it has been frequently determined, with a just regard to the convenience of trade, that a broker in negotiating a sale, is to be looked upon as agent¶ both of the buyer and of the seller. So also an auctioneer.* The agent must, however, be a third person. One of the contracting parties cannot constitute himself agent for the other, even with his consent and approbation.† Nor can a broker, expressly employed to sell certain goods, delegate, without the assent of his principal, that authority to another.‡ A signature by one of several partners will of course be sufficient, and even among part-owners only of the particular commodity, a subsequent parol adoption of the rest will render the signature of one the act of all.§

The note or memorandum must be *signed:* but in the interpretation of that word 'signed' considerable laxity has been admitted by the courts. Thus, not only has it been held sufficient that the name of the party to be charged should appear on the memorandum in the hand-writing of himself or his agent, without any formal signature at the foot;‖ but the requisite has even been considered as complied with, where the *printed* name has appeared: at all events, if the party has authenticated it by his own hand-writing on some other part of the instrument. This departure from the statute (for so, with all our respect, we must take the liberty of calling it) is attributable to Lord Eldon, when presiding in the Common Pleas. An action¶ was brought for the non-delivery of a quantity of gin. At the time of the order a bill of parcels was delivered to the plaintiff (the buyer) partly printed and partly written, 'London,—Bought of Jackson and Hankin, distillers, No. 8, Oxford Street,' was printed; then followed in writing '1000 gallons of gin, &c, 350*l.*' There was no signature. 'The question' said his lordship, 'is whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed as well as his written name.' It has been decided** that if a man draw up an agreement in his own hand-writing, 'I, A.B. agree,' and leave a space for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. Now that is a stronger case than the present. This, however, ought not to be considered as an express decision on the point, because there were in that case, as we shall shortly have occasion to remark, other circumstances sufficient

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* Hinde v. Whitehouse, 7 East, 558. Kilnitz v. Surry, 5 Esp. 267. Tolser v. West, Holt, 178.

† Cooper v. Elston, 7 T. R. 14.

‡ Blenkinsop v. Clayton, 7 Taunt. 597.

§ Datur autem arrha vel simpliciter, ut sit argumentum duntaxat et probatio emptionis contractæ vel ut si annulus detur; vel ut simul postea cedat in partem pretii, data certa pecunia. Cum arrha tantum ut symbolum data est, impleta emptione, i. e. re tradita et pretio numerato, restituenda est emptori; cum in certa pecunia, cedit in defalcationem pretii, nihilque repetitur sed reliqua pecunia, re tradita, exsolvenda est. Vinnius Commen, in Inst. 1. 3. tit 24. And the giving of earnest had this effect—Is qui recusat adimplere contractum, si uidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur; licet super arrhis nihil est expressum. Inst. de Empt. et Vend. Which is still the rule of the French law. Si la promesse de vendre a été faite avec des arrhes, chacun des contractans est maitre de s'en departir—celui qui les a données, en les perdant; et celui qui les a recues, en restituent le double. Code Civile, 1590.

‖ If given for any other purpose than as a token of ratification, it is not properly *earnest*, 5 Co. Rep. 117; and the purpose should be declared at the time of giving it. 2 Vern. 606.

* Egerton v. Mathews, 6 East, 307. The note was in this form—'We agree to give Mr Egerton 19*d.* per pound for thirty bales of Sumatra cotton, customary allowances, cash 3 per cent, as soon as our certificate is complete. MATTHEWS & TURNBULL.'

It was objected, that as the contract was executory, and the action, therefore, founded upon mutual promises, the note should have shown some undertaking on the part of Egerton (the plaintiff.) sufficient to bind him in law; else no consideration appeared for the promise of Matthews & Turnbull (the defendants,) and consequently no bargain; but the Court at once decided against the objection. And see Seton v. Slade, 7 Ves. 265.

† Champion v. Plummer, 1 N. R. 254. That was a memorandum signed by the seller only, and containing no mention of the name of the purchaser. Held, therefore, insufficient.

‡ Elmore v. Kingscote, 5 B. & C. 583.

§ Thornton v. Kempster, 5 Taunt. 786. And the same point has been determined in Cumming v. Roebuck, Holt, 172; and in Grant v. Fletcher, 5 B. & C. 436.

‖ The authority, therefore, need not be in writing, 1 Esp. 106. 1 Sch. Lef. 22. And it may of course be revoked at any time before the note is actually signed, even though the bargain may have been concluded. 2 Campb. 339. n. 3 Campb. 127, 1 M'Clel. 25.

¶ 1 Esp. 105. 15 East, 107. 2 Campb. 337. 6 B. & C. 117. 1 Stark. 128.

* 3 Burr. 1921. 7 East, 567. 1 Campb. 513. 2 Taunt. 38. 4 Taunt. 209.

† And, therefore, in Wright v. Dannah, 2 Campb. 203, where the seller wrote the note by the direction and dictation of the buyer, it was held, nevertheless, insufficient to charge him. And in Farebrother v. Simmons, 5 B. & A. 33, an auctioneer who had made an entry of the purchase was not considered as an agent for the purchaser, where the action was brought in *his own name*. And see Rayner v. Linthorn, 1 R. & M. 325. Cooper v. Smith, 15 East, 103.

‡ Henderson v. Barnwall, 1 Y. & J. 387.

§ Soames v. Spencer, 1 D. & R. 32. It seems almost unnecessary to state, that an entry of the contract in his sale-book, made by the broker, and signed by him, is a sufficient memorandum. 2 Campb. 337. And that although the original entry be unsigned, yet if the bought and sold notes copied therefrom be signed, the statute will be satisfied. 6 B. & C. 117.

‖ Knight v. Cuckford, 1 Esp. N. P. C. 190.

¶ Saunderson v. Jackson, 2 B. & P. 238.

** Knight v. Cuckford, ante.

to cure the defect of signature, if it existed. But the dictum subsequently received a qualified ratification in the case of Schneider v. Morris.* That was also an action against the sellers for non-delivery. The bill of parcels (which was the memorandum relied upon) was in these words 'London, 24th October, 1812.—Messrs John Schneider and Co. bought of Thomas Morris and Co. Agents,' &c. 'Cotton,' &c, all printed except the names of the buyers, which was in the hand-writing of one of the defendants. The court held that there was a sufficient signature, on the ground that the defendants had recognised the printed name as their signature by writing, on the same paper and as connected with the same transaction, the names of the buyers. Lord Ellenborough at the same time took occasion to add, 'If indeed this case had rested merely on the printed name, unrecognised by, and not brought home to, the party as having been printed by him or by his authority, so that the printed name had been *unappropriated to that particular contract*, it might have afforded some doubt, whether it would not be intrenching upon the statute to have admitted it.'

We have said, that by the words 'note or memorandum,' the statute could not have intended a formal instrument; and there may therefore be nothing unreasonable in considering a bill of parcels, an invoice, or even a printed catalogue at an auction (provided it contain all the conditions of sale) as included under the term. Still, it might have been supposed that some one entire document was contemplated, in which all the requisites above mentioned should be found. But the courts, looking to the supposed intention, conceived that the purpose of the legislature would be answered, if there existed sufficient evidence in writing of the transaction, although not found in any single document, but to be collected from several. This will be best illustrated by the following instances. In the before mentioned case of Saunderson v. Jackson,† there was, in addition to the printed invoice, the following letter sent from the sellers to the buyer. 'Sir, we wish to know at what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder.' (signed) 'Jackson and Hunkin:' and it was held, that this letter might be connected so as to supply any defect of signature on the invoice. In Allen v. Bennett,‡ which was likewise an action against the sellers, the order had been signed in the book of the buyer by an agent of the seller, but the *name of the buyer* did not appear in the entry: it was held, however, that this defect was cured by a letter subsequently written by the buyer, referring to the order, and requesting that it might be executed. And in another case, a letter from the buyer to the seller, (complaining of the quality of the goods) and the answer of the latter, were considered as together constituting a sufficient memorandum of the bargain.§ It is manifest, however, that before this use can be made of them, the papers must appear to be so connected as to relate to, and form parts of one entire transaction; and that, either from the internal evidence of which the jury are to judge,‖ or from actual annexation at the time of the contract. In Hinde v. Whitehouse,¶ which was a sale by auction of warehoused sugars, the auctioneer had before him at the sale, a printed catalogue containing the lots, marks, and number of hogsheads, and the pass weight of the sugars, and also another written paper containing the conditions of sale, which latter he read to the bidders, as the terms on which the sugars mentioned in the catalogue were to be sold; but the two papers were neither externally annexed, nor contained any internal reference to each other. As each lot was knocked down, the auctioneer wrote on the *catalogue* the name of the purchaser: and the question being, whether this was a sufficient memorandum of the bargain, the court held that it was not so, because the bargain (which was on certain conditions) could not be collected from the catalogue alone, and the conditions could not be called in aid, as not being connectible with the catalogue without parol testimony.*

One other condition is imposed on this connexion of separate documents, viz. that the later ones contain nothing at variance with or in disaffirmance of the supposed contract. A memorandum was insufficient, for want of the signature of the party to be charged; and it was attempted to supply the defect by a letter from him, in which he recognised the order, but insisted that the goods had not been delivered in the time stipulated, and therefore, that he was not bound to receive them; this attempt, however, the court refused to sanction.†

The section of the statute, which we have been thus minutely dissecting, applies, it will be recollected to those sales only, where the value of the goods bought at any one time exceeds 10*l*. Sales of a less amount remain as they were at common law, with one exception, which is this: The fourth section of the same statute enacts, 'that no action shall be brought whereby to charge any person upon any *agreement that is not to be performed within the space of one year from the making thereof*, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.' On this clause it will be sufficient for our purpose to remark that, the word 'performed' has been construed to signify the completion of the agreement; and consequently, unless the parties at the time of making the bargain, contemplated the possibility of a complete and not merely a partial performance within the year, the requisites of the statute must be complied with.‡

We have now considered all that is necessary for rendering a sale valid and complete, both at common law, and as respects the statute of frauds. We have also seen that the effect of the sale, when thus complete, is to transfer the property in the goods from the seller to the buyer. It follows, that we proceed to inquire what are the consequences of that transfer, as attaching upon the goods, while they yet remain in the hands of the seller. And the first and most obvious consequence is this: that from thenceforth, if any loss or damage happen to them, without fault on the seller's part, it will fall on the buyer, whose property they are. In technical language, they are said to be from the time of the sale, at the risk of the vendee, a result in which the civil law agrees with our own, although it arrives at it by a different and more circuitous process.* And here perhaps it may be convenient to pause; lest the narrow limits which are assigned us, should render it necessary to cramp a subject sufficiently important to justify a detailed investigation.

*2 M. & S. 286.
† 2 B. & P. 238.
‡ 3 Taunt. 169.
§ Jackson v. Lowe, 1 Bing. 9. And see Phillimore v. Barry, 1 Campb, 513.
‖ Jackson v. Lowe.
¶ 7 East, 568.

*The same point was determined in Kenworthy v. Schofield, 2 B. & C. 945.
† Cooper v. Smith, 15 East, 103. And the principle has been since recognised in Elmore v. Kingscote, 5 B. & C. 583; and Richardson v. Foster, 6 B. & C. 487.
‡ Boydell v. Drummond, 11 East, 142. And see 1 Salk. 280; Skin. 353; 1 Lord Raymond, 316; 3 Burr. 353; and 1 B. & A. 722.

* According to the civil law, by the sale a reciprocal obligation is contracted, binding the seller to deliver—the buyer to pay. Where performance on one side is rendered impossible, without any fault in the party, he is released from his obligations, while that of the other party remains good. If, therefore, goods sold, and remaining in the possession of the seller, are accidentally destroyed, he cannot be called upon to deliver them; but the buyer remains, nevertheless, under the obligation to pay. Our own rule is certainly more simple and direct than this, whatever other disadvantages there may be in considering property to be changed without delivery.

## LORD KEEPER GUILFORD.

Concluded from page 187.

The following is the character of the lord keeper given by his brother and biographer, upon which it will be necessary to make a few comments.

'He was descended of a noble family, virtuously educated: an early student in the law, signalised in his first performances, preferred for his abilities; passed gradually from the meanest initiation of practice through every degree of business and preferment in the law; court-keeper, practiser in the king's bench, chief in his circuit, king's counsel, solicitor-general, attorney-general, chief justice of the common pleas, lord keeper of the great seal and created a baron; and in all this walk, trod upon no man's heels, for he entered only by vacancies, and never by ungrateful removes, and was helpful and a friend to those whom he succeeded, especially the Lord Nottingham, who almost owned him for his successor. While he was chief justice he was taken into the privy-council, and then into the cabinet. He travelled most parts of the kingdom as judge in the several circuits; and gained the friendship, I had almost (and I might have) said the love, of the chief gentry of England, who afterwards stood by him, against divers attempts to remove or dishonor him. And notwithstanding his continual employments in church and state, many thought his room, or rather his places, worth crowding for; and however in nice matters it is more than human not sometimes to err, yet he stood against all as a rock immoveable; and nothing was ever found, even by the most discerning of a popular faction, that would or (in truth) could impeach his fame, probity, or honor. He served the crown steadily and according to law; and ever gave cogent reasons in public for what he did. No impression of fear, flattery, or interest, did ever taint or divert his justice. In his person he was modest to extremity; and yet in doing his duty enough assured. He was a declared enemy to pomp and vain glory. He was not an orator as commonly understood, that is a flourisher, but all his speech was fluent, easy, and familiar: and he never used a word for ornament, but for intelligence merely; and those who heard him speak, though, in ordinary conversation, had scarce room left to ask any explication or enlargement. He was a lawyer (modestly speaking) not inferior to any of his time; and knowing in records and histories, not only of England, but in general. He was master of the European languages, as French, Italian, and

Spanish, and had entered into those of High and Low Germany. He was adept in natural philosophy and mechanics, and no stranger to the mathematics. A musician in perfection, both practical and speculative, being a performer, composer, and (in print) a philosopher, as to the most recondite secrets of that art. He was covetous of nothing more than the society of the virtuosos of his time, as Lely, Moreland, May, Moore, Flamstead, and others of that tribe, who all courted him, and embraced his conversation, and many owned to profit by his encouragement and protection. He was civil and affable to all; and conversed, even with his enemies, without offence, and hated to be waited upon when he might give despatch. His course of life was unexceptionable; no manner of vice encouraged, nor by him known within his walls. His diet plain, and meals hospitable and profitable. His most intense study was to amend whatever he found amiss and amendable, where his employment gave him means and a latitude to do it. His zeal was to do all the good he could to his country; and that he thought best done by supporting the church and crown of England in all due and legal prerogatives, and thereunto he adhered during all his life, and no motive whatsoever made him swerve. Whatever he did in public was legal and effectual, without any affected lustre or handles to fame, if he could avoid them. No wonder he is so soon forgot. He never had, nor asked for profit, any boons of his majesty; and at the end, left but a moderate estate to his children, which one would think should have been by common profits much more; but thereby he demonstrated that corruption had no share in what he left. In short, he had a virtuous disposition, orderly and regular course of life, void of all pride and affectation; the utmost regard for truth and right; a vast extent of skill in the law and national constitution, and knowledge of men and the world; the love and esteem of the best; impartiality in his justice and dexterity in the forms and administration of it; sense of his duty, public and private, with industry and affection duly to perform it; he was patient in hearing, modest in determining, compassionate in severities, othodox and exemplary in the established church, and averse to all its enemies; for all which he had a visible temporal reward; and that is, dying as he lived, without stain or diminution of his honor, authority, or greatness, in the height of which he left the world. This character which I have here given, is not out of opinion, rumor or any means of fame whatever; but the result of my own personal knowledge and proof, and at the hour of death I can veritably swear to every article of it.'

In attempting to form a more just and accurate, opinion of the lord keeper's character than is to be derived from the foregoing partial sketch, it is proper to regard him in connexion with the times in which he lived, and with the state of feeling and scale of principle which then prevailed. If in his public character Lord Guilford never rose above the prejudices and feelings of the age, he did not, like many of his cotemporaries, sink without shame into those corrupt practices with which the higher ranks of society were infected. He was unstained by that loose prostitution in politics, and by that abandoned corruption which darkened the character of Sunderland and Jefferies.

Honest in his opinions, and in the expression of them, he refused upon more than one occasion to sacrifice them to his interests. But his character was altogether destitute of elevation. Possessing none of the elements of greatness, seldom in mind and never in feeling did he rise above mediocrity. He was thus led into meannesses, and sometimes into compliances, which men of loftier principles would have despised. Though not altogether free from the imputation of corruption in his judicial station, the accusation rests upon no substantial foundation, and his general character renders the justice of it improbable. Perhaps the most valuable quality which the lord keeper possessed, was that discretion which in all the transactions of life is so sure a guide, and which enables a man of moderate powers to accomplish what the highest genius and talent, if misdirected, must fail to attain. As a lawyer, the name of the Lord Keeper Guilford has always maintained a respectable station; but it does not occupy the foremost rank. To his efforts to effect a reform both in the common pleas and in the court of chancery, the greatest credit is due. In private life, his character was certainly excellent. Under all the toils of office, and amid the distractions of political life, he sedulously maintained that affectionate intercourse with his own family, the loss of which is ill supplied by all that the most successful ambition can offer. The fervent attachment, the regard, approaching to reverence, which were felt for him by his brothers, and which are so quaintly but beautifully expressed by his biographer, bear a striking testimony to the worth and goodness of his heart.

Some anecdotes of the lord keeper have been preserved by his brother, which are transcribed not only on account of the amusement they cannot fail to afford, but also as showing that he wanted that strength of character which prevents others from even attempting to render the possessor of it ridiculous.

Lord Sunderland, whose designs were generally opposed by the lord keeper, exerted all his wit to render him ridiculous. 'All the artillery of foul mouths,' says Roger North, 'were pointed at him; and the Earl of Sunderland marched at the head of them, who commonly gave out the signal.

'His lordship's virtuous course of life was a vile obstacle, and slanders on that head would not stick. But I shall show some snares laid to catch him: in the mean time, vilifications plenty: those were at their tongues' end. He was neither courtier nor lawyer, which his lordship hearing, he smiled, saying, 'that they might well make him a whoremaster, when they had dislawyered him.' And to show their intent of fixing some scandal and contempt on him, I shall allege a ridiculous instance or two. His lordship's brother-in-law, more than once named in these papers, came to him seriously with advice; which was, that he should keep a whore, and that if he did not, he would lose all his interest at court, for he understood from very great men (the Earl of Sunderland and his gamesters, I suppose,) that he was ill-looked upon for want of his doing so, because he seemed continually to reprehend them for practising the like, as almost every one did, and, if his lordship pleased, he would help him to one. His lordship was in his mind full of scorn at this proffer, which the messenger did not penetrate; and it was enough to decline the counsel, and not accept of his assistance. And with his nearest friends he made wonderful merry with this state policy, especially the procuring part, and said, 'That if he were to entertain a madam, it should be one of his own choosing, and not one of their state trumpery.' But his lordship had deeper reflections: that, besides the sullying his character, if he had such a snake in his bed, they would find a way to come, by her, into his most retired intentions: for the courtiers knew the use, that, in politics, might be made of the fair ladies, whom they could charm better than his lordship: and no spy like a female.

'To show that his lordship's court enemies, the Earl of Sunderland in particular, were hard put to it to find or invent something to report tending to the diminution of his character, I shall give an account of the most impudent buffoon-lie raised upon him, and with brazen affirmations of truth to it dispersed from the court one morning, that ever came into fools' heads; and Satan himself would not have owned it for his legtimate issue. It fell out thus: A merchant of Sir Dudley North's acquaintance had brought over an enormous rhinoceros, to be sold to showmen for profit. It is a noble beast, wonderfully armed by nature for offence, but more for defence, being covered with impenetrable shields, which no weapon could make any impression upon; and a rarity so great that few men in our country have in their whole lives opportunity to see so singular an animal. This merchant told Sir Dudley North, that if he with a friend or two had a mind to see it, they might take the opportunity at his house before it was sold. Hereupon Sir Dudley North proposed to his brother, the lord keeper, to go with him upon this expedition, which he did, and came away exceedingly satisfied with the curiosity he had seen. But whether he was dogged, to find out where he and his brother housed in the city, or flying fame carried an account of the voyage to court, I know not; but it is certain that the very next morning a bruit went from thence all over the town, and (as factious reports used to run) in a very short time, viz. that his lordship rode upon the rhinoceros; than which a more infantine exploit could not have been fastened upon him. And most people were struck with amazement at it, and divers ran here and there to find out whether it was true or not; and soon after dinner some lords and others came to his lordship to know the truth from himself, for the setters of the lie affirmed it positively, as of their own knowledge. That did not give his lordship much disturbance, for he expeeted no better from his adversaries. But that his friends, intelligent persons, who must know him to be far from guilty of any childish levity, should believe it, was what roiled him extremely: and much more when they had the face to come to him to know if it were true. I never saw him in such a rage, and to lay about him with affronts (which he keenly bestowed upon the minor courtiers that came on that errand) as then; for he sent them away with fleas in their ear. And he was seriously angry with his own brother, Sir Dudley North, because he did not contradict the lie in sudden and direct terms, but laughed, as taking the question put to him for a banter, till by iterations he was brought to it. For some lords came, and because they seemed to attribute somewhat to the avowed positiveness of the reporters, he rather chose to send for his brother to attest, than to confirm his bare denial. And so it passed; and the noble earl, with Jefferies and others of that crew, made merry and never blushed at the lie of ther own making, but valued themselves upon it as a very good jest.'

## ENGLISH CASES.

### ROLLS COURT—JULY.

*Marriot vs. Kynnersly.*

Mr Pemberton and Mr Beames for the plaintiff.—This was a bill filed against Mr Kynnersly and the personal representatives of a gentleman named Medison, for a breach of trust, in order to render them liable for certain funds which had been embezzled by their cotrustee, Mr Caye, a solicitor. The following were the circumstances of the case. In the year 1815, Charles Kynnersly, of Montague place, died, leaving the defendant, Kynnersly, his executor. Among his papers was found a package containing East India Bonds, accompanied with a direction that they were to be given to a lady named Marriot. Mr Caye had been confidential solicitor to the deceased, and he represented to Mr Kynnersly that it would not be proper to hand over this fund to that lady without having some settlement made in favor of her infant child, the natural son of the deceased. An arrangement of this description was approved of by all parties. A deed of trust was proposed, to which Mr Kynnersly refused on several occasions to be a party. It was, however, drawn up, and his name was included in it, as one of the trustees. By this instrument, the amount of the India Bonds, 3,620*l.* invested in Consols, was settled on the son of Mrs Marriot (the present plaintiff), to be paid over to him at the age of 21 years, besides a policy of insurance for 2,000*l.* on her life, the annual premium on the latter as well as the expenses of his education were directed to be defrayed out of the interest of the former. Mr Caye, Mr Medison, and Mr Kynnersly were the trustees to this deed, and in their names the Consols were vested. Mr Medison assented to the trust through confidence in Mr Caye; Mr Kynnersly, however, never assented, and never signed the deed. From the year 1815 to 1810, Mr Caye managed the receipts and expenditures with integrity; at that time, however, becoming embarrassed in his circumstances, he resolved, if possible, to appropriate the trust fund to himself. He accordingly persuaded Mr Medison, under a specious representation, to empower him, by a letter of attorney, to sell out the Consols. He then wrote to Mr Kynnersly, who was in the country, informed him that there was a necessity to make sale of a portion of the Consuls, requested his letter of attorney for that purpose, and telling him that by such a proceeding he would at once disembarrass himself of that trusteeship in which he had been involved. Mr Kynnersly, anxious to rid himself of a responsibility so unwillingly and unwittingly incurred, executed and despatched the required document. Thus empowered, Mr Caye made himself master of the 3,620*l.* and in 1822 absconded, leaving the premiums on the policy of insurance in the Equitable Office from 1819 unpaid, which consequently was rendered null. The plaintiff, having come of age in 1827, filed this bill. Mr Medison had died, but his representatives were made liable, and had admitted assets. With regard to them, the Learned Counsel submitted that they were answerable to the plaintiff, and that Mr Kynnersly's case, however hard, was equally clear. A person made trustee against his will could not escape from that office except with the concurrence of those who had appointed him, or by transferring his functions to some other person, under the direction of that Court. His only security consisted in a determination to act. The defendant, in this case, had not availed himself of that mode of proceeding, and continued therefore responsible. The bill prayed the restoration of the 3,620*l.* with its dividends, and a remuneration equivalent to the value which the policy of insurance would have borne had its premium been paid up to the present day.

Mr Tinney, for the defendant, said that if the Court should feel itself bound to decide against his client, it would be called upon to perform an act of the severest justice that could ever fall within the exercise of its functions.

Mr Tinney proceeded, and stated that Mr Clement Kynnersly, the father of the plaintiff, had, long previous to his death, left and directed the India Bonds, which had supplied the lost fund, to be given to Mrs Marriot. He had, however, subsequently made a will, and by that will alone had, in the eye of the law, rendered the gift nugatory. The defendant, who nevertheless was his executor, with the greatest honor and good feeling, had not taken advantage, as he could have done, of this circumstance, but had handed over the Bonds according to their original destination. He had constantly refused to concur in his appointment as trustee; he had not signed the deed, and, in the act upon which it was sought to render him responsible, he had been guided by the confidential solicitor of his deceased relative. He (Mr Tinney) hoped, however, that his Honor would not consider that there had been in his client's conduct any of that wilful negligence or default which influenced the decision of the Court in cases of breach of trust. The Learned Counsel also submitted that it appeared on the plaintiff's bill that Mrs Marriot had previous to her marriage (an event which took place since the occurrence of those transactions) absolved Mr Caye from all liability; that she had the power to do so, as the deed had been voluntary (see Walwyn v. Cook; 3 Merrivale, 707); and that the defendants were also thereby, and a fortiori, absolved.

Mr Tinney's Learned Junior argued very ingeniously on the same side, and, in conclusion, remarked that the plaintiff, by this bill, made a sad return to the defendant, Mr Kynnersly, for his generous conduct, in handing over to his mother that very bond which he sought to compel him to pay again out of his own pocket in consequence of, at most, an inadvertence.

Mr Bickersteth, for the other defendants, confessed that he feared the case was as clear as it was unfortunate against his clients. He hoped, however, that the heavier liability would be thrown upon Mr Kynnersly. Mr Medison had merely acted for the accommodation of the parties interested in the deed. He had placed confidence in Mr Caye; and it was only when he was informed that Mr Kynnersly had assented to the power of attorney that he also had concurred. While all the culpability rested with Mr Caye, the liability lay with Mr Kynnersly.

Mr Swanstead, on the same side, submitted that there ought to be an inquiry into the existence of the deed referred to by the plaintiff's bill; also as to the point whether the plaintiff had ever assented to the proceedings of the trustees, previous to the filing of the bill.

His Honor said that those matters were not referred to in the bill or answer, and could not be suggested by Counsel at the bar. He could not pay attention to, or draw any inference from, such statements. He should look alone to the record. This was a case of great hardship to Medison, but of much greater hardship to Mr Kynnersly. Mr Medison had chosen to place confidence in Caye, and it had been betrayed. By the principles of equity, and that Court was guided in its decision by equity, if he thought proper to commit his trust to the confidence of another, and that other neglected his duty, he (Medison) should suffer for it. Mr Kynnersly's was a different case—a case of greater severity. He (the Master of the Rolls) did admit that scarcely a man out of the profession of the law, and not many in it, would have acted otherwise than Mr Kynnersly had done. But that was no defence. The question was, whether Mr Kynnersly, being unwilling to act, had thrown the trust in hands by which it was liable to be misapplied? Had he been desirous to avoid the responsibility of the trust, he should have refused to concur in its exercise. He (the Master of the Rolls) did not therefore charge Mr Kynnersly with a breach of trust, but with having placed it in hands where it was liable to be misapplied, and was misapplied. But as that gentleman had not committed himself until he had written the letter of attorney, consequently he should be irresponsible for all deficiencies prior to that act—consequently he should not be liable for the failure of the policy of insurance. As Mr Medison had voluntarily accepted the trust, his representatives should be liable for the breach of that confidence which he had thought proper to repose in Caye.

His Honor then directed that there should be an account taken of the moneys which, prior to 1819, had been expended bona fide by Caye, and said he should not give costs against Mr Kynnersly.

Mr Pemberton requested that the fund might be restored as soon as possible, as his client was a young Clergyman, just come from Oxford, about to enter upon his duties, and in want of money.

His Honor directed the money to be paid into Court as soon as possible. He did not suppose there could be any difficulty on the part of Mr Kynnersly, as he supposed he was the gentleman of that name of Staffordshire.

Mr Tinney asked would the Court require the Consols to be replaced now to the same nominal amount as they had been in 1819, as that would be an additional hardship?

*His Honor*—Yes, I can't stop short. The principle of the Court is indemnity.

Mr Egar, for the plaintiff, said that as the bill had been dismissed with costs, as against the defendant, Davies, who had purchased a part of the estate, upon notice, the other defendants ought to be held responsible for those costs to the plaintiff, they having been incurred through their conduct.

The Counsel for the defendants, Drayton and Wilde, opposed this application, on the ground that the plaintiff could have dismissed the defendant Davies from the suit at its commencement, if she had liked, knowing as she did, how the defendant Davies had become possessed of his portion of the estate; instead of that, they had dragged him through this long suit.

The Vice Chancellor decided that the defendants should repay those costs to the plaintiff, as well as their own costs.

Here the case ended. From the number of Counsel engaged in this case, and the confused manner in which the discussion of the minutes was carried on, no less than five or six Counsel speaking at the same time, we found it an impossibility to give anything like a detailed report of the proceedings as they occurred, and we are therefore obliged to content ourselves with the above imperfect sketch of what passed.

EXTRACTS FROM THE GOVERNOR'S MESSAGE.

AUCTION DUTIES.

My attention has been drawn to a decision of the Supreme Judicial Court of the Commonwealth, at the last term in Suffolk, in an action of debt brought by the Treasurer, on an Auctioneer's Bond, for the recovery of a sum of money supposed to have accrued to the Government, under the Statute of 1822, Ch. 87, imposing duties upon Sale by Auction. The act provides *that all Real and Personal Estate*, with certain exceptions not affecting the case, *which shall at any time be exposed to sale at public auction or vendue*, shall be subject to certain specified duties. In the case before the Court, the transaction was an offer at auction to lease certain tenements for five years to the highest bidder of an annual rent for their occupation, for that time. The contract was struck off at a bid of $1950 annually and a Lease, by Deed of Indenture, thereupon executed between the owners in fee, and the Purchaser. It was held by the Court, *that this was not a sale of Real or Personal Estate under the Statute, there being no Estate sold, but a mere contract to create an Estate for years.* 'All that was offered to be sold and was sold, (say the Court,) was an engagement or contract to lease the Estate for five years. It was only in fact to ascertain the Annual Rent in the form of a Sale.'

This construction, although unquestionably sound, and required by the language used in the Statute, was different from that which had been practically adopted at the Treasury, and, in its application, it is apprehended may seriously affect the revenue from sales by Auction. It certainly indicates a defect in the law, through which, by a little management, its provisions may, in many cases, be evaded. Contracts, by auction, to lease real estate are of frequent occurrence. They are made for all periods of time, from a single quarter, to a length of continuance short only of an absolute fee. In principle there can be no difference between a contract for a Lease for five years, and one for ninetynine years, a limitation not unfrequent in the transfer of Real Property. If the law is to attach to no contract of sale by auction, but where the property itself, *in its pre-existing state* is the subject of the sale, a class of cases will escape the tax, which are clearly within the reason of the Enactment. Most transfers may be effected by such executory engagements. Any less estate, carved out of a greater, is as truly a new created interest, as a term for years out of a tenancy in fee. It is intimated in the opinion of the Court, that the sale of an actually existing lease may be within the liability to the duty. But it is manifest that the duty here would be evaded, by a contract to assign a property, less in amount or duration, or in any respect other than the lease itself, with the whole interest held under it. The rule of construction given to the law, may, possibly, also be made to apply to personal property.

For Merchandize itself, a contract in form, to deliver merchandize may, in some instances, conveniently enough be substituted; and in lieu of a sale of goods, there may be only an engagement with the highest bidder, for supplies of goods. For aught I can perceive, all the raw materials for manufacturing establishments or for other objects might, through the intervention of auctions, thus be provided, and their products, in return, disposed of. Instead of a hundred bales of Cotton, for instance, an offer to contract for furnishing this article, in any quantity and for any time, might be the subject of sale to the highest bidder. In this, no property would be sold, but an engagement only to furnish property, and the bid, as in the case of the lease, would but ascertain the price. If, therefore, the Legislature intend, that sales of this description shall hereafter pay a duty, the law requires amendment. The case decided by the Court may be of a class intentionally omitted, but the construction which the law has received will present questions of more important bearing. The subject is worthy of regard, and I recommend the expediency of revising the Statute, to your consideration. Should this be done, it may be necessary to prescribe a mode, by which, when the sale is for a contingent sum, or upon an annual rent, the amount of duty shall be determined.

LAW OF PRINCIPAL AND ACCESSORY.

The Judicial investigation of an appalling outrage upon the inviolability of Habitation and Person, in a neighboring County, during the last year, has induced to a more thorough discussion, and certain understanding of the Law in relation to Principals and Accessories in Felonies. It is now solemnly settled, by the highest legal tribunal, that the Rule of the Common Law, which requires that the principal Felon must be convicted before a supposed Accessory can be put upon Trial, unless by his own consent, is directory to the administration of Justice in this Commonwealth. The Court, indeed, while feeling constrained to yield to the authority, express great disapprobation of this distinction. The late learned and lamented Chief Justice, whose last act, in a life of eminent virtue, true greatness, and public service, was a profound researcher into the foundation and support of the doctrine of the Common Law, in its application to our system of jurisprudence, that he might find wherewithal to overrule it, pronounced the difference which existed, in regard, to the form and manner of Trial of Principals, Accessories before the fact, '*a relic of the unwise refinement of ancient times*,' and suggested 'that the Legislature would probably afford a remedy for future cases.' The unsoundness of a rule, which, however plausibly it may be sustained by reasoning in the abstract, that there can be no Accessory without a Principal, and that there is no Principal until conviction, yet *practically* has a bearing only towards impunity for crime, cannot be apparent. Its effect may be, and often has been, to discharge one guilty man, because another eludes Justice. Successful concealment or escape, or death by the visitation of Providence, or an act of self-violence, may prevent a conviction of him who might be the weak and tempted instrument of another in the commission of crime, and the consequence is entire immunity to the profligate and abandoned contriver and instigator of the wickedness.

Nor is the rule itself well supported by the only reason on which it rests. Innocence is not thereby better guarded from peril. There may be even less safety to the accused from this very course of proceeding. When deeds of rare and dreadful atrocity are perpetrated, and public mind becomes greatly excited, the Trial of a supposed Principal may be precipitated or unconsciously prejudiced, in an honest zeal to reach the more guilty Accessory. But to the Accessory there can be no increase of danger from his previous trial to that of the Principal. He cannot be convicted without proof of the guilt of *both*, and doubt as to the participation of *either* in the imputed offence, will sufficiently avail to his security. So satisfactory, in recent times, were the objections to the law, in that country whence we derived it, that an Act of Parliament was passed in the last reign, for its alteration; and now, in England, by the 7th George 4th, he who hires or procures a felony to be committed, 'may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal Felon, or after the conviction of the principal Felon; or may be indicted and convicted of a substantive the felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice.' The well known circumstances of the transaction to which I have alluded will furnish to your minds the best illustration of the reason for passing a similar Statute here. I submit it to you, respectfully, that it should not be the reproach of an enlightened Commonwealth, in a liberal age, that it became the last repository of the 'relic' of a barbarous jurisprudence.

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STATUTE OF LIMITATIONS.

IN THE HOUSE OF REPRESENTATIVES, JAN. 7.

Mr Gray, from Boston, in offering an order for inquiry into the expediency of altering the limitation laws, said—

He was unwilling to offer orders as matters of course upon trifling subjects; but this was one deserving consideration. It is well known that it is the policy of every government to limit the period within which actions may be commenced. A person by our own laws holding real estate in quiet possession for forty years, gains an exclusive title thereto; and another person having legal claims to that estate cannot enforce them,—he has lost his title by his own neglect in not enforcing it sooner. There is a limit to the bringing of personal actions beyond a period of 6 years. These laws seem to need amendment in several points, and he would state his reasons for it then, because the house would not probably have any more leisure opportunity for listening to them. There are two points in which the law should be amended—one relates to subsequent promises—the other to merchants' accounts.

It is well known that promises, subsequent to the expiration of 6 years from the contract, take any case out of the statute. It was formerly held that not merely a promise to pay, but any admission of the debt was sufficient; and it came to be a proverb that a man could not open his mouth without annulling the limitation. But lately the courts have taken a stronger stand, and have held, that it must be a substantial promise, sufficient to create an obligation *denovo*. A few years since, the late Chief Justice, then a member of this House, brought in a bill, providing that such subsequent promise should be made in writing—it passed the House and was not acted upon in the Senate, therefore the subject remains open for consideration, and seems to demand some careful attention.

The other objection relates to personal accounts—it is provided that the law shall not apply to merchants' accounts. It was held in England, that one item charged within 6 years should draw the whole account after it; but in our State it is decided that there need be no item within 6 years, and that it is in effect deciding that there is no limitation. There has been a case recently decided in which the latest item of the account took place more than 24 years before the action was brought—a case between father and son, brought after the death of the father, who might have been able, if living, to refute the claim; but it was

case had not passed beyond his control, at the time of the service of the writ, to consider whether he will obey the writ of the Supreme Court of the United States or not. On this question he must act on his own responsibility, and not upon the authority of the resolutions of the Legislature. We are not sufficiently conversant with the forms of judicial proceedings, in cases of this sort, to judge how far it could be in the power of the Judge to suspend the execution of the sentence, after the service of the writ of error, if he were so disposed.—*Boston Daily Adv.*

George W. Buchanan has been appointed United States Attorney for the Western District of Penn., in place of Alexander Brackenridge, Esq.

**THE JURISPRUDENT.**

BOSTON, SATURDAY, JANUARY 15, 1831.

## SUPREME COURT.

SUFFOLK COUNTY.—NOV. TERM.

Opinions were delivered by Judge Putnam, in the following cases on Monday, the 10th inst.

*Harvard College vs. Francis Amory, Trustee.*

This was an appeal from a decree of the Probate Court upon the petition of Amory to be discharged as Trustee, under the will of the late Mr McLean, by which the income of a certain amount of property, or funds to be selected from the Testator's Estate by the Trustees, was given, in remainder, to Harvard College and the McLean Hospital. The funds were not specifically designated by the Testator—the amount only being fixed, and the power of selection given to Amory and others, Trustees named in the will.

The selection was made out of certain Manufacturing Stock belonging to the Estate. The Trustees were also Executors of the will. The Petition of Amory to be discharged was resisted on the ground that the funds were not such as the Trustees should have selected; that the investment was injudicious and illegal. And as the stock had fallen in value, they were bound to make up the deficiency. The Court held that the trustees, having the power of selection, were required to exercise a sound discretion in regard to the investment, and, having done so, were not to be charged with any loss. That they were bound to make up any deficiency only in case of fault on their part or a breach of their trust. That it was not necessary that the investment should be made in Government Stock. The Stock of private companies was, in many cases, preferable; such as Bank or Manufacturing Stock. There was risk in all. That risk should not fall on honest Trustees. They were considered favorably, and if they acted with good motive, and with discretion, would be protected. They should be so; otherwise no man would take the hazard of such offices.

Besides, the Court regarded the settlement of the Executors' account in the Probate Court, some years since, with notice to all concerned, from which settlement there had been no appeal, as conclusive upon the subject matter of this action. The Stock had then been selected and appropriated according to the will, and that appropriation was there considered and made the subject of adjudication.

The decree of the Probate Court was affirmed with costs.

QUESTION OF TOTAL LOSS.

*Henry Hall and others vs. the Franklin Ins. Co.*

The Court, in deciding this case, remarked that it did not intend to extend the power of the master to sell beyond the principles laid down in *Gordon vs. Mass. Fire and Marine Insurance Co.*—2 Pickering, 249.—[In that case Parker, Ch. J., says, 'that a master of a vessel, as such, has has no authority to sell the vessel, unless in a case of *extreme necessity*, and where he acts with the most perfect good faith for the interests of those who are concerned in the property.' 'All the Judges, who have adverted to this subject, except Lord Mansfield, have put the authority of the master to sell, upon the ground of extreme necessity.']

This power was to be confined to cases of extreme, cogent necessity; a necessity which prescribes the law for itself, and compels the master to act. It must be an absolute, positive necessity, arising from the facts and circumstances at the time. The duty of the master was to hold the property in safety, as long as possible, for the interest of all concerned.

As to the abandonment, which was set up in the case, the court remarked, that being made while the vessel was sailing and in safety, it could not aid the plaintiffs. The facts and circumstances at the time of abandonment are to govern the case.

As to the repairs, the costs were to be estimated where they were actually made, and not at the place of disaster.

There was no such doctrine as that *imminent danger* of a total loss will justify an abandonment. Such a doctrine would lead to great uncertainty and litigation. The contract was to insure against loss sustained, not against danger of loss.

Judgment of Court, that plaintiffs were not entitled to recover as for a total loss.

[In the case of Peele et al. vs. The Merchants' Insurance Company—Mason's Reports, 3 v., 27—where this subject is considered, Justice Story remarks, 'if the facts then present a case of extreme hazard, and of *probable* expenses, exceeding half the value of the ship, the party may abandon, although in the event, it turn out that the ship is gotten off at a less expense.' 11. Johns R. 293. 2 Starkie, 571. Maule and Selw. 240—248. 'An absolute total loss is not necessary to justify an abandonment. It is sufficient, if at the time it be in the highest degree probable, to sound judgments acting upon all the facts. If there be any general principle, that pervades and governs them (the *cases* on this subject,) it seems to be this, that the right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case the law deems the ship, though having physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost.' 4 Cranch 41, 207. Vide *Wood vs. Lincoln and Kennebec Insurance Company.*—Mass. R. 6, 479.]

*Sproul vs. Hemmenway.*

Motion to set aside the verdict as being against the weight of evidence.

Verdict set aside and new Trial granted.

The Legislature of Ohio has elected Eben. Lane, Esq. a judge of the Supreme Court.

Judge Emmot, in the full vigor of his usefulness, has retired, to the great regret of the Bar. Being more than sixty years of age, by a strange provision lately introduced into our Constitution, he is excluded ftom sitting upon the bench of this State. —*N. Y. Gazette.*

Francis Jeffrey has been appointed King's advocate for Scotland, and Henry Cockburn, Solicitor.

Justice Bayley of the King's Bench resigned his appointment Nov. 13th.

Mr Justice Bayley is to be removed to the Exchequer, in consequence of the opening of that Court inducing the expectation that it will be the means of relieving the King's Bench of some of the business. Mr Taunton will be a Judge of the Common Pleas.

It is understood that Mr Alderson is appointed one of the Judges of the Court of Common Pleas, and Mr Gurney one of the Judges of the Court of King's Bench; and it is said that Mr Justice Bayley will receive an appointment in the Court of Exchequer, for the trial of Nisi Prius causes in that Court.

It ought to be generally known, that any attorney of the Court of King's Bench, or Common Pleas, may now be admitted an attorney of the Court of Exchequer, on payment of a fee of *one shilling;* and that, being so admitted, he may practice in the Court of Exchequer, without the intervention of a clerk in Court.

Mr Brougham is appointed Lord Chancellor of England—Lord Althorp Chancellor of the Exchequer; Mr Denman, Attorney General, and Mr Bickersteth, Solicitor General; Mr Robert Grant, Judge Advocate.

Sir James Burrough, late one of the Judges of the Common Pleas, having in his judicial capacity, on the Western Circuit, excited the resentment of some loose characters, an attempt on his life was, it is said, contemplated by some of the Hampshire and Wiltshire rioters a few days since, whose nefarious plans were, however, frustated by Sir James and his family setting off for London in the dead of the night.

Mr Brougham, in moving for leave to bring in a Bill for establishing Local Jurisdictions in England and Wales, took occasion to complain of the conduct which the attorneys had adopted towards him. He represented them as having entered into a conspiracy against him, with the view of ruining him in his profession, solely because he wished to make the law accessible to the poor as well as to the rich. He declared, however, that all their threats should not have the slightest effect in deterring him from the discharge of his duty.

LAW REFORM.—*November.*—Mr Campbell gave notice that it was his intention shortly after the recess to move for leave to bring in a Bill to amend the law with respect to property and succession, containing, among other provisions, a clause entitling parents to succeed as heirs to their children: also a Bill to amend the laws relating to dower; and a Bill to abolish fines and recoveries, and to substitute other assurances. Those Bills would make important changes in the laws of England, but he wished to observe at the same time that they came recommended by the unanimous sanction of the Law Commission.

WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

EVENTS IN PARIS, during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

GRAY & BOWEN, have in preparation, and will very shortly put to press,

A NEW DICTIONARY OF MEDICAL SCIENCE AND LITERATURE; which will contain a concise account of the various subjects in *Anatomy, Physiology, Pathology, Therapeutics, Materia Medica, Surgery, Obstetrics, and Pharmacy*, with the Etymology and Orthoepy of the terms of their Greek, Latin, French, and German synonymes;—a copious Bibliography appended to the different articles, and Biographical Notices of the most eminent Authors in the different departments of Medical Science, with a Catalogue of their principal works mentioned and an Epitome of the existing state of Medical Science and Literature. By Robley Dunglison, M. D. Professor of Medicine in the University of Virginia &c, &c.

While many of the nations of Continental Europe possess Dictionaries, which have kept pace with the advancing condition of Medical Science, Great Britain and America possess it may be said, but *one* of a concise character,—that of Hooper,—which independently of its want of accuracy on many points, is incontestibly far behind the present state of Medical Science and Literature, and unfit for the purposes of the Medical Student. In proof of this, it will be sufficient to remark, that the New Dictionary will contain at least *five thousand words* more than are to be found in that publication,—while the circumstance of the Dictionary of Hooper being stereotyped in this country, renders it impracticable to make the necessary additions to it, were the ground work such as to render such a course advisable.

The work will not be a mere Dictionary of terms; it will comprise concise histories of diseases: a description and doses of various kinds of medicine, with formula for the different Pharmacentrical preparations, &c, &c.

The important publications daily appearing in France and Germany, have induced the author to add the French and German synonymes to the various terms; so that the work will really contain the substance of an English, French and German Dictionary, at a comparatively trifling expense.—The French Index will be found to include every word in the 'Dictionaire des Science Medicales,' which consists of sixty volumes, as well as in the smaller Dictionaries more recently published.

Great attention has been, moreover, paid to the Greek and Latin synonymes, so that the Dictionary will, it is trusted, form a safe and convenient guide to the study of ancient and modern authors on Medicine.

It will be comprised in one large volume, 8vo. Oct. 23.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

GRAY AND BOWEN, No. 141, Washington Street, Boston, have recently published the following valuable works.

I. A DESCRIPTION OF TREMONT HOUSE; WITH ARCHITECTURAL ILLUSTRATIONS.—4to.

'Jam scires ab introitu primo—herculentum et amvenum videre et diversonium.' APULEIUS, M. A V.

This work is embellished with a copper-plate engraving, representing the front of the house, and thirty lithographic prints, exhibiting the details of the structure. Its object will be understood by the following extract from the preface.

'The present publication is intended to satisfy a curiosity, which frequent inquiries for a description of Tremont House were supposed to indicate.

'Its original plan was to furnish such particulars relative to this establishment as strangers might wish to possess, but it has been extended so as to comprehend many architectural details, which will probably be interesting to mechanics; as much of the ornamental work of Tremont House was copied or adopted from books, not commonly in their hands, and has not before been executed in this country.

II. AN EPITOME OF UNIVERSAL GEOGRAPHY; or, a Description of the various Countries of the Globe; with a view of their Political Condition at the present time. With sixty Maps. By NATHAN HALE.

III. A DICTIONARY OF GENERAL KNOWLEDGE; or, an Explanation of Words and Things connected with all the Arts and Sciences. Illustrated with numerous Wood Cuts. By GEORGE CRABB, A. M., Author of 'English Synonymes,' 'Technological Dictionary,' and 'Historical Dictionary.'

IV. THE VESTAL—A TALE OF POMPEII. 1 Vol. 12mo.

'Oh Time, thou beautifier of the dead,
Adorner of the ruin.' CHILDE HAROLD.

V. AUTHORSHIP. A Tale. By a New Englander over Sea. 1 Vol. 12mo.

VI. AN ORATION; Delivered before the Phi Beta Kappa Society, Cambridge, Mass. August 26th, 1830. By the Rev. ORVILLE DEWEY.

VII. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

VIII. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

IX. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near.
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

LAW BOOKS.—HILLIARD, GRAY & Co. 134 Washington Street, have on hand a large Stock of *American and English Law Books*, comprising a complete assortment of the best editions of all works in general use. They also purchase and sell second hand Law Books—terms liberal.

H., G. & Co. supply any volumes that may be wanted of Massachusetts or Pickering's Reports.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, JANUARY 22, 1831. NO. XXVI.

## DEBATE ON CHANCERY REFORM,

IN THE HOUSE OF COMMONS, JUNE, 1830.

REMARKS OF MR BROUGHAM.

Mr Brougham rose, and began by observing that the motion brought forward by the Hon. and Learned Gentleman (Sir C. Wetherel) put to the test, all those persons who hitherto professed themselves anxious for a reform in the Court of Chancery. It ought to be borne in mind that, since the time when the Commissioners were appointed, in 1811 and 1824, new circumstances had arisen, and new facts had been elicited, while a state of things appeared differing altogether from that which had existed before. In 1827, the present Lord Chancellor shortly after his accession to office, pledged himself to effect reform, and seemed only anxious to obtain time for the purpose. 'Give me,' said he, 'but a little time—but one season, and I pledge my reputation—I pledge myself on the faith of Parliament, on the faith of the Court of Chancery, and of the practitioners in that Court, that I will mature a plan for securing the discharge of all the business faithfully and accurately.' Such was the pledge of the Lord Chancellor. Well, they gave him not one year, but three, and in the lapse of that time no change was thought of; no reform agitated by him; no bending of the understanding of a man young in years but still younger in office —(cheers). No alteration whatever was made in the Master's office, except that payment was to be made by salaries, and not by fees. This was all that was done towards reforming an office which was now a sink of delay, and a storehouse of vexatious abuses—(cheers). What did this state of things imply? What argument was to be drawn from it? Nothing more than this—the Lord Chancellor would seem to say, 'Give me that system which shall enable me to hold the Great Seal without discharging any of the duties of my office.' This was the reform to which that Noble and Learned person appeared to have pledged himself. He (Mr Brougham) had likewise pledged himself upon the question of Chancery reform, and here he must say that he thought he might have trusted to the habits of industry and exertion for which the Lord Chancellor was well known, as a security that his Lordship would not sanction unnecessary delay by making the Woolsack a place of slumber in the midst of power, instead of a place of duty and of judgment—(cheers). He thought he might have safely relied that the business of the suitors would alone be attended to; but as he now found that the office of Lord Chancellor was to be a place of perfect repose, he, for one, could not think of voting away the money of the people of England, in order that that noble person might lead a more quiet and less active life. Here he must further say that he was now ready to accept the challenge which had been held out to him by the Right Hon. Gentleman opposite, and to show that all that was said as to the necessity of this appointment, was a mere vision, a Midsummer Night's Dream, and quite as baseless. With respect to the statement about five hundred cases being in arrear, he considered that of no import whatever. So small an amount could not be regarded as any arrear at all. But what could he say of the Court of Exchequer? It appeared they were now discussing the merits of that Court, at an hour when the House was fast going into the night's tomorrow—(hear, hear). That Court, in which business there was none, and of which it was said that parties might think themselves lucky if they caught the Judges sitting, as they were like pheasants in November, no sooner down than up again—(a laugh). What could he say of Learned Judges, who knew of no change, except that they wore scarlet robes at one period of the year, and doublets without fur at another? Yet, could the fact be for a moment imagined, though it was nevertheless true? In the Court of Exchequer there were fifteen cases in arrear within a single fortnight. The business in that Court was continually going down till it reached Zero, and at last arrived at a point which meant nothing, or, rather, at a negative quantity, which was worse than nothing. He was not a little surprised at the course taken this evening by his Hon. and Learned Friend, whom he might now call his successor for Winchelsea (Mr J. Williams), and whose celerity in running after and detecting former abuses was only equalled by the speed with which he seemed anxious to run away from new ones. His Hon. and Learned Friend, who, from long experience, perfectly understood both sides of the question, told the House that they ought not to tax judicial officers any more than other individuals to a degree beyond their powers. This course of argument was very new to his Hon. Friend, who now, for the first time, discovered that the Chancery Judges were worked too severely—(hear, hear). But what, he would ask, were the exertions of the Master of the Rolls? Why, he sat after breakfast, instead of after dinner; he sat for six hours, instead of four; and he devoted one or two holidays to hear arrears instead of otherwise disposing himself—(a laugh). He (Mr Brougham) was inclined to allow the Judges all reasonable indulgence and relaxation; and if it was necessary that they should be composed of persons of profound learning, enlarged views, and great enlightenment, they ought not to be treated like galley slaves. But then it was quite absurd to suppose that the present Judges of the Court of Chancery had too great a weight of business imposed upon him. The Vice-Chancellor would laugh to scorn any man who should presume to commiserate him as too highly worked. Then as to the Master of the Rolls, he would ask if that Learned person was a slave, except in the manner of those parties in the West Indies, who exerted themselves during the day and amused themselves, in the evening? The Vice-Chancellor followed this rule; he exerted himself during the day, and amused himself in the evening. To found the necessity of a new appointment upon the principle of the Judges being overworked, was most preposterous—it was a baseless vision, idle as the tale of *Robin Goodfellow* and *Puck*. The Honorable and Learned Gentleman, in the course of some further observations, maintained that to countenance the proposed appointment of an additional Judge was like purchasing an additional horse to drag a coach to the top of a hill, when one might be hired for the purpose. Upon the principle now before the House, there was to be no successor to the purchased horse; but his proposition was, that there was no necessity whatever for the purchase. The carriage had already gained the top of the hill, drawn by those two excellent horses, the Vice-Chancellor and the Master of the Rolls. Where, then, was the occasion for any auxiliary?—(a laugh). But his objections to this motion were still higher than those he had yet stated. If there was any one object which was more desirable than another to be attained in judicial administration, it was, that everything connected with the Court of Chancery should be pure and unsullied. But even though that Court should be made the purest tribunal in the world—even if the Courts of Common Law should, as was suggested by his Hon. and Learned Friend (Mr J. Williams), draw back from it a large portion of its business, an event which he (Mr Brougham) would call a restoration, still it would be necessary to look to its constitution in every respect; for so long as infants and guardians were found in the country, and so long as various complex matters of judicial administration remained to be decided, a Court of Chancery could never cease to exist. Such a Court must always be a tribunal of the highest importance in the country, and it was therefore the more necessary, that all persons presiding over it should be fully qualified to discharge the great responsible duties which devolved upon them. But he would ask, was it possible that, after a proposition like this should have been once carried into a law, a proposition which went to make the Chancellor's situation a judicial sinecure, that any such persons could be found as candidates for the seals? In such a case the Lord Chancellor would be a mere Judge of Appeal —nothing more. He would cease to be a man looked up to as the first lawyer in the country, and filling the first judicial office in the country—an office of which he ought at all times to be the ornament—(hear). In such a case the House of Lords would lose all its authority, and the first tribunal of the land it just influence. His Hon. and Learned Friend, the Solicitor General, among others, had used the argument that in 1811, Sir Samuel Romilly, Sir John Leach, Mr Canning, and others, used the same language, and indulged in similar anticipations as to the effects of the measure that was then contemplated; and those Gentlemen now came in all the confidence of triumph, and said, 'Look at the result;' and, mingling a little pity for the illustrious dead with their feeling for the living, in whose behalf this argument was used, they said, 'See how the wisest of us all, when we overstep the bounds assigned by Providence to the human faculties, are deceived, and how our predictions are set at nought!' It was asked whether anything like what those distinguished persons foretold had since occurred—whether anything like a tendency to make the Great Seal a sinecure had happened? If he were to look to any one thing in the life of that illustrious, learned, wise, and virtuous person whose name had been just mentioned—Sir Samuel Romilly—upon which to found an indisputable claim to the

respect and veneration of his posterity, he knew of no incident to which he would more readily appeal, for the vindication of his fame, than this particular one. Sir Samuel Romilly said, 'You will get less able men to fill the office of Lord Chancellor than while there has been only the Master of the Rolls. Hitherto, while this has been the case, the Government would not dare to give the Great Seal to any man whose ability for the discharge of his high functions was not conspicuous and acknowledged, and in whom the profession and the public had not a high confidence.' He (Mr Brougham) had a very high respect for the present Lord Chancellor. That eminent personage had disappointed him in some respects, although not in others. He wished to say nothing in the slightest degree partaking of harshness towards him; but, in the discharge of a duty which was rendered additionally painful by his personal respect for the Lord Chancellor, he thought, and he would therefore fearlessly say, that, latterly, the words of Sir Samuel Romilly had been verified, where he said that the contemplated measure would facilitate the giving the Great Seal to persons who, if there had not been a Vice-Chancellor, would probably never have held it. He did not know that his ears had served him rightly when he fancied he had heard it asked whether the appeals had increased. Why, he would ask in return, what did the Chancellor do except to hear appeals? And on this point he would rest the fame of Sir Samuel Romilly. Had any Chancellor ever heard fewer causes, had any Chancellor done so little Equity business as the present?—(hear, hear). But this was not necessary to his argument, for the Chancellor had now the assistance of the Vice-Chancellor. The records of the Court would show that, in the years which followed the appointment of the Vice-Chancellor, the Chancellor heard only one fourth of the number of causes that he had done before, but he probably heard ten times the number of appeals. The Lord Chancellor indeed heard a great number of bankrupt petitions, to which large fees were attached, and which were the most profitable business that a Chancellor or any other man could do—(hear, hear.) No complaints were made to that House of arrears or delay in disposing of bankruptcy business—(hear, hear);—at least certainly not of late years. He was not disposed to say anything invidiously of any individual discharging these important functions. God forbid that he should say anything of Lord Eldon in his absence, and when he was out of office, which he would not have advanced when he was in power. He had already, when that was the case, spoken of Lord Eldon's defects, as well as of his many and exalted merits and great legal accomplishments; but he had said, and he would repeat, that his manner of disposing of bankruptcy business formed a great contrast to the diligence which he exercised in administering the other business of his office. No man who knew Westminster Hall would doubt that the Court of Chancery was now become merely a Court of Appeal, and the effect of this Bill would be to preclude the necessity of the Lord Chancellor ever sitting to adjudicate an Equity cause in the first instance, from the beginning of January to the end of December. If he were asked whether on all occasions, and inflexibly, he would resist the appointment of an additional Judge, he would answer, 'show me the necessity, and I will yield.' But you are now beginning at the wrong end. First show me the reforms which you propose to make in the administration of the the business—(hear, hear). First smooth the avenues of the Court—make them more accessible to the public, and more easily and safely approached, by preventing the delays which beset the suitor from his first entrance into Court, down to that very remote date—if, indeed, such a period ever arrived—when his grandson, or some very distant successor, should be liberated by a decree of the Court.' He desired to see the plan for the diminution of the expenses which the Chancellor had promised to bring forward after due deliberation; but, notwithstanding which promise, he had done nothing, but now came and called for additional help over and above the journeyman whose aid he already enjoyed, and by the aid of which helpmate the arrears were now so much reduced. Why, he asked, should they now give relief to the Chancellor, when they ought to begin by giving relief to the suitor?—(hear, hear.) Let the Chancellor at least go *pari passu* with the unhappy victims of his jurisdiction. Let them share in the relief which he called for on his own account. It might be very fit that his services should be purchased at so large a price as was paid for them, but he put it to the House and the country, and he put it to those Honorable Members who, before many years passed over their heads, expected to meet their constituents—to them he put it, as he might safely do to their constituents themselves, that it would be decorous, before granting the prayer of the Lord Chancellor's petition for the relief and relaxation which he sought—or if not before, at least, at the same time—that he should be prepared with some plan by which some slight share of that relief and relaxation might be extended to the suitors in his Court. This, surely, was an humble or modest, and, he would say, a reasonable demand. As to the substitution of salaries for fees, he would observe that fees for the performance of judicial duties, if they were proportionate to the prolixity of the proceeding, were an abomination. They were a defeat of justice, a bribe to delay. That was the worst possible way of paying a Judge: but if those fees were not commensurate with the length of the proceedings—if one fee was paid by the suitor, once for all—that would be attended with no possible mischief; and if the Judge received a salary in that way for discharging those functions, which would be open and exposed to the eye of the world, it would be the safest possible way in which he could be remunerated; because he would not dare to take his salary and not discharge his duty. But the case was different with the Master in Chancery. He sat in silence and in the dark. He saw no one but the suitors who appeared before him. He had no public to watch him—no newspaper to report his proceedings. The only problem he would consider was, not how he could expedite justice to the suitor, but how he could get his own salary—(hear). This was a problem which all men studied, and which, when operating in the dark, they solved with an ingenuity which would do honor to any Senior Wrangler. What then would be his (Mr Brougham's) remedy for the evils of the Master's Office? He said 'Let in the light, open the doors, admit the public. Let the master be Judge in name, as he is in fact. He exercises the authority of a Judge. He has all the characteristics of a Judge, except his responsibility.' Place the Master under this check, and then they might pay him by salaries or by fees, whichever they pleased. There would be no mischief and no risk—(hear, from the Solicitor-General).

His Honorable and Learned Friend cheered him, and chid him by that cheer. It was meant to signify 'You need not now, at hal past one o'clock in the morning, occupy ou time in enlarging upon points upon which we ar all agreed.' His Honorable and Learned Frien would have him rest contented with the expectatio that hereafter some measures might be introduce to correct the evils of the Master's office. Bu how was he to know this? He must look at th Bill. What light did this Bill let in? The onl light he saw was the pleasant fee which dawne upon the dark office in Southampton-building whether much business was done or little busines was done, or no business at all was done. H was told that the Government was bent upon re form. As regarded some Members of the Govern ment, he entirely concurred in that belief. A Honorable Gentleman, judging of the Solicito General's feeling in this way, upon that judgmen grounded his support of the present measure; bu feelings were not always safe to be relied upo If he (Mr Brougham) were to trust his own feeling he should say that this was winter, whereas th Calendar told him it was midsummer. If h were to judge of the intentions of the Right Hon Secretary of State, he should believe him to b disposed for reform, not from his professions, bu from his actions—(hear, hear); because he ha been the protector of reformers—because he ha been a mighty shield and a tower of strength t the reformers, by cutting down that clamor whic had, heretofore, impeded all their efforts. H (Mr Brougham) had never felt the slightest jea ousy, even for those now no more, who had begu the great career in which the Right Hon. Gentl man had now so honorably begun; because h saw that, under circumstances which others migh for their own purposes, have used to stifle refor the Right Hon. Secretary had disinterestedly an wisely, for his own fame as well for the honor the country, been the friend of reformation. Bu if he were to judge of the Solicitor-General and the Lord Chancellor (and the only way in whic he could judge of them was by their actions; an by this measure, among the rest,) he would sa that all the Lord Chancellor had done was t recommend the payment of the Masters by sala and not by fees, which, under the accompanyin circumstances, might be the reverse of a reform tion; and as to his Hon. and Learned Friend, th only ground for reliance upon him was, that h said 'Pass this Bill; for aught you know, ne year some other Bill will be introduced to me other evils of which you complain.' Softly the he (Mr Brougham) said, with this Bill. Sufficie for the day is the *good* thereof. It was no refor to begin at the wrong instead of the right en He implored the House to recollect that, since th volume had been laid on the table, which had t night been held up in order to laugh at the arg ments used against this measure, times we changed—circumstances were changed—the Cou of Chancery was changed. The Master of t Rolls now sat so much longer, that he ought do 50 per cent more business than former Under all the circumstances, he would say to t House that the only safe course towards their co stituents, who were the people—the best answ they could make to the Chancellor's proposit would be, 'Redeem your pledge—let us s the facts, and then we will judge of the nec sity, and when, how, and as new help shall necessary to you, that new help you shall ha and not sooner, and no otherwise.'—(The H and Learned Gentleman sat down amid l cheers.)

## NEW YORK SUPREME COURT.

### FIRE POLICIES.

*Mapes, Davis & Brooks vs. The Washington Ins. Co.*

This was a feigned issue from the Court of Chancery. It was tried before Judge Edwards during Monday and Tuesday of the last week: and the jury gave in a sealed verdict on Wednesday. The following is a summary of the case: Amos Coffin, grocer, was indebted in 1828 to Mr Mapes. The former died about the 1st of April, 1828, leaving a will; and under which, Wm. Coffin acted as executor. Process was issued after Amos Coffin's death, to recover Mr Mapes' demand; and finally, on the 15th August, 1828, execution was taken out for $1585,35, and a levy made upon the stock of groceries left by Amos, and which were in the hands of his said executor. These groceries were in a store at the northeast corner of Maiden lane and Front street in this city. In order to give the executor time to try and satisfy the execution, a sale was not immediately insisted on; *but while the levy was upon them, and before a sale, and on the 5th Sept.* 1828, *a fire took place*, which caused a serious injury to the stock so levied upon, although the *fire itself* did not *burn* many of the articles. Now, Amos Coffin had from time to time, renewed a policy of Insurance upon his stock of groceries for $3500 with the Washington Insurance Company; and the last renewal was not out at the time of the fire. Mr Mapes found if necessary to file a bill in Chancery; and he got an injunction restraining the Company from paying, and the executor from receiving so much of the amount due under the policy as was his claim under the execution. About nine months afterwards, Messrs Davis & Brooks, having a debt which had been incurred by Amos Coffin, and having obtained a judgment, also filed an injunction bill, for the purpose of being paid out of the avails of the policy and trying to open Mr Mapes' claim. After pleadings had occurred and proofs gone into, both the suits were referred for decision to Esek Cowen, Esq. the intelligent Vice Chancellor of the fourth circuit. At his July term, 1830, in Ballston, the matters were argued.

Mr Charles Edwards, appeared as counsel for Jas. J. Mapes.

Mr W. T. McCoun, represented The Washington Insurance Company.

And Mr J. Blunt appeared as counsel for Davis & Brooks.

The principal points upon which the Company attempted to defend themselves from any liability were the following: That they ought not have been made defendants in the bills filed in Chancery, and therefore the same must be dismissed as against them: That the policy died with Amos Coffin. That the execution by Mapes divested the property: That the goods were not burnt: That the executor could not carry on trade: And that the executor ought to have had the policy endorsed to him: And for all these reasons the Company insisted they were not liable for any loss. Mr Edwards combatted the positions taken by the counsel for the Company; and also argued against Mr J. Blunt who objected to the priority of Mr Mapes' claim.

The Vice Chancellor gave a luminous opinion, and we here present such parts of it as may be found of service:

### OPINION.

The insurance upon the goods was against all loss or damage which they might sustain by fire The answer denies all direct injury by fire, but admits theg oods may have been injured in consequence of removal at the commencement of the fire. There is proof that not many of the goods were burned, but they were very much injured, and many of them entirely destroyed in consequence of their being removed to prevent the communication of the fire, (6. Pick. 182 ,186; 2. Marsh. Rep. 132. Sol. Gen, arguendo,) so that the remnant sold at auction for only about $200. The question, as to the furnishing of the preliminary proof and the loss, with its extent, may, however, be better settled by a master, (4. Cowen. 645, 666;) or, more properly perhaps, by a feigned issue. I think the right under the policy continued to the executors. The clause that it should cease to operate on the transfer or termination of the testator's interest, by sale, or otherwise, or upon assignment of the policy, without consent in writing, does not apply. The interest of the assured did not terminate at his death: it continued in his executors. The assignment or transfer to them is by operation of law. The assignment or transfer intended by the policy is conventional. This distinction is a familiar one in the case of leases for a term, (*Jackson vs. Corlis*, 7. *John R.* 531, 534; *Doe vs. Carter*, 8; *J. R.* 57.) A covenant by the lessee not to assign is not violated by judgment, execution and sale. This is an act of law, *a fortiori*, where the property passes to an executor, by operation of law founded on the act of God, the death of the party. The English authorities, (*Lynch vs. Dalzell.* 4. *Br. P. C.* 431,) relied on against this doctrine, clearly go on the terms of the policy. The loss is there confined to the contracting persons only: and there is an express provision that the policy shall be continual to the personal representatives by an endorsement on the policy, (4 *Br. P. C.* 432; 2 *Condy's Marsh*, 800.) This practice distinctly appears in the report of *Lynch. vs. Dalzell.* The case is shown in other books, but the terms of the policy are not shown as the ground of the difficulty. It is of the nature of every promise to pass to the promisee's executor, who is an assignee in law, (*Plow. Com.* 288; 11, *Vin.* 158, *pl.* 10; *Off. Ex.* 100.) I agree that the consequence may be avoided by express stipulation. The landlord in his lease for a term may avoid an assignment even by operation of law. This will be seen by several cases put in *Doe vs. Carter;* but a covenant or condition not to assign or transfer generally, will not have that effect. Even the power to assign a policy conventionally, must be restrained expressly, for, in equity, it is assignable in its nature the same as any other chose in action, (*per Ashurst J. in Delancey vs. Stoddart*, 1, *T. R.* 26; 2, *Condy's Marsh.* 800; *Phil. on Ins.* 11.) Alhough this policy is payable to the insured or his *assigns*, and stops there; yet the law inserts the words *executors or administrators*, and to restrain or conquer this legal effect, the English clauses should have been inserted. The clause here is that the assignment or transfer shall not be made without *the company's consent;* clearly implying that some act of the insurer is intended; otherwise, there could be no consent. The policy could not mean consent to an act of Providence.

'Then the complainant caused his execution to be levied on these goods in the hands of the insured's executors: and it is insisted that the levy changed the property and terminated the interest of the assured. But this is clearly not the legal effect of the levy. The Sheriff acquired a lien on the goods, but nothing more. The general property remained in the executors (12 *John.* 407; 8, *Id.* 520.)

'Again, it is said the levy on sufficient goods, *per se* satisfied the execution; that the judgment is therefore gone, and the complainant has nothing to stand upon. I hardly think this would be holden, after the destruction of the goods by fire. Clearly it would not, if the Sheriff had been deprived of the goods by the act of the defendants. (*Ontario Bank vs. Hallet*, 8, *Cowen*, 192.) So, I apprehend, in case of an eviction, (12, *John.* 407;) and even after an actual sale of the wrong property and a satisfaction acknowledged, there should be relief. But if the legal consequence contended for be the true one, it only argues more strongly the necessity of interfering here to guard against the injury otherwise arising from this accident.

'It is argued that the Company are not liable to the complainant because they did not *insure him.* True they only insured the executors in respect to the goods levied upon. These goods were destroyed; and I agree that the complainant's bill, if it lie at all, must rest on the ground that the insurance money due shall come in the place of the goods; and that in the eye of a Court of Equity, to prevent the effect of the accident, the complainant should be made good out of money thus representing the goods. This strikes me as the difficult point in the cause; for I do not feel warranted, since the case of *Donovan vs. Finn*, (1 *Hopk.* 59,) to factorize this debt of the Company, and to make them liable as the debtors of the complainant's debtor, against whom his execution has failed. The insurance debt, as between the parties to the policy, is emphatically of legal cognizance, and is therefore directly within the case cited. The case in the Court of Errors of *Hadden vs. Spader*, (20, *J. R.* 254,) with which, it is supposed, *Donovan vs. Finn* interfered, was regarded by Chancellor Sanford, after much consideration, as going no farther than to warrant the conversion of equitable claims to the satisfaction of judgments. He said that all beyond was a mere *dictum*, which he would disregard. And the Revised Statutes (2. *R. S.* 173, 4§. 38.) which have since carried the doctrine out according to the resolution of the Court of Errors, were not in operation when this bill was filed. Although I have known *Donovan vs. Finn* to have been unfavorably received by several members of the Court of Errors on different occasions, yet it has never been overruled; and I shall not take it upon me to question the clear, deliberate and unreserved doctrine of the head of this Court. I the more readily avoid doing so in this case, because there is high and recent evidence that Chancellor Sanford went to the farthest verge of English Chancery jurisdiction. (*Ottey vs. Lines*, 7 *Price*, 274.)

'Indeed the complainant does not appear to found his claim on the cases authorizing a judgment creditor as it were to levy through a Court of Chancery on the chose in action of his debtor. To make out such a case it is necessary that he should show his *fi: fa:* to have been returned unsatisfied; or, at least, that there was in fact nothing which existed as the subject of a legal levy; a matter which should, I imagine, appear by the bill and which might form the subject of a distinct issue. I suppose he rather goes on the ground that he has obtained a judgment against these executors, which of itself gives a preference upon the assets; that he has made that preference still more distinct and specific by a levy on the insured goods. These are snatched from him

by the accidental fire; whereupon, immediately, in respect to these identical goods, the debt due from the Insurance Company takes their place as assets in the hands of the same defendants, and is therefore, in equity, subjected to the same lien which bound the goods. And why should not this be so? True, the Company are not liable to the complainant as the *insured;* but he claims a right, under the circumstances, that they should pay to him directly what they must pay to the executors, and what he would have a right to claim of the executors after payment. He claims that the fruits of his legal diligence shall be preserved to him. His rights under the levy are gone at law; the subject upon which he reposed is destroyed; he claims that which must come in its place. Relief against the legal effect of accidents is a familiar head of equitable jurisdiction. An executor who paid on the faith of assets afterwards accidentally destroyed by fire, was relieved in *Ex'rs. of Lady Crofft vs. Lindsey, (2 Freem. 1.)* So, where executors became bound by recognizance to pay legacies on the faith of assets which were partly lost and partly destroyed by fire, the condition was relieved against (*Holt vs. Holt,* 1. *Cas. Ch.* 190.) These and the like decisions are on the broad principle that rights perfect at law shall be kept so, notwithstanding any accidental change, as far as a Court of Equity can relieve, without injury to any one.

'But connected with the doctrine of relief, against accident, the doctrine of conversion or substitution comes in. The complainant saw that the period was rapidly approaching when the insurance debt would become due; peradventure, the preliminary proofs might be waived and payment made by the Company immediately. At any rate, the time would shortly come, when that should be done; a time when this Court, for all equitable purposes, would consider it as done; the payment as actually made, and the money as being assets in place of the goods. He therefore files his bill, claiming the effect of this fiction, whenever the time should arrive. It passes. The money thus comes instead of the goods levied on. In what light is it to be viewed? In what other than as the goods themselves, and subject to the same burthen; the payment of the complainant's debt, leaving the balance, or surplus money, if any, to constitute assets for the payment of other claims? In this view it was important to keep the money distinct, so that it should not be confounded with other assets, and the effect of the levy lost. What is the rule of substitution in respect to personal property (and indeed all property) holden in trust? I answer in the words of Lord Ellenborough, in *Taylor vs. Plumer, (3 M. & S. 562. 575.)* The product of, or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such. There a broker had tortiously converted the money of his principal to a large amount into U. S. bank stock, U. S. 3 per cent funded stocks, and doubloons. Held, that the property of the substituted stocks and money vested in the principal. All the authorities are gone over in that case, and they fully establish that debts or money coming into the hands of a trustee as a substitute for the thing originally in trust, follows precisely the nature of the latter. An assignment of an outward cargo carries the return cargo purchased with the proceeds of the former *(Conrad vs. Atlantic Ins. Co. 1 Peters' U. S. Rep. 447-8; De Wolfe vs. Harris, 4 Mass. R. 529, 530.)* These things are especially so in the eye of a court of equity. Suppose the Company had settled with Coffin, the executor, and given him a promissory note for the insurance money; is there a doubt that the judgment and levy should have been applied to the note, and that the complainants, through this Court, might come in and take the money from the note to satisfy his debt? With these reasons are also conbined the admitted insolvency of W. Coffin, the acting executor. I conclude that the complainant (*Mapes*) is entitled to relief, provided there has been a loss within the policy, and the preliminary proofs were duly made. I cannot settle the amount due; I shall accordingly refer them to an issue.

'In the view I have taken of Mapes v. the Coffins and this Company, the complainants, Davis and Brooks, would have a right to come in junior to the defendant, Mapes, if their judgment had been followed by a levy. Even in such a case they must have been postponed to Mapes. As the case stands, they have obtained a judgment which covers the assets generally, including the fruits of the policy of insurance, subject to the prior claim of Mapes. The balance, if any, after satisfying him, would be paid to W. Coffin, the acting executor, and might then be recovered by the complainants, Davis & Brooks, in the course of a proceeding on their judgment at law. It seems, however, that the *fi: fa:* of the complainants has been returned *nulla bona;* that the Coffins are insolvent; and that if the balance go into their hands, there will be danger of losing it entirely. On this ground, I will retain the bill.'

Upon the trial of the feigned issue, Mr Charles Edwards opened the pleadings; Mr McCoun and Mr B. Ferris appeared for the Washington Insurance Company: and the former and Mr Edwards and Mr Blunt, also on the part of their respective clients, addressed the jury.

The Jury found that the preliminary proof had been delivered to the Company in proper time, and that the loss sustained within the policy was $1531 35—*New York Journal of Commerce.*

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EXTRACT FROM THE GOVERNOR'S MESSAGE.

The importance to the community, of a prompt, able and efficient administration of Justice, will always secure to any proposition, by which it is designed to be facilitated, a favorable attention. It has of late been a subject of very general and just remark, that the increased business of the Supreme Judicial Court has occasioned a severe pressure on time for its regular and convenient transaction, and imposed upon the Judges oppressive labor in the discharge of their duties. In both these respects, I apprehend, much relief might be afforded, and great advantages every way produced, by transferring the Criminal Jurisdiction, except only in Capital cases, to the Court of Common Pleas. When it is considered, how that Tribunal now is, and always may be, composed, of men of talents, learning, and sound discretion, enjoying the full confidence of the People, there can be no distrust, that, from such change, there would still remain the same security to innocence, and like certainty of the just conviction of guilt.—The criminal code, from its object, and in the very nature of our Institutions, is plain and simple, and easy to be understood, rarely giving occasion, in the application of its principles to facts or in the proceedings upon trials, to new, subtle, and difficult legal questions. Should these occur, they may be referred, upon Exceptions, or a Report of the Presiding Judge, for consideration and ultimate decision, to the highest tribunal. It is also to be regarded, that the Grand and Traverse Juries are now by law constituted in the same manner in both Courts, being drawn by lot to serve in either, from the same Jury Boxes. Hence there would be no less qualification, or exercise of intelligence, in those with whom would rest the issues of fact.

As an additional consideration of much weight in favor of the alteration, the investigation of offences would be more prompt, from the greater frequency of the Terms of the Common Pleas. The accused, not unfrequently now are confined for a period of six months, waiting the Circuit of the Supreme Court for opportunity for trial. To the innocent, this imprisonment, in many cases, is scarcely less severe, than the punishment inflicted upon crime, while to the Guilty, it metes out no measure of atonement, and offers no aid to reform. To the State, also, as the Treasurer's Accounts will exhibit, it is attended with great, and to any purpose but a compliance with the law, as it seems to me, most gratuitous expense. The Terms of the Common Pleas are held with intervals of half the time, and from the information which I have of the sittings, and of the duties of the Judges, faithfully and vigilantly performed as they are, the additional assignment of the criminal business would not constitute an unreasonable requirement of service.

By this arrangement, the Supreme Court would be spared much of that time which is so greatly needed for the trial of civil causes. With the original and exclusive jurisdiction of the numerous classes of cases, in which the punishment is imprisonment in the State Prison, no inconsiderable portion of each term, in the large Counties, is occupied in criminal trials, and with the imperative duty of delivering the Jails, these trials often greatly interfere with the business of the whole Court, on the Law Circuit.—Grand and Traverse Juries are also assembled immediately upon the dismissals of precisely similar Bodies in the Common Pleas, with no other diversity of duties, than what results from the difference of jurisdiction in the tribunals before which they are convened, and the Traverse Juries are often detained, waiting the argument of causes requiring the presence of the full Bench, to be afterwards put upon the discharge of their appropriate office in the trial of facts, before a single Judge.

With much reflection bestowed upon this subject, in all its various bearings, I am persuaded, that no greater improvement could be produced in the administration of Justice in this Commonwealth, than by the measure of transferring the criminal jurisdiction in the manner proposed. To make it effectual to the despatch of business in the Supreme Court, it should be vested, with the exception before suggested, *exclusively* in the Common Pleas. This only could prevent interference with the civil business of the higher tribunal, and save the occasion, most generally, either of Grand or Traverse Juries, at the Law Sittings. To provide for the trial of capital cases, at these terms, it might be required of the Sheriffs of the respective Counties to certify commitments for such offences, to the Chief Justice, who thereupon would give orders to the Clerks for issuing the proper venires for the attendance of Jurors. May it not also be worthy of inquiry, whether still further benefit would not result to the community, from enlarging the final Jurisdiction of the Common Pleas in *civil cases,* by increasing the sum which now

restricts the right of appeal. This would have a tendency to advance the usefulness and respectability of that Court, while it would keep from the docket of the appellate jurisdiction, many cases of less pecuniary importance than the costs incurred in their litigation.

On former occasions, I have earnestly pressed upon the attention of the Legislature, the claims of the impoverished and unfortunate to an amelioration of the laws which subject the person to imprisonment for debt. Increased information, and greater liberality in public sentiment on this subject, encourage the hope that some measure of alleviation will now be adopted. Experience has abundantly proved how utterly unavailing is this species of coercion to the collection of debts. It may well be feared, that resort to it, in many instances, not only results in showing the incapacity, but in destroying, also the very inclination to make payment. Deep, extensive, unalleviated distress is the consequence of the imprisonment of the honest poor, and, with the privations of restraint to the debtor, are oft times mingled the keenest sufferings of tender and helpless families in want. Wise and provident legislation will mark the distinction between inability and fraudulent concealment, and while it will secure to the former the indulgence due to involuntary misfortune, it will punish the latter with a severity merited only by deliberate moral transgression. In the discussions which have been had before the public, various modes of relief have been proposed. But that which consists in extending exemption from arrest to a much larger amount of debt than at present, and in all other cases substituting security for the appearance of the debtor to submit to an examination, for imprisonment previous to an opportunity of showing his right to a discharge, appears to have been most favored. These are simple provisions and do the least violence to former opinions and accustomed habits of business. If more than this in your judgment, can practically be accomplished, without weakening the salutary restraints upon improvident credits, or impairing the motives to faithful endeavors in the fulfilment of contracts, it will meet from me a ready and most cordial approval.

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## ENGLISH CASES.

PREROGATIVE COURT — NOV.

*Trillick vs. Allanson.*

This was a question of Insanity, and was argued at considerable length last Term.

It appeared that the Rev. Mr Monkhouse, Rector of Bramshot, died in Oct., 1828, aged 70, leaving by a will executed the 16th of April, 1827, nearly the whole of his property, amounting to about 11,000*l.* in trust, to found a charity school in his parish. In the will, which is in his own hand writing, he excluded from the benefits of this charity the children of all persons addicted to cheating, lying, thieving, swearing, &c ; and, according to his estimate of his own flock, there were not ten persons who could avail themselves of his bounty. The deceased was the son of a farmer in Cumberland, was a man of talent and acquirements, and had been a Fellow of Queen's College, Oxford, from whence he removed to the Rectory of Bramshot, which was in the gift of the College. Here he resided for 20 years, and led a life of extraordinary eccentricity. Between himself and his family there was little or no intercourse, as he lived in great seclusion. The defendant, Mrs Allanson, is his only sister, to whom he never gave more than a few pounds. In the year 1817, a Mr Harrison and his wife, the daughter of the defendant and niece of the deceased, came to reside at Bramshot. Harrison was employed by the deceased to let his tithes and manage other business for him, and resided in the house with Mr Monkhouse for two years, when he removed to a distance of a mile, where he still continued to act for the deceased, upon whose recommendation Harrison became Churchwarden in 1827. Up to that period there existed no hostility between them, and Monkhouse declared his intention of leaving the bulk of his property to Harrison's family. In the month of April of that year, he labored under a delusion that he and two females, one the daughter of Harrison, were to be poisoned by Harrison and his wife. He was perfectly persuaded that poison was put in his milk, in his butter, and eggs : and he declared that there was as much arsenic in his well as would poison the parish ; nor could he be convinced to the contrary, though Harrison drank several glasses of the water in his presence. During his residence in the parish he had professed Unitarian Doctrines, though a Rector of the Established Church, and had texts of Scripture on his cart and on the handle of the pump. In the year 1819 he made a will, leaving 1,850*l.* for a school in the parish, and it appeared that he had all through an intention of founding an institution ; but the sum left was much greater than the wants of the parish required. In addition to the will of April 16, 1827, there were three codicils—one signed the 24th of the same month, and in this he leaves 100*l.* to the provost, Fellows, Scholars of Queen's College, Oxford, in trust, for a Unitarian Society for the promotion of Christian knowledge. He also bequeathed 1*l.* to procure good and wholesome milk for the parish, and one shilling he left to such person or persons as had poisoned his dog Carlo, an animal to which he was much attached, and whose death, in 1824, he attributed to poison. He wrote verses upon the death of this dog, and in his will he called him his faithful companion by day and guardian by night. Long previously to his suspicions of Harrison, he was afraid of being attacked, and went out armed with a pistol and dirk cane, and he fancied some poachers, whom he called the Headly Gang, were going to murder him and several of the parishoners ; but, notwithstanding, he had shown great ability and acuteness in some controversial writing, which he published. He thought his parishioners were very immoral, and frequently recorded his opinions of them in the parish registries, by adding to many names either the word 'bastard' 'illegitimate' or 'kept mistress.' He always kept 2,000*l.* or 3,000*l.* in his house, which he hoarded up with more than a miser's fears, and kept a supply of fire arms to protect himself from attack. He was in every respect a moral and humane man, and anxious for the welfare of the poor, for whose comforts, however, it did not appear that he had made any sacrifices. His will was witnessed by two clergymen, to whom its contents were at the time unknown ; and these gentlemen did not think at the time there was any appearance of insanity about the deceased.

Dr Lushington this day, on the part of the defendant, contended that the statements of the several witnesses showed that the deceased, at the time of executing the will, was not of sane mind.

Sir John Nicholl said the whole question for him to decide was, whether, at the time of executing the will the deceased was of sound mind ; or whether it had been prepared by him when of sound understanding. In looking at the conduct of the deceased, his actions, up to April, 1827, could only be considered as one of extreme eccentricity ; and he could not say that the delusion under which he labored in April amounted to insanity. It was extremely difficult to draw the exact line between extreme eccentricity and derangement, but he did not think the deceased's state of mind amounted, at most, to more than a sort of monomania. The gentlemen who had witnessed the will did not perceive any symptoms of madness at the time ; and it appeared that in the ordinary occurrences of life, he had acted with shrewdness and caution. He should therefore pronounce in favor of the will, and grant the probate prayed for.

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*The King vs. Dynely.*

The defendant in this case was an attorney, and had been convicted at the last Assizes for Worcester, of conspiring with a person named Loxley, now dead, but who had formerly been one of his own clerks, and had acted as professional agent to a gentleman named Marshall, to defraud the said Marshall of the sum of 2,000*l.*

The defendant was now brought up to receive the judgment of the Court, and he put in an affidavit, stating that it was not his intention to defraud the prosecutor ; for he expected to be enabled to repay the money, and had actually paid the interest up to 1820, when he became unable to do so. He also put in a number of affidavits from various persons to the effect that he had always borne a respectable character and reputation for integrity.

Mr Campbell and Mr Godson addressed the Court in mitigation of punishment ; Mr Sergeant Ludlow and Mr Curwood were heard in aggravation.

Mr Justice Parke, in delivering the judgment of the Court, told the defendant that he had been convicted of a great offence—that of conspiring to defraud, in conjunction with Mr Loxley, now deceased, a Mr Nicholas Marshall of the sum of 2000*l.* The evidence of his guilt did not depend upon the frail memory of witnesses, who, however desirous of speaking truly, might yet be deceived, but upon the unfailing testimony of his own hand-writing. Letters written by the defendant were found among the papers of Loxley after his death, in one of which he made the proposal to the latter to 'gammon' Mr Marshall out of 2000*l.* ; and, in the next, he stated the means by which it was to be done ; and, in this latter was contained a third letter to Loxley, applying to him, as the agent of Mr Marshall for the advance of 2,000*l.* upon a mortgage to which he (Dynely) was trustee for one Sarah Jenks and her children. The defendant, as a professional man, knew that he could not assign this mortgage without the consent of Sarah Jenks ; and he therefore, knew that the title was defective, and he must also have known that Mr Marshall would not have advanced the money if he had known that the title was not good. The defendant had alleged in his affidavit that he had no intention to defraud, because he expected, when he raised the money, that he would be enabled to repay it ; but this was the vain delusive hope with which all persons about to commit a fraud endeavored to stifle the voice of conscience, and the Court could not listen to it. This transaction took place so

long as 14 years ago, which was a clear proof that no lapse of time could give impunity to crime. The Court felt itself bound to exercise a painful duty, and to impose upon the defendant a punishment such as would operate to deter others from similiar offences. In any man such a fraud deserved a severe punishment, but in a professional man it was still more serious, for a trust was placed in him which was not given to others. That confidence he had broken. It appeared that the father of the defendant was a Clergyman, now in his 81st year and the Court regretted, that, in the exercise of a painful duty, it must inflict a deep wound on the feelings of an old man, now sinking into the grave, and also cast a shadow over a young man now receiving his education. It also regretted that the defendant himself had lost that good character which it appeared he had hitherto maintained; but its duty to the public was imperative, and in the exercise of that duty it adjudged that the defendant should be imprisoned for eight calendar months in the gaol for the county of Worcester; and also that he should be struck off the Rolls of the Court, for, after being convicted of such an offence, he could not be suffered to continue to practise as an attorney of the Court.

The defendant was then taken away in custody.

## RECENT ENGLISH DECISIONS.

One of the partners in a banking firm had caused certain stock of the plaintiffs to be transferred under a forged power of attorney. The Bank of England promised that, if the plaintiffs would prove the amount of the demand against the firm and make an assignment of their proof, the Bank would replace the stock, to which the plaintiffs assented: Held that, it being at the time a question of nicety and difficulty whether the Bank were liable to make good the loss, there was a good consideration for the agreement; that the plaintiffs therefore could not sue the Bank in respect of the stock, until they had proved for the amount in pursuance of the agreement.—*Stracy vs. The Bank of England*, 6 Bing. 755.

[As to the question, whether the Bank be liable in the case of forgery, see Davis v. Bank of England, 2 Bing. 393.]

The defendant was arrested by the plaintiff's testator, by whose death the action abated: Held that the defendant might be arrested again for the same cause of action at the suit of the executor.—*Millin vs. Evans*, 1 C. & J. 82.

The plaintiff had from time to time paid rent to the defendants for premises which he held of them; it afterwards turned out that they had no title; and the plaintiff was ejected, and compelled to pay the mesne profits, for the time during which he had held of the defendants: Held that he might recover back the rent in an action of assumpsit for money had and received. The objection was, that title to land could not be tried in this form of action.—*Newsome vs. Graham*, 10 B. & C. 234.

The defendant had engaged to carry a quantity of lime on board his barge for the plaintiff, which was put on board accordingly. The master of the barge deviated unnecessarily; during the deviation a storm wet the lime; and the barge being thereby set on fire, was lost with her whole cargo; Held, 1. That the deviation was a sufficiently proximate cause of the loss to render the owner liable. 2. That the law implies a duty in the owner of a vessel to proceed by the direct, usual and customary course, and that there was no necessity for averring in the declaration an express undertaking to carry by the direct course.—*Davis vs. Garbett*, 6 Bing. 716.

The plaintiff, having taken a place by the defendant's coach, was requested by one G. to book a parcel, containing among other things a 50*l.* note, at the defendant's office. The plaintiff, instead of booking it, put it into his own bag, intending to convey it himself. The parcel being lost without any particular negligence, on the part of the defendants: held that the plaintiff could maintain no action for the value. The ground principally relied on by the court appears to have been, that the plaintiff was himself a wrong-doer by depriving the defendants of the carriage of the parcel; but it was expressly stated that a carrier could not be permitted to enter into questions of title with his bailor.—*Miles vs. Cattle*, 6 Bing. 743.

Assumpsit for business done as an attorney, The plaintiff called his son to prove that the business was done, who swore that he was not in partnership with his father; but it appeared that the business had been carried on under the style of K. and Son, and that K. and Son was on the door of the office. The judge directed the jury to find for the plaintiff, if they believed the son's testimony, as to the business done and the non-existence of a partnership. They found for the plaintiff, and a new trial was moved for, on the ground that it ought to have been left to them to say, whether, the father and son had not been jointly employed; the court held the direction to be right.—*Kell vs. Nainby*, 10 B. & C. 20.

Action on a promissory note, dated January 1817, for 300*l.* payable to P. H. and Co., or order, with interest. The plaintiffs and H. (named in the note) carried on business as bankers; one of the defendants (A) kept an account with them, and, to obtain credit, induced the other defendants to join in the note; which being deposited with the bankers, they gave him credit on account of it, and charged him with interest for the same yearly. Between the giving of the note and the bringing of the action, H. died; and three changes had taken place in the firm by the retirement of old partners, or the introduction of new. On each occasion the note was transferred to the new firm but not endorsed. A. had at one time a balance in his favor of nearly 700*l.*, but it did not appear that it was a money balance. Held, 1. That the note was a continuing security, and that the liability of the makers was not affected by the changes of the firm. 2. That the action was properly brought in the names of the surviving original payees. 3. That even assuming the balance to be a money balance, the bankers were not bound to apply it in payment of the note. 4. That payment of interest by A. within six years, took the case out of the statute of limitations as to all the parties.—*Pease vs. Hirst*, 10 B. & C. 122.

This was an action of trespass for false imprisonment, against a justice of the peace. The jury found that the commitment was *bona fide* and intended for re-examination, but that it was for an unreasonable time. It was objected that *case* was the proper remedy, and that trespass was not maintainable for such a commitment, without improper or indirect motives. But the court held the action to be well brought; and intimated an opinion that, where the time is unreasonable, the commitment is void from the beginning.—*Davis vs. Capper*, 10 B. & C. 28.

If a witness remain in court after an order for the witnesses on both sides to withdraw, it is a question for the discretion of the judge, whether he shall be subsequently examined.—*Parker vs. M'William*, 6 Bing. 683.

[In the Exchequer a witness thus remaining is peremptorily excluded.—*Attorney General vs. Bulpit*, 9 Price, 4.]

THE JURISPRUDENT.

BOSTON, SATURDAY, JANUARY 22, 1831.

## SUPREME COURT.

SUFFOLK COUNTY.—NOV. TERM.

Opinions were delivered by Judge Putnam in the following cases on the 18th instant.

*Sturtevant vs. The Globe Ins. Company.*

This was a case of Insurance on a vessel which got on shore about 30 miles from Charlestown, S. C. The master cut away the masts, saved what he could and sold her as a wreck. There was much contradictory testimony as to the conduct of the master, the extent of the damage to the ship and the loss on the cargo.

At the trial, it was contended on the part of the office, that the master was guilty of fraudulent conduct and that there was no necessity for a sale.

These allegations were denied by the plaintiff. The jury returned a verdict for the plaintiff for a total loss. And a motion was made to set it aside as against the weight of evidence and for a new trial, which motion was now decided.

The court considered the case one of great doubt. The evidence was exceedingly balanced. The court was inclined to think the weight of the testimony was in favor of the defendants. That matter was, however, for the jury, and they having found it otherwise, the Court was not disposed to disturb their verdict. The Court could not say that the jury had found a verdict against the evidence. They had a right to judge of that, and having done so, their judgment must stand. Judgment on the verdict.

*Joseph Bryant vs. Commonwealth Ins. Co.*

This was assumpsit on a policy of Insurance by which the defendants caused the plaintiff to be insured a certain amount on the cargo and freight of the schooner William King, at and from Havana to her port of discharge in the United States. She was stranded on the 28th of December at the Washwoods, on the coast of Virginia, about 40 miles from Norfolk and the goods were landed without damage. The assured received a letter from the master on the 8th of January, relating the accident, and on the same day an abandonment was tendered but refused. The master, without waiting to hear from the assured, on the 11th of January, sold the goods on the beach for a small amount less than the Invoice value. The duties paid, the wreck master's commissions on the sales, and the expense of saving the goods amounted to more than half the invoice value. There was evidence that the goods, might have been carried to Norfolk, by land in three or four days, after the accident, and thence shipped, in another vessel to the port of destination, for something more than half the loss on the sale; but no attempt was made to send them on.

The case was submitted to the jury on a former trial and a verdict rendered for the plaintiff. On motion to set it aside as against the weight of evidence, the Court granted a new trial—March Term, 1828 (6. Pick. 131.) It was then decided that the owner of goods insured could not abandon on account of the vessel's being disabled, in the course of her voyage, if, upon the whole, it is reasonable, taking into view the nature of the voyage and the time, expense and risk of sending on the cargo, that the master should procure another vessel, for that purpose, although he should not be able to do it at the port of distress or one contiguous, and although it should be necessary to make use of land carriage to reship the goods. And it was considered that the loss was not affected by the duties, and as exclusive of those, the expenses of saving and sending the cargo to the port of destination would have been less than fifty per cent of the invoice value, there was no right of sale by the master or of abandonment by the assured.

That a usage for the master of a vessel stranded to sell the cargo, without a legal necessity, was void.

A new trial was afterwards had and the same verdict returned. A simular motion was made on the part of the office, and now, at this term, decided by ordering the verdict to be set aside and a new trial granted.

The court could not perceive any material change in the aspect of the case. If the jury had returned a special verdict finding the facts, the court could have entertained no doubt that the loss was partial, not total. The cargo was not technically totally lost. The expenses did not amount to 50 per cent.

The court has not altered its views of the law or the facts. It could not suffer the law to be wrested from its proper operation. The goods might have been transported to Norfolk. There was no evidence of a necessity to sell.

The verdict must be set aside as against the evidence and the law.

A new trial granted accordingly.

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*John H. Smith et al vs. The Oriental Ins. Co.*

(Jury trial.)

This was an action on a Policy of Insurance by which the plaintiffs were insured a certain amount on the cargo of the *Merrimack Packet*, from Salem, to the coast of the Brazils—to one or more ports, one or more times, for the purpose of selling her outward and purchasing a homeward cargo—with liberty to touch on her homeward voyage in the West Indies.

The Plaintiffs claimed damages as for a total loss, by reason of a loss of the voyage, the vessel having been destined to Pernambuco, in the first instance, and thence intending to prosecute a trading voyage within the terms of the policy. They alleged that having been prevented going to that port by stress of weather and damage to the vessel, from the perils insured against, she was obliged to change her course and ultimately put in to Maranham. That the vessel was so much damaged as to create a necessity for a sale. That the cargo was injured, at any rate, to the amount of a partial loss, and could not have been transported to Permambuco, the place of her original destination, for less than half its value, if at all. The vessel and cargo were accordingly abandoned. The plaintiffs, therefore, claimed, in this action, damages of the office, as for a total loss, on the cargo, on account of a loss of the original voyage.

The grounds of defence, on the part of the office, were substantially, that the real object of the voyage was to go to Maranham. The Papers were all made out in accordance with such a design. The cargo was selected with a view to that market and well adapted to it. That it was not at all suited to the market of Pernambuco, that the voyage was not lost. If it were otherwise, there was no necessity for a change of the course of the voyage. There was no such damage to the vessel as to make such a change necessary. It took place, if at all, by design or accident, and not by reason of any of the perils insured against. There was not a technical total loss, of the vessel, nor a partial loss even of the cargo. If one of the objects of the voyage were to go to Para, that portion of the cargo, which could not be advantageously disposed of at Maranham, might have been transported to the former place, at a small expense, as there was a regular and direct communication between the Ports.

The cause occupied several days in the trial and was given to the Jury on the 18th by Judge Putnam.

He remarked that the Jury had to consider, in the first place, what the real design of the voyage was; and then if it were lost by inevitable necessity. If the vessel were prevented from going to Pernambuco by the act of the master, or by loss of reckoning or by any mistake or accident and put into Maranham, *that* must, in law, be considered the port of destination.

If, however, when there, the master would have gone to Para, had no loss happened, and could not, although a large part of the cargo had been sold at Maranham, it would, in that case, be a total loss.

The Jury would consider whether there was any necessity of sale such as the law regards. The state of facts at the time, and not the impression of the master, or of any of the survey or others —must determine that fact. Were the injuries which happened to the vessel, by the perils insured against, equal to one half her value? These are matters of fact, not of impression—or conjecture. If an abandonment be made upon the supposition that it would cost more than 50 per cent to repair the vessel and it turns out otherwise, the abandonment can be of no avail.

These principles apply as well to the question of *necessity* for a sale as of loss by damage to the vessel.

If the master mistake the existence of the necessity of a sale, the loss cannot fall on the underwriters.

If there were a total loss of the ship and the cargo could have been carried on, was there a *partial* loss of the cargo?

On this point there seemed to be no doubt.

If the grounds of the abandonment were substantially true, the abandonment was good.

Although it was intended to go to Maranham, in the course of the voyage, yet if the design was to go to Pernambuco, in the first place, and that was prevented, by any of the perils insured against, it was a total loss.

In making up the estimate of repairs, the jury would consider the repairs necessary to place the vessel, in as good a condition as she was in, before the injury, and not the expense of repairing her, in such a manner as to enable her to complete the voyage merely.

The Jury disagreed.

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## A NARROW ESCAPE.

In the administration of criminal justice, we are informed, that the following circumstance occurred. A young man had been arrested, on the charge of knowingly passing a counterfeit bank note—the grand jury had found a true bill against him—and he was placed on his trial. The evidence in support of the prosecution was strong; the note had been passed in a way to create suspicion; the prisoner's explanations were embarrassed and unsatisfactory; and little doubt seemed to remain of his conviction. The evidence was closed excepting the examination of a clerk of the bank, on which the forgery was supposed to have been committed, for the purpose of showing that the note was spurious. The court were detained a short time, he at length arrived; the note was placed in his hands, he examined it carefully and *pronounced it good.* The accused was of course immediately acquitted.

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## DOUBT ON AN IMPORTANT QUESTION.

The principle, that the owner of property which has been stolen, or obtained by gross fraud, may follow and reclaim it wherever it is found, admits under very careful restrictions of exception—and that is in favor of commercial negotiable instruments—of money—and of bank notes. These, though originally stolen from the real owner, may be retained by a bona fide holder—who takes them in the course of business with due caution—and for a valuable consideration. In the case of bank notes, this exception is allowed in the language of Lord Mansfield, 'for the sake of the currency.' In a case lately tried before a learned and able Judge, (Hallowel,) in this city,—a very strong opinion was intimated, after argument by counsel, that in the case of notes of the Bank of England, passed or negotiated *in this country*, the reason of that exception, has no existence; and, that the exception, therefore would not *here* be permitted to prevail—that these notes would be treated as bonds, certificates of stock, or any other evidence of property.—The point was not expressly decided, as the case went off on other grounds. Lord Tenterden expressed lately a similar doubt in a case, in which fraud and transfer took place in France.—*Jour. of Law.*

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*Dr Sega's Work on the Prevention of Crimes.*—The work some time since announced by Dr Sega, from the University of Pavia, is just published, bearing the title, 'What is Civilization, or Means to suppress the practice of Duelling, to prevent or to punish Crimes, and to abolish the Punishment of Death.' We cannot pretend to have leisure for the study of subjects of this sort and therefore cannot express any opinion upon the merits of this work. But the commendations the author has received from those much more competent to judge of his merits, leads us to believe it contains matter deserving of attention. The careful reader will not value it less, because it is strongly marked with a foreign idiom, when they consider that the author has been but a short time accustomed to speak or write our language. We hope he may meet with that reward, in the reception of the work by the public, to which his industry and talents entitle him.—*Daily Adv.*

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## ADVERTISEMENT.

A gentleman in the city, who has been seven or eight years in practice, and can furnish the best recommendations, would be glad to connect himself with some person of advanced standing and full business in the profession, as a partner or otherwise, on reasonable terms.—Address to A. B., at this office, with real name.

Dec. 4, 1830.

LIBRARY OF EDUCATION.
This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

WHITMAN'S LETTERS.
This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

PARLEY'S ASIA.
This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late Keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan.

GIRL'S OWN BOOK.
This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semi-annual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M.

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

GRAY AND BOWEN,
have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

GRAY AND BOWEN,
No. 141, Washington Street, Boston, have recently published the following valuable works.

I. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

II. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

III. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

CONTENTS.

Art. 1. Mill's Phenomena of Mind. 2. Tytler's and Scott's Histories of Scotland. 3. Memoirs, Correspondence, and Papers of Thomas Jefferson. 4. Niebuhr's Geography of Herodotus. 5. Galt's Southennan. 6. Floods in Morayshire. 7. Troades of Euripides. 8. The Belgian Insurrection, and De Potter's Trial. 9. Alexander's Travels. 10. London Bridge. 11. Hydrophobia. 12. Mr Brougham and Local Judicatories. 13. Novels and Travels in Turkey. 14. The Three Days of Paris. 15. Brasse's Sophocles. 16. Geometry without Axioms. 17. Revolution of 1830. List of Books, Index, &c. Jan. 22.

AMERICAN ALMANAC,
Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY.
This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

EVENTS IN PARIS,
during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS.
This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, JANUARY 29, 1831. NO. XXVII.

## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

That upon the completion of a sale, the risk of accidental loss in the interval before delivery devolves upon the buyer, is, as we have said, an obvious and necessary consequence of the change of ownership.* Accordingly, we find no case in which the principle has been questioned.† Undoubtedly in this, as in every other respect, the liability imposed by the law may be removed or varied by the special agreement of the parties; and if, as is frequently the case, the seller expressly undertake to deliver the goods, or such have been the customary course of dealing between him and the buyer, he will be bound by that agreement or custom, and the risk will remain with him until punctual fulfilment. But the general rule, we repeat, is undisputed. The question, where question has arisen, has for the most part been, whether the sale was complete so as to transfer the property; and of the criteria which have been already given for determining this question, one only was reserved for more particular consideration. It was stated generally, that so long as anything remained to be done for ascertaining either the specific commodity or the price, the transaction could not be considered as a perfect sale, and there would, consequently, be no change of property until that act had been done. The following instances will show the application of this rule to the doctrine of risk. A quantity of turpentine in casks of a nominal weight was sold by auction in different lots. It was announced by the auctioneer to the bidders that the casks were to be filled up before delivery. The plaintiffs were the purchasers of several lots, and paid an immediate deposit. Pursuant to the terms of the sale, all the casks, remained in the warehouses of the seller, where, not long afterwards, a fire broke out and consumed them. The plaintiffs claimed the return of their deposit, and the question in effect was, upon whom ought the loss to fall? Now at the time of the fire all the casks had been filled up except ten: and the court decided, that the property in the former had passed to the buyers; and that as to so much, the loss was consequently theirs; but that the property in the ten casks had not been changed, and that these, therefore, remained at the risk of the seller.‡ The principle of the decision seems to be this:—the commodity bargained for was certain casks *filled* with turpentine: so long, therefore, as there were any not filled up, it was impossible to say that they were the identical casks purchased. To borrow a phrase of Lord Ellenborough, applied to a case depending on a similar principle, 'there was something further to be done, to regulate the identity and the individuality of the thing to be delivered.'*

In another case† the bought note was as follows:—'Bought of Mr S. Z. &c, 289 bales of goat skins from Mogadore, per Commerce, containing five dozen in each bale, at the rate of 57*s.* 6*d.* per dozen, to be taken as they now lie, with all faults, paid for by good bills at five months.' It appeared that by the usage of trade it was the duty of the seller to count the skins over before delivery, for the purpose of ascertaining that each bale contained the specified number. In the present case this had not been done, when all the skins were consumed by fire, upon the wharf where they were lying at the time of sale. An action was brought against the buyers for not accepting bills according to the bargain, and the plaintiff was nonsuited, Lord Ellenborough being of opinion, that as the enumeration, which was necessary for ascertaining *the price*, had not been made when the fire happened, there was not a complete transfer of the property to the purchaser, and that the skins continued at the risk of the seller.‡ It will be observed, that in both these instances the act to be done was to proceed *from the seller;* and we apprehend that it will be necessary to limit the general proposition to such cases.§ At all events, there can be little doubt that if the buyer were in fault, the loss would in effect be visited upon him, even though he might not in strictness be clothed with the ownership.

In general, however, the rights and liabilities of the buyer are reciprocal; and so far as the *property* in goods is concerned, the one may for the most part be taken as a test of the other. Thus the goods are bound by the sale, and the vendor cannot in general resell them to another, so as to defeat the title of the first purchaser. The latter, again, in his character of owner, may sue and is entitled to compensation for any injury done to them while in the possession either of the vendor or of a stranger. Further, if the price has been paid, he has also a right to the immediate possession, and to speak technically, may maintain *trover* (a form of action in which both right of property and right of possession must concur) against any one who wrongfully withholds them from him. But payment in advance is of comparatively rare occurrence. In general payment is not made until delivery, and in the interval the buyer has indeed the right to say, 'These goods are mine;' but he has no right to take, or even to demand them, without payment or tender of the price. In our English system, where particular forms of action are appropriated to the different rights in which the injured parties sue, this distinction will be found very material. The doctrine is thus stated by Mr Justice Bayley:—'Where goods are sold, and nothing is said as to the time of delivery or the time of payment, and everything the seller has to do with them is complete, the *property* vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price.'* And as he has no right of possession, so neither can he maintain an action against the seller, for a breach of contract in not delivering, without averment and proof of the performance of that precedent condition. Nor is this right of the seller, as was observed by the same learned judge,† a mere *lien*‡ (which is an adscititious privilege depending upon actual possession) but rather, as it were, a *reservation* out of his original ownership and dominion, and therefore not forfeited, even though the goods pass into other hands. Whether he can, under any circumstances, without the consent of the buyer, *resell* the goods, admits perhaps of some doubt. Chief Justice Holt indeed, (no mean authority) states the law to be this:—'After earnest given, the vendor cannot sell the goods to another without a default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if

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*If a man sell his horse for money, though he may keep him until he is paid for, yet the property of the horse is by the bargain in the buyer: and if the horse die in the vendor's stable between the bargain and delivery, still he may have an action of debt for the money, because by the bargain the property was in the buyer. Noy's Max. chap. 42.

†It was assumed in the cases of Phillimore v. Barry, 1 Camph. 573. Hinde v. Whitehouse, 7 East, 558. and Tarling v. Baxter, 6 B. & C. 360. the question in the two first cases being whether the requisites of the statute of frauds had been complied with so as to pass the property.

‡Rugg v. Minett, 11 East, 210.

*Zagury v. Furnel, 2 Campb. 240.

†In Busk v. Davis, 2 M. & S. 397.

‡The action might also have been answered thus: How could it be ascertained for what amount the bills were to be given, until the number of dozens by which the price was to be regulated had been ascertained by counting? The principle, however, which was taken by Lord Ellenborough seems to be admitted, and is confirmed by the case of Simmons v. Swift, 5 B. & C. 857. In this respect our law exactly coincides with the civil law. Si vinum vel oleum, &c, non uno pretio, sed ita venierint, ut in singulas amphoras vini, in singulas metretas olei, &c, certum pretium diceretur, non prius, *quantum ad periculum*, perfecta videatur venditio, quam res hujusmodi adnumeratæ, admensæ, appensæve sin, quasi venditio sub hac conditione contracta sit. Vin Comm. in Inst. 1. 3. tit. 24. The rule is thus neatly stated in Bell's Commentaries on the Laws of Scotland, vol. i. p. 444. 'While the sale is still incomplete, as where the quantity has not been separated from a common mass, or where the price is referred to weight or measurement, and the quantity has not been ascertained, or where the bargain is in reference to some test or criterion not yet applied, the risk is with the seller, and if the goods have perished, he will have no claim for the price.'

§See Tarling v. Baxter, 6 B. & C. 364.

*And the learned judge subsequently adds, 'The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, *or they may still act upon their right of property, if anything unwarrantable is done to that right.* If for instance the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury: but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights. Trover is an action of that description.' Bloxam v. Saunders, 4 B. & C. 948. and see Tarling v. Baxter, 6 B. & C. 364.

†Ibid.

‡What is a *lien* will be best seen by examples. If I send my coat to a tailor to be repaired, he has a right to keep it till I pay for the repairing. A wharfinger has a right to detain goods landed at his wharf, till his charges are satisfied. An inn-keeper may detain the luggage of a guest, till the bill is paid. This right in each case is called a *lien*, and it differs from the vendor's right principally in this, that it is lost by parting with the possession of the goods either to the owner *or to a stranger.*

he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them again to any other person.'* On the other hand, in a case where the course thus prescribed had been strictly followed, Lord Ellenborough considered it no defence in law to an action against the seller for not delivering, and expressed his opinion thus :—'If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room, or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. The notice given to fetch away the goods could not discharge the defendant from his contract, nor empower him to sell the property of the plaintiff.'† In the conflict of authorities such as these it would ill become us to decide: thus much, however, may without presumption be said, that convenience seems to favor the doctrine of Chief Justice Holt.

But we come now to that far more numerous, as well as more important class of sales, in which the dealing is on credit. In general, sale-notes are exchanged between the parties, in which the time and place of delivery, the period of credit, the mode of payment, and in short the terms of the bargain generally, are specified. In large transactions, the usual stipulation is, that the buyer shall accept bills for the amount, either immediately, or at some future day. Occasionally, but far more rarely, a period is fixed for the payment, or credit given generally, without the intervention of negotiable securities. In some branches of trade again, a certain credit has been established by custom, which is, in such cases, equivalent to an express agreement; the law implying, that all persons deal according to the general usage, unless the contrary appears. Now, by giving credit in any of these modes, the seller waives his privilege of retaining until payment, and the buyer acquires, not only a right of property, but a right of possession also (either absolutely, or on his acceptance of bills, as the terms of the contract may be) immediate, when there is no stipulation as to the time of delivery—from that time, when there is. But if, as frequently happens, while the goods are yet, without fault on the seller's part, undelivered, the period of credit should expire, or the buyer should, before the expiration of the credit, become insolvent, or his bills should be dishonored, then, in any of these cases, the right of possession returns to the seller, and he may again insist on his privilege of retaining until payment.‡ This right or condition may, however, like every other condition, be waived by the act of the party for whose benefit it is introduced; and therefore if the seller choose, notwithstanding, to deliver the goods, actually or constructively, to the buyer, he cannot except in the single case of insolvency which will be considered hereafter, resume the possession, and re-invest himself with the privilege which he has abandoned. And this leads us to the next main division of our subject, the delivery of goods to the purchaser.

To be continued.

## LORD JEFFERIES.

George Jefferies, afterwards successively recorder of London, attorney-general, chief justice of the king's bench, and lord high chancellor of England, was born at Acton, near Wrexham, in the country of Denbigh, about the year 1648. He was the sixth son of John Jefferies, Esq., of that place, by Margaret, daughter of Sir Thomas Ireland, Knight, of Bewsey, in the county of Lancaster. His father was a gentleman of small estate; but his paternal grandfather had filled the office of a Welsh judge. Young Jefferies received his education successively at the free-school of Shrewsbury, at Saint Paul's free-school, and at Westminster school, under the celebrated Dr Busby. Of the progress which he made in his studies, or of the motives which induced him to pursue the profession of the law, little is known. In consequence of the narrowness of his father's fortune, he was deprived of the benefit of an university education, and became at an early age a member of Inner Temple, where, in a mean and obscure apartment, he for some time applied himself with diligence to his professional studies.* At this period he derived his principal support from his grandmother, who supplied him with an annuity of forty pounds, to which ten pounds were added by his father.

It has been asserted that Jefferies was never regularly called to the bar†; and it appears that while yet a student, and only eighteen years of age, he assumed the gown of a barrister, and attended the Kingston assizes, during the prevalence of the plague in London; an irregularity which was probably overlooked in that season of calamity. In endeavoring to force himself into practice, Jefferies looked principally to the city, attending with diligence at Guildhall and Hick's Hall. In compliance also with the temper of the citizens, he not only professed the political principles at that time favored by them, but attempted to ingratiate himself with them by adopting all their convivial habits.* Nor did he neglect other artifices, equally mean, to promote his interests. We are told by Roger North† that, 'after he was called to the bar, he used to sit in coffee-houses, and order his man to come and tell him that company attended him at his chamber; at which he would huff and say, "let them stay a little, I will come presently," and thus made a show of business.'

These arts appears to have been successful, for he rose at a very early age into practice; and although he possessed no resources from his father, he was married, while yet in his minority, to Sarah, the daughter of Thomas Neesham, A. M. Such were his reputation and influence in the city even at this early age, that upon the 17th of March, 1670, on the resignation of Sir Richard Browne, he was appointed common sergeant. This office he enjoyed for several years, till, finding that the seat of recorder was likely to become vacant, he did not hesitate to sacrifice his political principles to his hopes of advancement, and having contracted such an acquaintance with Chiffinch, the king's favorite page, as, to use the words of Roger North, 'is apt to grow up between immane drinkers‡, he obtained through the influence of the court, the vacant appointment, and on the 22d of October, 1678, was elected recorder of London.

Being thus introduced to the court party, he was made solicitor to the Duke of York, and received various other appointments in rapid succession. On the 17th of February, 1680, he was called to the degree of Sergeant at law, and about the same time mas made a Welsh judge. On the 13th of April in the same year, he succeeded Sir Job Charlton as chief justice of Chester, on the 12th of May was made king's serjeant, and on the 17th of November, 1681, was created a baronet. The degree of influence which Jefferies possessed at court was displayed in his appointment to the chief justiceship of Chester. Sir Job Charlton, a venerable and learned man, was in possession of the office; but as the recorder was resolved to appropriate it to himself, Sir Job was told that it was necessary that he should accept the seat of a puisne judge in the common pleas. 'Sir Job,' says Roger North, 'laid this heavily upon his heart, and desired only that he might speak to the king, and receive his pleasure from his own mouth; but was diverted, as a thing determined. But once he went to Whitehall, and placed himself where the king, returned from his walk in Saint James' Park, must pass, and there he set him down like hermit poor. When the king came in and saw him at a distance, sitting where he was to pass, he concluded that he intended to speak to him, which he could not by any means bear; he therefore turned short off, and went another way. Sir Job, seeing that, pitied his poor master, and never thought of troubling him more, but buckled to his business in the common pleas.'§

While filling the office of recorder, it became the duty of Sir George Jefferies, as counsel for the crown, to prosecute many of the persons accused of a participation in the popish plot. At first he did not exhibit that violence and rancor against the prisoners which afterwards distinguished him. He was probably aware that the court would gladly, had it been possible, have dis-

*3 Langfort v. Administratrix of Tyler, 1 Salk. 113.

† Greaves v. Ashlin, 3 Camph. 426. In Comyn's Dig. tit. Agreement, B. 3. it is laid down that 'if a man agree for goods at such a price, the bargain shall be *void*, if the money be not paid immediately; for in every bargain payment ought to be made upon the delivery of the goods, except where a future day is agreed for the payment.' But this we apprehend must be understood as applying to cases where no *earnest* has been paid so as to bind the bargain.

‡ In Bloxam v. Sanders, 4 B. & C. 941. a quantity of hops had been sold on the usual credit of the trade. Payment was not made at the expiration of that time, and the purchaser having become insolvent, the vendors re-sold a part without his consent; whereupon his assignees brought an action of *trover* founded, of course, on a supposed right of *possession*. But the court held that it could not be maintained, Mr Justice Bayley saying, 'If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he become insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire; because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear.' The point thus left doubtful, was subsequently determined in the case of New v. Swain, Dan. & Lloyd's Merc. Cases, 193. There, hops had been bought to be paid for by a bill at three months. The bill was given, and the hops remained at the buyer's request in the warehouse of the seller, who upon the subsequent dishonor of the bill refused to deliver them without payment. Lord Tenterden said, 'We are all of opinion that on nonpayment of the bill, the defendant (the vendor) had a right to retain the goods.' And Mr Justice Bayley added, 'Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffer the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them.'

*Lives of the Chancellors, vol. i. p. 179.

†Life of Lord Keeper Guilford, vol. ii. p. 5.

*Life of Lord Guilford. vol. ii. p. 5.

†Id. p. 4.

‡Id. p. 8.

§Id. p. 12.

countenanced the prosecutions; but at length, when the popular feeling had risen to such a pitch, that common sense and justice were forgotten in the excitement, Jefferies readily adapted his conduct to the prevailing sentiment, and urged the conviction of the unfortunate prisoners with brutal vehemence. It is difficult to discover whether Jefferies himself felt convinced of the guilt of the accused. His attachment to the church of England, which assumed almost the semblance of a principle, might induce him to credit the reality of the plot; but even the most thorough conviction of its truth could not have excused the violence and injustice which he exhibited towards the accused. Nor was it in these trials alone that he manifested his disregard for the principles of truth and justice. The prosecutions for libels, which were at this time instituted by the court, afforded him an opportunity of promulgating certain unconstitutional doctrines which were doubtless intended to procure him favor from the government, and which probably led the way to his subsequent promotion.

At length the violence and intemperance of the recorder drew down upon him the reprehension of the party whose principles he had deserted. After the dissolution of the Oxford parliament in 1679, the country party petitioned for the calling of a parliament in terms offensive to the court; and in opposition to these petitions, the prerogative party addressed the crown, expressing their *abhorrence* of the tumultuous proceedings of the petitioners. In encouraging these *abhorrers*, as they were termed, Jefferies rendered himself eminently conspicuous; and on the meeting of the new parliament, in 1680, he fell, with the rest of those who had opposed the petition for its assembling, under the censure of the commons. Accordingly, on the 13th of November, 1680, it was resolved, 'that Sir George Jefferies, recorder of the city of London, by traducing and obstructing petitioning for the sitting of this parliament, hath destroyed the right of the subject.' And it was ordered that a humble address should be presented to his majesty to remove Sir George Jefferies from all public offices. To this address his majesty replied that he would consider of it. Jefferies himself trembled at the prospect of popular indignation. Being brought to the bar of the house, he received a reprimand on his knees; and such was the effect of this discipline upon his spirits, that he immediately resolved to resign his office of recorder, which drew from the king the observation that 'he was not parliament proof.'* On the 2d of December the office was accordingly surrendered, and was immediately afterwards filled by George Treby, of the Middle Temple.

Of the character acquired by Jefferies while chief justice of Chester, some idea may be formed from the speech of Mr Booth, afterwards Earl of Warrington, in which he denounces the profligate conduct of Jefferies in very severe terms. 'The county for which I serve is Cheshire, which is a county palatine, and we have two judges peculiarly assigned to us by his majesty; our puisne judge I have nothing to say against him, for he is a very honest man, for aught I know; but I cannot be silent as to our chief judge, and I will name him, because what I have to say will appear more probable. His name is Sir George Jefferies, who, I must say, behaved himself more like a jack-pudding than with that gravity which becomes a judge: he was mighty witty upon the prisoners at the bar; he was very full of his jokes upon people that came to give evidence, not suffering them to declare what they had to say in their own way and method, but would interrupt them because they behaved themselves with more gravity than he; and in truth the people were strangely perplexed when they were to give in their evidence; but I do not insist upon this, nor upon the late hours he kept up and down the city; it is said he was every night drinking till two o'clock, or beyond that time, and that he went to his chamber drunk: but this I have only by common fame, for I was not in his company—I bless God I am not a man of his principles or behaviour—but in the morning he appeared with the symptoms of a man that over night had taken a large cup. But that which I have to say is the complaint of every man, especially of them that had any lawsuits. Our Chief justice has a very arbitrary power in appointing the assize when he pleases, and this man has strained it to the highest point; for whereas we were accustomed to have two assizes, the first about April or May, the latter about September, it was this year, as I remember, the middle of August before we have had any assize; and then he despatched business so well, that he left half the causes untried, and, to help the matter, has resolved that we shall have no more assizes this year.'*

Jefferies was too firmly seated in the favor of the court to suffer from these attacks, and continued to deserve the good opinion of his patrons by the zeal with which he conducted the many important matters intrusted to his hands. On the trials of Fitzharris† and of Plunket‡ he displayed great acrimony and violence; but the full tide of his insolent vituperation burst forth in the case of Colledge, the 'protestant joiner.'§ He was also counsel for the crown in the prosecution of Pilkington and others for a riot, arising out of the attempt made by the court to secure the election of one of the sheriffs of London;‖ in the celebrated case of the quo warranto against the city of London,¶ and lastly in the prosecutions which followed the discovery of the Rye-house Plot. The good service which he did to government on these occasions, and especially on the trial of Lord Russell, in which he boldly endeavored to pervert the rules of evidence, in order to procure a conviction, entitled him to some substantial mark of royal gratitude; and on the death of Sir Edmund Saunders, the chief justice of the king's bench, he was on the 29th of September, 1683, appointed to the vacant office, and was soon afterwards sworn in as a member of the privy council. It was not until the 15th of May, 1685, that he was raised to the peerage, under the title of Baron Jefferies, of Wem.

The temper which distinguished Jefferies, when counsel on the prosecution of Lord Russell, was again exhibited by him when he sat as judge on the trial of Algernon Sidney. The same desire to convict, the same eagerness to pervert the law, the same fierce animosity towards the prisoner, were again visible. The conclusion of this trial exhibited a singularly impressive scene. Jefferies had no sooner pronounced sentence than the prisoner exclaimed, 'Then, O God! O God! I beseech thee to sanctify these sufferings unto me, and impute not my blood to the country, nor the city through which I am to be drawn; let no inquisition be made for it; but if any, and the shedding of blood that is innocent must be avenged, let the weight of it fall only upon those that maliciously prosecute me for righteousness' sake.'—'I pray God work in you,' said Jefferies, 'a temper fit to go unto the other world, for I see you are not fit for this.'—'My lord,' replied Sidney, 'feel my pulse (holding out his hand,) and see if I am disordered: I bless God I was never in better temper than I am now.'* The feelings with which Jefferies presided at this trial may easily be divined when we hear the language with which he not long afterwards insulted the memory of Russell and of Sidney. In his summing up on the trial of Sir S. Barnardiston, for a misdemeanor, he said, 'Then here is as I said, the sainting of two horrid conspirators; here is the Lord Russell sainted, that blessed martyr; my Lord Russell, that good man, that excellent protestant: he is lamented, and what an extraordinary man he was, who was fairly tried and justly convicted, and attainted for having a hand in this horrid conspiracy against the life of the king, and his dearest brother, his royal highness, and for the subversion of the government. And here is Mr Sidney sainted! What an extraordinary man he was! Yes, surely, he was a very good man, because you may some of you remember, or have read the history of those times, and know what share Mr Sidney had in that black and horrid villany, that cursed treason and murder—the murder, I mean, of King Charles I., of blessed memory; a shame to religion itself, a perpetual reproach to the island we live in, to think that a prince should be brought, by pretended methods of law and justice, to such an end at his own palace. And it is a shame to think that such bloody miscreants should be sainted and lamented, who had any hand in that horrid murder and treason, and who, to their dying moments, when they were upon the brink of eternity, and just stepping into another world, could confidently bless God for their being engaged in that good cause, as they call it, which was the rebellion which brought that blessed martyr to his death. It is high time for all mankind that have any Christianity, or sense of heaven or hell, to bestir themselves, to rid the nation such caterpillars, such monsters of villany as these are.'†

* North's Examen, p. 550.

*Chandler's Debate.
†State Trials, vol. viii. p. 223.
‡Id. p. 447.
§Id. p. 549.
‖Id. vol. ix. p. 187.
¶Id. vol. viii. p. 1039.

*State Trials, vol. ix. p. 902.
†State Trials, vol. ix. p. 1353.

To be continued.

## LAW REFORM.

Whoever sets about the task of improving the administration of justice in this kingdom, with a view to making it cheaper and more accessible to the people, must be prepared to grapple with no common difficulties. There is a common saying among lawyers, that 'cheap law is bad law;' but though it may be bad for them, there is no reason why it should not be good for their clients. We cannot understand why law should be more excellent for being a luxury, of which only the rich can afford to partake; nor do we know what necessary connexion there is between justice and extortion. One of the wise measures of finance of Mr Pitt's Government was, to increase the cost of law proceedings by exorbitant stamp duties—although, without such additional cause of expense to the suitor, law was extravagantly dear, and well justified the sarcasm of Horne Tooke, that, 'Courts

of Justice in this country were like the London Tavern—open to every person who could pay.' The reduction of the stamp duties has still left justice a very costly thing; and while the prices of all other commodities of English produce and manufacture have fallen, the price of English justice has suffered no depression. What is more, it seems resolved by a great number of those who deal in the commodity to make common cause against any man who attempts to reduce the price of the article to a level with the reduced resources of the community at large. This Mr Brougham has discovered in his endeavors to realise a plan for the recovery of small debts at little expense and delay, and to introduce some other reforms into the practice of the law in certain cases, with a view to the establishment of a limited system of cheap and expeditious justice. It will be recollected that we gave last year an abstract of the Bill of the Hon. and Learned Member for the erection of Courts of local jurisdiction, with some comments upon its provisions. Mr Brougham proposed that, even if his Bill should in theory appear deserving the sanction of the legislature, yet he wished it to be tried but on a small scale at first, that the practicability of giving a general application to the principle might be ascertained by the test of experiment. Certain members of the profession, however, have taken alarm at the prospect of Parliament giving encouragement to such a dangerous innovation upon ancient institutions as a cheap and expeditious system of law. Already they see in their alarmed imagination the business of the superior Courts of Westminster diminished at least one half, and, consequently, feel, like the silversmiths of Ephesus, that 'their craft is in danger.' Disinterested, no doubt, in their zealous advocacy of the existing system of law, as the others were in their support of the established system of religion, they cry out that the temple of Justice is threatened with as much danger, from the hands of profane innovation, as ever befel the temple of the 'great goddess Diana.' All established systems of imposition, to which the many have been, in all ages, subjected, for the benefit of the few, have claimed their chief title to preservation, when attacked by the weapons of reason, from the length of time during which they have been patiently endured, as if antiquity could consecrate abuse, or make absurdity venerable. Nothing can be more excellent than many of the *principles* of English law,—nothing can be worse, generally speaking, than its *practice;* and it will be understood that it is of the practice only, in the present instance, that we complain. It is to remedy the practice, and thereby make justice cheaper and less tedious than it is in certain cases, where the sums to be recovered, or the matters in dispute, are of small value, that Mr Brougham's Bill is intended. Another object is to prevent litigation in matters of minor importance by a process of *reconcilement.* Now these two objects—namely, to make the administration of justice cheap and expeditious in practice, and to prevent lawsuits about trifles, have excited the jealousy and alarm of the legal practitioners to whom we alluded—and hence the 'circular' to which Mr Brougham adverted in such pointed terms lately. We do not now enter into the merits of his Bill,—we have touched on those before. It may possibly admit of some improvement in its details; but those gentleman, by attempting to raise a violent prejudice against the measure, before it has been submitted to the test of experiment on the smaller scale, have at least, evinced their own conviction of its being likely to be of some public advantage; for they would not oppose anything which would have the effect of sacrificing the public good to their own profit.

The reformation in the administration of justice, which was promised in the Speech from the Throne at the commencement of the last Session of Parliament, has yet to be carried into effect. It is true some alterations in the practice of the law were made during that Session, but we fear they cannot be called improvements. Those alterations consisted in the abolition of the Welsh system of judicature—a system which afforded more cheap and expeditious justice to the people than the one that is substituted for it; a system, moreover, in which the inhabitants of the principality expressed their confidence; and, though they admitted some reforms were necessary, they depreciated abolition. A few of the aristocratic families of Wales supported the measure, but it was carried against the sense of the great body of the people. We need not wonder at this, when we find that the same Bill by which this abolition has been effected went to increase the patronage of the Ministers of the Crown, by the appointment of three new Judges, with a salary of 5,000*l.* a year each, in the Courts at Westminster. At the same time that this addition is made to the expenses of the judicial establishment of this country, it is notorious that we have four Judges in the Court of Exchequer, who, except at the periods of the Spring and Summer Assizes, have very nearly sinecure offices in the Court of Exchequer. It is true the Welsh Judgships have been abolished, but the expense of their appointments was not so great by some thousands as that of the three Judges who are to be appointed in their place. Thus neither has cheapness in the administration of justice, nor economy in the appointment of Judges, been consulted; and this is all the 'reformation' which the people have obtained! The dearness of justice is one of the greatest grievances under which the people of this country at present labor, and every attempt to reform the abuse has hitherto proved abortive. It is true there are some Courts of local jurisdiction, in which justice may be had comparatively cheap; but another grievance—that of monopoly—prevents their being in much favor with the public. One of these is the Lord Mayor's Court, which has a jurisdiction over certain causes of action arising in the City. In that Court, the other day, the Recorder, who presides as Assessor to the chief Civic Magistrate, expatiated on the advantages which the cheapness and expedition of the process afforded to suitors. He said that the action which had been then tried, and in which the plaintiff, a dealer in spirits, had obtained a verdict for 6*l.* 10*s.* against the defendant, as the price of a certain quantity of spirits delivered, if brought in any of the superior Courts at Westminster, would have produced a bill of costs to the amount of 40*l.* or 50*l.*; whereas in this Court they would not amount to more than one tenth of either sum—that is, to 4*l.* or 5*l.* Again: the plaintiff in the higher Courts would not obtain his money sooner than nine months after the verdict, while here he could get his decree in two or three days. This is not quite accurate, inasmuch as the successful plaintiff in the superior Courts can sue out execution on his judgment after four days of the ensuing Term have elapsed, unless in these four days the defendant should have moved for a new trial, or taken some other step to set the proceedings aside. Still it must be admitted that the superior Courts afford great opportunities for dilatory and vexatious proceedings by writs of error, sham pleas, &c, which are a disgrace to justice; but the cheapness and despatch of such civil tribunals as the Lord Mayor's Court and the Palace Court are not much estimated by the public, in consequence of the monopoly of Attorneys and Barristers in these Courts, which prevent suitors from employing as their legal advisers men in whose talents and judgment they can have confidence. What the public want is cheap and expeditious law, without the drawback and positive nuisance of legal monopoly.—*London Morning Herald.*

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*In House of Representatives of the State of Georgia.*

WEDNESDAY, DEC. 22.—The following communication was received from the Governor, which, after being read, with the accompanying document, was referred, on motion of Mr Haynes to a select committee, composed of Messrs Haynes, Beall, of Twiggs; Howard, of Baldwin; McDonald, and Schley.

EXECUTIVE DEPARTMENT,
December 22, 1830.

I submit to the Legislature, for its consideration, the copy of a communication received this day, purporting to be signed by the Chief Justice of the U. States, and to be a citation of the state of Georgia to appear before the Supreme Court, on the second Monday in January next, to answer to that tribunal for having caused a person who had committed murder within the limits of the State, to be tried and convicted therefor.

The object of this mandate is to control the state in the exercise of its ordinary jurisdiction, which in criminal cases, has been vested by the constitution exclusively in its Superior Courts.

So far as concerns the exercise of the power which belongs to the Executive Department, orders received from the Supreme Court, for the purpose of staying or in any manner interfering with the decisions of the Courts of the state, in the exercise of their constitutional jurisdiction, will be disregarded: and any attempt to enforce such orders will be resisted with whatever force the laws have placed at my command.

If the judicial power thus attempted to be exercised by the courts of the United States, is submitted to, or sustained, it must eventuate in the utter annihilation of the state governments or in other consequences not less fatal to the peace and prosperity of our present highly favored country.

(Signed) GEORGE R. GILMER.

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UNITED STATES OF AMERICA, SS.

*To the State of Georgia, Greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden, at Washington, on the second Monday in January next, pursuant to a writ of error, filed in the Clerk's office of the Superior Court of the state of Georgia for Hall County, in the County of Hall, wherein George Tastle, alias George Tassles, alias George Tassel, alias George Tassle, alias George Tasslle, is plaintiff in error, and the said state of Georgia is defendant in error, to show cause, if any there be, why judgment rendered against the said George, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable JOHN MARSHALL, Chief Justice of the said Supreme Court of the U. States, this 12th day of December, in the year of our Lord, 1830.

(Signed) J. MARSHALL,
*Ch. Just. of the U. S*

The committee to whom the above had been referred, made the following report, which was agreed to by the House, and concurred in by the Senate:

Whereas it appears by a communication made by his Excellency the Governor to the General Assembly, that the Chief Justice of the Supreme Court of the United States, has sanctioned a writ of error, and cited the state of Georgia, through her Chief Magistrates to appear before the Supreme Court of the United States, to defend said state against said writ of error, at the instance of one George Tassels, recently convicted in Hall Superior Court:

And whereas, the right to punish crimes against the peace and good order of this state, in accordance with the existing laws of this state, is an original and a necessary part of sovereignty which the state of Georgia has never parted with:

*Be it therefore Resolved, by the Senate and House of Representatives, &c*, That they view with feelings of deep regret, the interference by the Chief Justice of the Supreme Court of the United States in the administration of the criminal laws of this state, and that such an interference is a flagrant violation of her right.

*Resolved further*, That his Excellency the Governor be, and he and every other officer of this state, is hereby requested to disregard any and every mandate and process that has been or shall be served upon him or them, purporting to proceed from the Chief Justice or any associate Justice of the Supreme Court of the United States for the purpose of arresting the execution of any of the criminal laws of this state.

*And be it further resolved*, That his Excellency the Governor, be, and he is hereby, authorized and required, with all the force and means placed at his command by the constitution and laws of this state, to resist and repel any and every invasion, from whatever quarter, upon the administration of the criminal law of this state.

*Resolved*, That the state of Georgia will never so far compromit her sovereignty as an independent state, as to become a party to the case sought to be made before the Supreme Court of the United States by the writ in question.

*Resolved*, That his Excellency the Governor, be, and he is hereby, authorized to communicate to the Sheriff of Hall county, by express, so much of the foregoing resolutions, and such orders as are necessary to insure the full execution of the laws, in the case of George Tassels, convicted of murder in Hall county.

On the subject of the writ of the Supreme Court, served on the state of Georgia, the National Intelligencer remarks:

'The execution of the Indian was to have taken place, we believe, on the 24th ult. and no doubt did then take place, at the time set for it; so that the death of the plaintiff will have abated the suit and citation of the Chief Justice, and the Resolutions of the Legislature of Georgia, as regards that particular case, will be equally inoperative.'

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From the Georgia Journal.

Our Indian Affairs are approaching a crisis. The reader will remember the resolutions adopted in consequence of the citation served upon the Governor, as published in our last paper. In obedience to the last of them, an express was despatched to Hall county, at 12 o'clock, on the night of their passage, and reached the sheriff on the day appointed for the execution of Tassels. Eberhart, the Sheriff of Hall county had been served with a citation from the Supreme Court of the United States, which he had determined to disregard, even if he had received no instructions from the state authority. Tassels was hung pursuant to his sentence.

During the past week the Governor received the following letter by special messenger:—

*Head of Coosa, Cherokee Nation,*
December 20th, 1830.

To his Excellency GEORGE R. GILMER,
*Governor of the State of Georgia:*

SIR—You will please to take notice, that on Saturday, the 5th day of March next, at the City of Washington, in the District of Columbia, the Cherokee Nation will by their Counsel, move the Supreme Court of the United States, which is expected to be then and there in session, for an injunction to restrain the state of Georgia, the Governor, Attorney General, Judges, Justices of the Peace, Sheriffs, Deputy Sheriffs, Constables and all the other officers, agents and servants of that state from executing and enforcing the laws of Georgia, or any of those laws, or serving process, or doing anything towards the execution and enforcement of those laws, within the Cherokee Territory, as designated by treaty between the United States and the Cherokee Nation: The motion will be made on the grounds set forth in the bill, a copy of which will be handed to you with this notice, which bill will be supported by the necessary affidavits and documents.

JOHN ROSS,
Principal Chief of the Cherokee Nation.

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The bill referred to in the letter, consists of nine closely printed foolscap pages, and is endorsed thus:—

SUPREME COURT OF THE UNITED STATES.

*The Cherokee Nation*, vs. *The State of Georgia.*

BILL IN CHANCERY.

It commences thus:—'*To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States, sitting in Chancery.*

'Respectfully complaining, show unto your honors, the Cherokee Nation of Indians, a foreign state, not owing allegiance to the United States nor to any state of this Union, nor to any other Prince, Potentate, or state other than their own,' &c, &c.

And concludes, after a detailed statement of their grievances, thus:—

'In tender consideration of all which, and inasmuch as your complainants are wholly remediless in the premises, except by the interference of this honorable court: to the end, therefore, that the said state of Georgia, one of the United States of America, may be made defendant hereto, with apt words to charge her as such, and that she may by her proper officers, according to the established forms of proceeding in this court, in like cases, true, full, and perfect answer make to all and singular the premises, as fully and particularly as if the same were herein again especially repeated, and they thereto particularly interrogated; that the said state of Georgia, her governor, attorney general, judges, magistrates, sheriffs, deputy sheriffs, constables, and all other her officers, agents, and servants, civil and military, may be enjoined and prohibited from executing the laws of that state within the boundary of the Cherokee territory, as prescribed by the treaties now subsisting between the United States and the Cherokee Nation, or interfering in any manner with the rights of self-government possessed by the Cherokee Nation within the limits of their territory, as defined by treaty: That the two laws of Georgia before mentioned as having been passed in the years 1828 and 1829, may by the decree of this honorable court, be declared unconstitutional and void; and that the state of Georgia and all her officers, agents and servants, may be forever enjoined from interfering with the lands, mines, and other property, real and personal, of the Cherokee Nation, or with the persons of the Cherokee people, for or on account of anything done by them within the limits of the Cherokee territory; that the pretended right of the state of Georgia to the possession, government or control of the lands, mines and other property of the Cherokee Nation, within their territory, may by this honorable court, be declared to be unfounded and void, and that the Cherokees may be left in the undisturbed possession, use, and enjoyment of the same, according to their own sovereign right and pleasure, and their own laws, usages, and customs, free from any hindrance, molestation, or interruption by the State of Georgia, her officers, agents, and servants; that these complainants may be quieted in the possession of all their rights, privileges, and immunities, under their various treaties with the United States; and that they may have such other and further relief as this honorable court may deem consistent with equity and good conscience, and as the nature of their case may require.'

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The Savannah Georgian of January 3d contains the following paragraph:—

'We understand that on Monday last, John Ross, the President of the Cherokees, went into the Executive Office at Milledgeville, and served on the Governor some process from the Supreme Court, in contravention of the jurisdiction of Georgia over the Indians, but not signed, like the former one, by Chief Justice Marshall—entering abruptly into the office and retiring from it quickly without saying a word—perhaps anticipating—what we understand was intended had he been subsequently found—that the Governor would return the compliment, by serving some process quite as abruptly, on him, under the authority of the laws of Georgia to suppress the Indian Government—which make it a penal offence, punishable by four years' confinement in the Penitentiary, to exercise any authority whatever under the sanction of that government.

We regret that this redoubtable half bred hero had not remained a sufficient time to test the law of Georgia in his own proper person.'

THE JURISPRUDENT.

BOSTON, SATURDAY, JANUARY 29, 1831.

## LAW REFORM.

Our friend of the *Patriot*, in the proposition and remarks submitted by him in the House of Representatives on Tuesday the 18th inst. which we publish today, has really laid his political axe *at* the root of the tree. He has, with the ardor of a reformer, put his shoulder to the pillars of Diana's Temple, and given timely warning to 'Demetrius the silver smith,' and all the Priests, Worshippers and Janitors there to look to their craft.

We think he entirely mistakes the feelings of the 'respectable class of practitioners' to whom he refers, in supposing they have the least disposition to put forth any opposition to the work of reform. We are satisfied that not one of them would wish to impose a hand's weight against the wheel set in motion by the distinguished efforts of Mr Brougham, who was a very zealous reformer in the house of Commons, and, we presume, if he takes the course of all his predecessors, now he has a seat on the *woolsack*, will make a very easy and loyal Lord Chancellor. There is nothing, which cools the ardor of reform like a good place at Court. As our friend has got the wheel well

over the water and given it a new impetus here, if it roll well, he will find politicians and 'practitioners' enough willing and ready to jump on. Nothing, in truth, could do the profession less disservice than the Establishment of Courts of Reconcilement. Cheap litigation is by no means a short way to 'amicable and quick settlements.' To cure the evil of litigation, the remedy must go deeper still. Nothing short of making it penal to sue or be sued, to buy or sell advice, will meet the case, and that kind of Legislation would be about as successful as the Act for the suppression of lotteries. The truth is, there must be litigation where there is business. And there must be tribunals established to try and settle questions which admit of doubt. Suits in Court are not, as some would represent, all vexatious and frivolous; there is much honest and necessary litigation. A great portion of the cases tried in our Courts are of that character. And, after all, there is no extravagant and unnecessary pay for working the machine, if it is to be worked at all. Our Judges are neither too many nor too well paid. We have no Lord Chancellor, with £30,000 a year, reposing over the arrears of equity business, and nodding, at brief intervals stolen from political strife and debate, over unnumbered appeals and cases set down for hearing. No Vice Chancellor to help the Chancellor, and no Master to look after both, and more especially after the fees.

We have now all the necessary powers for submitting cases to referees, auditors, and arbitrators, whenever the parties choose it. But all experience has satisfied Courts, Counsel and parties that these domestic forums are the dearest and least likely to end litigation of any in the community. There is a wide difference between our condition in this country and that of England. Propositions for reform there can have little pertinency of application here, except, perhaps, in the single matter of special pleading. As to the necessity of a change, in that respect, we go with him who goes farthest. In other respects we have already stripped our system of most of the objectionable features of English Jurisprudence. We cannot well simplify it farther and preserve the substance or any of the forms of justice. The process by which the suit is commenced, and the evidence by which it is carried on, are procured at the cheapest rate and in the plainest form possible. The suitor pays for no service which is not rendered and of which he has not the benefit, and is never obliged, as is sometimes the case, in other countries, to buy justice at the hands of the judge. We believe it will be found, on examination, that, if our system of jurisprudence has in any degree failed of its object, the fault must be looked for elsewhere than in its theory or general adaptation to our condition.

However this may be, we think Mr Davis' speech a good one and calculated to be popular, although we are inclined to believe the importance of the topic overrated.

On motion of Mr Davis it was

*Ordered*, That Messrs Davis of Boston, Baylies of Taunton, Shaw of Lanesborough, Betton of Boston, and Barton of Oxford, be a committee to inquire into the expediency of abolishing by law Special Pleadings to Civil Suits; also, into the expediency of providing by law for the examination of parties in civil suits; also, into the expediency of giving to the Judges of the Court of Common Pleas authority to act as Courts of Reconcilement; also, into the expediency of adopting more plain and simple indictments in criminal suits—reference being had, by such provisions, to their effect in lessening expense, and in preventing delay in legal proceedings in this Commonwealth.

Mr Davis of Boston said, it would have afforded him great pleasure had the propositions contained in the order been submitted by some gentleman his better both in years and knowledge. But, as they were both novel and important, a due respect for the House seemed to require, that he should accompany them with some explanation. He should not, however, have presumed to have done this, had not the state of the business of the House made it apparent, that there were now no subjects of pressing interest, requiring the attention of the House.

From the early period of English history, it was considered essential to the forms of freedom that justice should neither be sold, delayed nor denied. And if there were a privilege, which emphatically might be said peculiarly to distinguish a free, republican form of government, it was the impartial, easily accessible, and speedy and cheap administration of justice. In truth, in the Court of Justice could be found almost the only practical illustration of the sublime maxim, 'that all men are born free and equal.' In most concerns of life, accident, truth, superior habits of industry, greater energy of character, higher intellectual powers were constantly making distinctions—placing one man above—another below the general level: but in the Court of Justice all ephemeral distinctions were merged—every man stood on his own rights—be he high or low—rich or poor—knowing no distinction, but those arising from the immutable principles of right or wrong, as applied to this case.

The history of Massachusetts from its existence as a state, had been distinguished for the impartial and independent character of her judiciary. During periods of trial, of peril, of excitement, he might say, of party phrenzy and folly, the character of our judiciary had been not only above reproach but above suspicion. And the present elevated character of the Judges of both our Courts, among whom the recently appointed Chief Justice of the Supreme Judicial Court was deservedly eminent for his integrity, ability and sound learning, was the best guaranty that the merited distinction of our judicial tribunals in this respect would continue unimpaired. As to having justice easily accessible, by our system of circuits, not only for the trial of issues of fact, but also questions of law, he believed that we had in this Commonwealth for years enjoyed a system of justice, as it were, brought home to every man's door, far superior to what was now proposed to introduce into practice in England as a great improvement.

But as to having justice speedily and cheaply administered, he believed that changes might be made which on experiment would prove to be great improvements. The first inquiry was, what is the present expense of our judicial proceedings? A portion of this expense is apparent. By going to the Treasurer's Annual Reports, we could see the amount paid annually in salaries to our judges. It is a liberal compensation;—but not too liberal,—he would not reduce it one cent. By looking at our County Treasurer's accounts, we can see the amount paid to prosecuting county officers—to sheriffs—constables, clerks and jurors. But these sums in aggregate, make up not the largest sum of money paid for judicial proceedings. Estimating the number of civil suits, annually commenced in this Commonwealth at 20,000 and the costs on such suits to somebody at $15 each, it would seem that $300,000 annually was the cost of this part of judicial proceedings. If this estimate was too great, it would not affect the argument, because at all events the sum total would be a large one. He believed that every gentleman would concede that what went to shorten and simplify legal proceedings, would tend to make them cheaper. For the purpose of shortening civil suits, he would abolish *special pleading*. He was assured in so doing, that opposition is to be encountered. That highly respectable class of practitioners, who had become familiarized with this branch of practice, would naturally oppose it. No one had more respect for their talents and integrity himself. But human nature was the same in all ages in conditions. When Paul preached at Ephesus the cry was 'great is Diana of the Ephesians!' But the reason of the cry was, as Demetrius the silversmith said, 'Sirs, by this craft we have our wealth!' So now, it is not unreasonable to suppose that some of an able and respectable class of men, who have been successful in a particular branch of practice should be opposed to a proposition which went to its abolition. It will also be said that this is a great innovation on established usages and that innovations are dangerous. He maintained that every valuable improvement had in its day, been denounced as an innovation. The Mariner's Compass was thought to be a dangerous innovation by the men who followed coasting, but had it not been adopted, the Cape of Good Hope would not have been doubted—America would not have been discovered, and we, he said, should not have been here debating on Special Pleading. So of the Art of Printing—the manuscript writers considered it a dangerous innovation and one of its first professors, Faustus, was accused of being in league with a gentleman, who should be nameless in that House. He might make similar remarks of almost every valuable improvement, that had ever been made. The true doctrine seemed to him to be, to seek out for improvements—but to proceed cautiously—to make haste slowly—but once satisfied that a change proposed is an improvement, to take the lead in adopting it.

The question then to be considered was—Is Special Pleading intrinsically good? He did not deny that it was a very old system, but it was yet to be shown that it grew better, like some kinds of wine, as it grew older. Some kinds of wine spoiled by keeping them a long time, and it might be so with special pleading.

He should not undertake to go into a full analysis of the system of special pleading—but he hoped he might in a brief manner be able to exhibit some of its difficulties. The first step in pleading was the Declaration. This, instead of being concise, simple and intelligible, was prolix, complicated and obscure: so that on the most simple contracts, we often had five or six counts, neither of which would be intelligible to a well informed man, unacquainted with technical language. The reason of this is obvious. The Plaintiff's Attorney fearing he may have his heels tripped up, when he least expects it, like a prudent man spreads himself over as much ground as possible. He has, he well knows, to encounter obsolete distinctions and arbitrary rules, and he prepares himself accordingly. For instance, in an action for assault and battery, it has been decided that the omission of the technical words 'with force and arms' is

fatal on demurrer. So that in a suit brought for spitting in a man's face in State-street, in which the injury is to the feelings—not to the body—it must be alleged that it was done with force and arms; or in other words, that must be alleged to secure redress, which is absolutely untrue. Another rule in trespass is, that the averment must be direct; and according to decisions in the books, the difference between in declaring using the word 'whereas' and 'because' makes in the result the important difference of the Plaintiff's securing or losing redress for the wrongs he has suffered. Mr D. stated other cases, equally glaring, of the absurdity of the arbitrary rules of the common law on this subject.

The next step to the declaration,—supposing it to steer clear of both special and general demurrer—is the plea. This also becomes prolix and obscure in proportion, generally, as the declaration was prolix and obscure. It assumes a great variety of shapes. It has to encounter technical difficulties, and arbitrary rules, not founded in reason or common sense. For instance, if in a real action a defendant sets forth one seizin, it is a good plea, but if he set forth two seizins, it is bad for *duplicity*. So that if a man tell half his story, he is safe—but if he tell his whole story, he loses, if not his rights, a heavy bill of costs. But, besides the plea, we have a replication and rejoinder, rebutter and surrebutter;—to the honor of the profession it ought to be said that the use of the rebutter and sur-rebutter is very unusual. In proceeding with pleading, another difficulty to be encountered is *departure*. The declaration may do well enough, but when the plaintiff comes to reply to the plea of defendant, he may find himself, if not deprived of, postponed in his rights by this arbitrary and technical error. Mr D. illustrated this difficulty by cases, which he stated. But supposing that the declaration is not bad on demurrer, the plea not had for duplicity, and the replication to make no departure, he asked, in the great majority of cases, of what use is the system of Special Pleading? A man is sued for goods sold—he pleads his infancy—the plaintiff replies that they were necessaries—the defendant rejoins they were not necessaries, and on this issue the case is tried. Of what use are these intermediate pleas, provided the law required that in all cases the party intending to avail himself of special matter, should give to the other party a short and informal notice thereof. He contended, in nine cases out of ten, that the system of pleading had no other effect than to prolong Judicial investigations.

He next asked the attention of the House to the history of Special Pleading in this Commonwealth. For a long time, it was the rule of the Common Law, that a defendant should have but one plea to the plaintiff's action. This rule was so inequitable, that the civilians compared it to requiring a man to fight a battle with one hand tied behind him. The statute of Anne was passed to authorize double pleas. In the action of slander the usual pleas were, the general issue and special pleas in justification. In a case that occurred in Berkshire, the Supreme Judicial Court having decided that the plea in justification was insufficient, the parties went to trial on the general issue. The plaintiff relied on the admissions of the plea in justification for her proof of the slander, and on such evidence the jury gave a verdict of damages. The full court afterwards decided that this use the plea of justification by the plaintiff was according to law, and the verdict was sustained. This rule of law, however, was altered by an act of the legislature, which provided that in case both the General Issue and the Pleas in justification were used, and the latter failed, the admissions therein contained should not be used by the plaintiff on the trial of the General Issue. In about a year, another case occurred, in which the pleas in justification only were used, and they failed. The defendant asked for leave to introduce evidence, to show that the alleged slander was published with good intent, believing it to be true and without malice—such evidence to go in mitigation of damages; but the court ruled out the evidence, the act of the legislature having reference only to cases in which both the General Issue and Special Pleas are used; and not to cases in which Special Pleas only are used. The difficulties that had occurred in this action of slander from our system of special pleading, he had the authority of very experienced members of the profession for saying, had occurred in almost every other kind of suit that is brought into courts of law.

He said the experience of our Commonwealth, as far as it had gone, was in favor of dispensing with special pleas. Administrators, Executors, Criminal and Civil Officers when such civil officers are sued for acts done in their official capacity are allowed to plead the general issue only. Why? Because it affords them a facility in making their defence. They are a favored class of defendants; but Mr D. knew of no good reason, why the privilege, if a valuable one, should not be extended to all defendants. He considered the system of special pleading as now obsolete. It was a sort of Gothic structure, which answered a good purpose, when our ancestors were satisfied to live in huts or caves, but not suited to the present times, when even the poor man lives in a house that would, at the period alluded to, have been thought a palace.

But with a view more effectually to shorten legal proceedings, he thought the examination of parties in civil suits might well be allowed. He respected the Common Law, but he did not believe it to be perfect. The examination of the parties, taken down in writing, would enable the judge to decide what case involved questions of fact;—what questions of law, and what neither questions of fact, nor law. This would save a vast deal of useless litigation and besides in the event of a trial, it would enable the parties to decide beforehand, what evidence is material and what not. Here again would be saving of great expense both of money and time. He did not believe that this would lead to perjury. The provision would be prospective. Placed at once upon suits already commenced, it might lead to perjury—but if parties before they plunged into wilful litigation knew that they must submit to this examination, and that their will could only be gratified in defiance of the pains and penalties of perjury, he believed they would pause before they commenced their downward career. The practice had been tried in Chancery with good results—it had been partially tried in the trustee process, which he presumed no one would now be willing to give up, and he fully believed it might be incorporated into our Common Law practice, with the best results.

But to carry out fully the idea of reducing the expense of litigation, he would invest the Court of Common Pleas, before which most of the business of the Commonwealth originates, with power to act as a Court of Reconcilement. He believed most would agree, if parties, before their passions were enlisted, could submit their whole case to an enlightened Judge, that in a vast proportion of cases they would come to an amicable and quick settlement. The experiment had been tried in Denmark. In 1795, courts of reconcilement were established there. In 1825, from an official report, it appeared that there had been in the previous year 31,000 suits commenced; of these 20,000 had been settled by courts of reconcilement; 600 had been dismissed as vexatious and frivolous; 9400 had been sent to the ordinary courts, and of these but 2400 had been tried. The beneficial effects that had resulted in Denmark might also result here from the same cause. The people of Massachusetts were as sagacious and well informed as to their rights, as any people on the face of the earth, and might well be trusted with the most speedy mode of settling their disputes.

He said he made no claim to originality in these propositions. He had had access to some recent debates in the British Parliament. These propositions had been made there. They struck him as highly valuable. In conversation with a gentleman of age and experience in the legal profession they had expressed themselves in their favor. He had urged them to offer these propositions to the House, but they being unwilling to encounter the labor of so doing—acting on the principle of young men for action and the more aged for counsel—having first assured himself of their countenance and support—he had concluded to offer the propositions himself. They would stand or fall according to their real merit.

His object was to excite the public attention to these interesting topics. He would through this House throw them out for the consideration of our constituents. He would have them examined and discussed;—mind should be brought into collision with mind—and he did not doubt that enough intellectual fire would be elicited fully to illuminate this whole matter. We should then see our way plain;—we could then try all things and hold fast to that which is good.

The order proposed merely to direct a committee to consider the expediency of certain measures. It did not ask the House to vote for the measures. This he should now consider premature. He did think the changes proposed were worthy of serious consideration, and he therefore hoped the House would sustain the order, instructing the committee to consider their expediency. He should be satisfied, he doubted not, with the result of the committee's deliberations.

Mr Baylies of Taunton, said that in addition to the subjects which had just been proposed for inquiry he wished to offer one concerning the *form of indictment*. It so happens on account of the extreme nicety and length required in those instruments that notorious rogues not unfrequently escape justice, although the indictment may be deficient only in some very trifling respect,—the Court not allowing of an amendment being made therein. He thought that shorter and more simple forms might be prescribed by statute, and therefore proposed an order to that effect in addition to the orders which had just been submitted. Mr Davis accepted the amendment.

Mr Mann of Dedham, thought that these orders should go to a special committee instead of the judiciary, who have already as much as they can do. Besides he thought that it was desirable that the mover himself should be one of the committee who should have this subject under consideration,—it being evident that he had given great and careful attention to it. It was therefore important to have his services upon the committee.

## LIBRARY OF EDUCATION.

This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Cotton's Memoranda of Study. Edited by Wm. Russell, late editor of the American Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

## WHITMAN'S LETTERS.

This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

## SIXTY MAPS

of the various Countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

## PARLEY'S ASIA.

This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fifth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

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Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

## THIS DAY PUBLISHED,

by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

'The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

## GIRL'S OWN BOOK.

This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

## JUST PUBLISHED,

by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

## THIS DAY PUBLISHED,

by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semiannual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M.

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

## GRAY AND BOWEN,

have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

## MALTE-BRUN SCHOOL GEOGRAPHY.

—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

## GRAY AND BOWEN,

No. 141, Washington Street, Boston, have recently published the following valuable works.

I. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

II. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

III. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

## THIS DAY PUBLISHED,

by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

CONTENTS.

Art. 1. Mill's Phenomena of Mind. 2. Tytler's and Scott's Histories of Scotland. 3. Memoirs, Correspondence, and Papers of Thomas Jefferson. 4. Niebuhr's Geography of Herodotus. 5. Galt's Southennan. 6. Floods in Moray's'hire. 7. Troades of Euripides. 8. The Belgian Insurrection, and De Potter's Trial. 9. Alexander's Travels. 10. London Bridge. 11. Hydrophobia. 12. Mr Brougham and Local Judicatories. 13. Novels and Travels in Turkey. 14. The Three Days of Paris. 15. Brasse's Sophocles. 16. Geometry without Axioms. 17. Revolution of 1830. List of Books, Index, &c. Jan. 22.

## AMERICAN ALMANAC,

Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

## WORKING MEN'S PARTY.

This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

## EVENTS IN PARIS,

during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

## WEBSTER'S WRITINGS.

This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

THE JURISPRUDENT

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, FEBRUARY 5, 1831. NO. XXVIII.

## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

There are few things which more strikingly illustrate the necessity of that multiplication of rules, which the ignorant and unreflecting impute as a fault to the law, than the subject upon which we are now, not without some degree of apprehension, entering. Apparently, no transaction can be more simple, than the transfer of commodities from the possession of the seller to the possession of the buyer; and so in the infancy of trade undoubtedly it was. But the rules, which are sufficient for the purposes of direct traffic between the grower and consumer, are ill adapted to a state of things in which the merchant in England buys goods in Hindostan, and commodities of unwieldy bulk, stowed in ships, or bonded in warehouses, change owners often more than once a day. Accordingly, there has sprung up in the mercantile law of England a multitude of lesser rules, or, to speak more properly, of exceptions from, and qualifications of the more general rules, to suit the real or fancied exigencies of commercial dealing. We say the *fancied* exigencies, because it cannot be denied, that this accommodating spirit has been carried too far, and that not the necessities only (to which extent alone can it be strictly justified) but the mere convenience of trade has been consulted in the decisions of the courts. The consequence has been an over-refinement and subtility in inventing distinctions, and sanctioning substitutes for actual delivery, and a confusion which can only be conceived by those, who have toiled through the endless variety of cases which are to be found reported on this subject of delivery. Thus, a principle has one day been relaxed to invest the buyer with a property in the goods, and the next day tightened to favor the seller's equitable right of reclaiming them. For it is necessary, before we enter upon the investigation, to premise, that delivery is to be regarded under different aspects, according to the effect which is proposed to be given to it. For instance, there is a large class of sales, indeed, by far the most numerous of those which come under the cognizance of the courts, in which the property in goods sold is not transferred until delivery. These are, when a general order is given for commodities of a certain quantity, quality and price, without any selection or specific designation of the individual articles purchased. Thus, a broker contracts for so many tons of hemp, or so many hogsheads of wine, at so much per ton or hogshead, and so long as the article delivered is of the kind, quality and quantity contracted for, the bargain is equally fulfilled by the delivery of *this* hemp or wine, or of *any other*. But, by the act of delivery, the identical subject of the purchase is set apart and appropriated, and thenceforth the property in that subject passes to the buyer. It is by no means, therefore, an unfrequent inquiry, whether there has been such a delivery as to change the property. Another material question will be, whether the delivery has been such as to satisfy the contract of the seller, where he has entered into an express agreement to deliver, or to entitle him to the price, where there has been no such agreement. Again, as we have seen, by delivery the seller waives his right of retaining until payment; and this effect may be produced, though he may not have done all which would entitle him to demand payment. Even after the goods have left the seller, if the buyer become insolvent before they reach his hand, or the destination which he has appointed, in such case either the seller may stop them in their transit, and retake possession, or the buyer, with the consent of the seller, may agree to return them, and thereby prevent them from passing with the rest of his property to the general body of his creditors. Nor, lastly, must it be forgotten, that in treating of the requisites prescribed by the statute of frauds for giving validity to contracts of sale, one of the alternatives, the *acceptance*, namely, of the whole or some part of the goods by the buyer, was reserved for after-consideration, as necessarily connected with the subject of delivery. Now, in the three last cases, viz. acceptance by the buyer, stoppage *in transitu* and restitution in case of insolvency, it is evident, that delivery must be considered with reference, not merely to the passing *out of the possession of the seller*, but to the passing *into the possession of the buyer*. And yet, however obviously convenient it might seem to keep these cases entirely distinct from the rest, in which this latter ingredient is not strictly necessary, it is in practice impossible to do so. Both in the reasonings and in the decisions which have taken place upon the cases of delivery, they have been so mixed up together, and they do, in fact, so frequently illustrate each other, that one class cannot be considered altogether apart from the rest; and we are, therefore, compelled to adopt a more artificial arrangement of the subject, contenting ourselves with pointing out the distinctions when they occur, and reserving, as far as may be, the three subjects last mentioned for more specific investigation hereafter.

Immediate delivery from the hand of the seller to the hand of the buyer, needs of course no observation. For the rest, it may be convenient to consider, first, those cases in which the goods to be delivered are in the actual possession of the seller, and, secondly, those in which they are in the custody of another. Under each of these heads, again, a distinction may be made between the cases where an actual tradition takes place, and those, in which the transfer is merely symbolical or constructive.

And first, of goods in the seller's own possession, of which actual tradition is made. It is not necessary that the delivery should be made to the buyer in person. It is sufficient if made into his warehouse, whether in the care of himself or a servant, or even into the warehouse of any other person which he has been accustomed to use, or has adopted for the occasion, as the depository of his goods. Under such circumstances, delivery into the warehouse of a wharfinger,* a packer,† a carrier,‡ has been considered in the respective cases as complete delivery to the purchaser.* Delivery into a *public* warehouse, in the name and to the use of the buyer is good: much more then is the delivery of goods bonded in the buyer's name into a bond warehouse, which by the express words of the act is for that purpose the buyer's own warehouse.

Delivery to a servant or agent† of the purchaser, or to a third person at his request,‡ is a valid delivery to himself. It has even been considered that a delivery of goods by the seller to *his own servant*, to be conveyed to the premises of the buyer, is sufficient to vest the property in the latter.§ At all events there can be no doubt that a delivery into the buyer's own cart, wagon, boat, or other conveyance, or on board a vessel which he has either chartered for a certain period‖, or taken of freight for the particular voyage,¶ or, following up the same principle, to a carrier, whether by land or water, *specially named* by the vendee,** and therefore of course his agent for the purpose, is effectual delivery for all consequences which do not depend upon the actual arrival of the goods at their ultimate destination. But further, delivery to a carrier by whom commodities have been before conveyed to the same purchaser without dissent on his part, and even to a *common* carrier usually plying between the two places, is for many purposes a good and valid delivery.†† The carrier,

* Goss v. Richardson, 3 B. & P. 119.

† Scott v. Petit, 3 B. & P. 469.

‡ Foster v. Frampton, 6 B. & C. 187.

* Even so as to put an end to the right of stoppage.

† Leeds v. Wright, 3 B. & P. 320. Dixon v. Baldwin, 5 East, 175.

‡ Bull v. Sibbs, 8 T. R 328.

§ Blakey v. Dinsdale, Cowp. 664. A quantity of corn had been sold by sample to be delivered in a month. It was sent within the month by the seller, in a cart under the charge of his own servant, to the premises of the purchaser, and while the servant was in the act of uncarting the corn, part being actually delivered, and the rest still on the cart, a seizure was made of a portion of that which remained on the cart, for non-payment of a market toll. One question was, whether the buyer had a right of property in the grain, so as to maintain an action of trespass for this seizure. Lord Mansfield gave it as his opinion that the delivery to the vendor's servant was in respect of third persons a delivery to the buyer, adding, however, that the case was still stronger, inasmuch as it was absolutely brought to the plaintiff's house, and part of it unloaded before the trespass complained of was committed. It is evident that the real question was one not strictly of delivery, but of specific appropriation, and in this view there is no difficulty in the case: because there was clearly an appropriation by the vendor, and the assent of the vendee was signified not only by his acceptance of the part actually unloaded, but also by his bringing the action. See Rohde v. Thwaites, 6 B. & C. 688.

‖ Fowler v. M'Taggart, 7 T. R. 442.

¶ Bothlingk v. Inglis, 3 East, 395.

** Dawes v. Peck, 8 T. R. 330. Vale v. Bayle, Cowp. 294. In this latter case the vendee directed the goods to be sent by *land carriage* to Carmarthen. But there was but one carrier by land to that place, and it was consequently equivalent to a naming of him specially.

†† Dutton v. Solomonson, 3 B. & P. 582. 'It is a proposition,' said Lord Alvanley, 'as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to a carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for injury done to the goods; and if any accident happen to the goods, it is at his risk. The only exception to the purchaser's right over the goods is that the vendor in case of the former becoming insolvent may stop them *in*

in fact, is considered the agent, not of the seller but of the buyer. By the latter alone, except perhaps under special circumstances of contract, can an action be maintained, in case of loss or damage to the goods in the course of conveyance ;* to him the property, if not previously transferred, and with it the risk, passes by this delivery ; and the seller's right of possession is gone, to be resumed only in case of insolvency. The same rule applies of course to carriage by water as to carriage by land. Accordingly, where the vendor has placed his goods on board even of a general ship,† deliverable to the order of the buyer, and bills of lading to that effect have been signed by the master, he has done his part, and all the consequences attach which have been above enumerated.‡ It will follow, therefore, that whatever accident may befal the goods in their transit, the seller will nevertheless be entitled to treat them as *delivered*, and to sue the purchaser for the price. But this must be taken with a large qualification. In the first place, though it is true in general that the risk of loss is the buyer's, so soon as he is clothed with the property, yet it is only true on the supposition that that loss is not imputable to any negligence or fault of the vendor. Again, where it is the delivery alone which transfers the property, it will not be effectual, so as to cast the risk upon the buyer, unless or until the goods are in the usual and regular course of conveyance. Nor, lastly, can the seller pretend, that he has satisfied either a particular engagement to deliver, or the general obligation cast upon him by the law, unless he has used all reasonable care either to procure the safe arrival of the goods at the place of their destination, or at least to furnish the buyer with a remedy against the intermediate parties, if loss or damage should occur.

[To be continued.]

*transitu.*' The rule, we apprehend, is equally true, whether the vendor says anything about a carrier, or not, for, as Lord Ellenborough, observed in the case of Copeland v. Lewis, 2 Stark. N. P. C. 33. 'when nothing is said as to any carrier, according to common sense it is to be understood that the goods are to be delivered in the *most usual and convenient way*, and the delivery is complete as soon as they are put in such a course of delivery.' And see Harwood v. Lester, 3 B. & P. 617. and Huxham v. Smith, 2 Campb. 21.

* It seems to have been once a settled opinion, that as it was the vendor by whom the bargain was actually made with the carrier for the conveyance of the goods, he it was by whom the action should be brought in case of loss. It was on this principle that the cases of Davis v. James, 5 Burr, 2680. and Moore v. Wilson, 1 T. R. 659. were decided. In the latter, it is remarkable enough that Mr Justice Buller, who had been of a contrary opinion at nisi prius, expressed himself in banc as convinced, upon looking into the authorities, that he had been in error. It was Lord Kenyon, we believe, who first put the matter on the right footing, by asking on whom was the risk cast? because if the loss were to be the buyer's (which according to the settled principles of mercantile law it would be,) to him of course was the injury, and he therefore ought to sue. Accordingly the vendor, in making the bargain with the carrier, is now considered as the agent of the vendee, from whom he has an implied authority to do all which may conduce to the safe conveyance of the goods. In King v. Meredith, 2 Campb. 639. the vendors of certain spirits which had been seized on their passage, by the officers of excise, brought an action against the buyer for the price. The vendors were to pay the carriage, and it was contended that the spirits were consequently at their risk until arrival. But Lawrence, J. said, 'The mode in which the carrier was to be paid makes no difference. The moment the spirits were delivered to him, the property vested in the defendant.'

† A general ship is one, which is not under charter-party to any particular person, but takes in cargo for different consignees, subject to the payment of freight on delivery.

‡ 'When orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, except in the peculiar case in which he is again re-instated by the privileges of the *vendeur primitif*.' By Lord Stowell in the case of the Constantia, 6 Rob. Adm. Rep. 321. Abbott on shipping, 5 ed. p. 372. Groning v. Mendham, 5 M. & S. 189. Brown v. Hodgson. 2 Campb. 36. And see Walley v. Montgomery, 3 East, 585. where Grose, J. says, 'The property was once in Schumann and Co. (the vendors), but by the bill of lading and invoice sent to the plaintiff, and the delivery to the captain, the property passed from them to the plaintiff, to every purpose except as to the right of stopping them in transitu to the vendee.'

## LORD JEFFERIES.

Continued from page 211.

The hatred with which Jefferies regarded the presbyterian party found a free vent on the trial of the celebrated Richard Baxter, for publishing what was termed a seditious libel. The language which, during this trial, Jefferies applied both to the counsel and to the defendant, was more gross, vulgar, and indecent than had ever before been heard in a court of justice. Interrupting Mr Wallop, the counsel for Mr Baxter, he said, 'Mr Wallop, I observe you are in all these dirty causes ; and were it not for you gentlemen of the long robe, who should have more wit and honesty than to support and hold up these factious knaves by by the chin, we should not be at the pass we are at.'—'My lord,' said Mr Wallop, 'I humbly conceive that the passages accused are natural deductions from the text.'—'You humbly conceive!' cried Jefferies, 'and I humbly conceive.—Swear him—swear him!' Soon afterwards he added, 'Sometimes you humbly conceive, and sometimes you are very positive ; you talk of your skill in church history, and of your understanding Latin and English : I think I understand something of them too as well as you, but in short must tell you, that if you do not understand your duty better, I shall teach it you.' Upon this Mr Wallop sat down. On Baxter endeavoring to address the court, Jefferies stopped him. 'Richard! Richard! dost thou think we will hear thee poison the court? Richard, thou art an old fellow, an old knave, and thou hast written books enough to load a cart. Every one is as full of sedition, I might say treason, as an egg is full of meat. Hadst thou been whipped out of thy writing trade forty years ago it had been happy. Thou pretendest to be a preacher of the gospel of peace, and thou hast one foot in the grave. It is time for thee to begin to think what account thou intendest to give; but leave thee to thyself, and I see thou wilt go on as thou hast begun ; but by the grace of God, I'll look after thee ! I know thou hast a mighty party, and I see great many of the brotherhood in corners waiting to see what will become of their mighty don, and a doctor of the party (looking at Dr Bates) at your elbow ; but, by the grace of Almighty God, I will crush you all.'

When the chief justice had finished his summing up, Baxter said, 'Does your lordship think that any jury will pretend to pass a verdict upon me upon such a trial?'—'I'll warrant you, Mr Baxter,' replied Jefferies; 'don't you trouble yourself about that.' The jury immediately found a verdict of guilty.*

The rebellion of the Duke of Monmouth, in the autumn of 1685, quickly followed by the total rout and defeat of his army at Sedgmoor, opened a wide field for the display of those ferocious tastes by which Jefferies was distinguished. Monmouth had been highly popular in the west, through which, in the year 1680, he had made the triumphal progress celebrated by Dryden in his Absalom and Achitophel :—

> The crowd that still believe their kings oppress,
> With lifted hands their young Messiah bless :
> Who now begins his progress to ordain,
> With chariots, horsemen and a numerous train.

Of the popular rejoicings to which this visit gave rise, an account has been preserved by a contemporary writer.* 'In August, 1680, the Duke of Monmouth went into the country to divert himself, visiting several gentlemen in the west of England, by whom he was received and entertained with a gallantry suitable to the greatness of his birth and the relation he stood in to his majesty, incredible numbers of people flocking from all the adjacent parts to see this great champion of the English nation, who had been so successful both against the Dutch, French, and Scots. He went first into Wiltshire, and was pleased to honor the worthy esquire Thyme with his company for some days. From thence he went to Mr Speaks in Somersetshire, in which progress he was caressed with the joyful acclamations of the country-people, who came from all parts twenty miles about, the lanes and hedges being everywhere lined with men, women, and children, who with incesant shouts cried, 'God bless king Charles and the protestant duke!' In some towns and parishes which he passed through, they strewed the streets and highways where he was to pass with herbs and flowers.' Five years afterwards the duke again appeared, and was joined by great numbers of his former friends, who little foresaw that the festivities and rejoicings, with which they had hailed their deliverer were so soon to be replaced by the terror and dismay which the scaffold, the axe, and the halter inspired.

The unfortunate men who had adhered to Monmouth had of course incurred the penalties of high treason. To punish these ignorant and devoted wretches, Jefferies was despatched to the west, not only with a commission of *oyer* and *terminer*, but with a military commission as general of the west; and the carnage that ensued was in strict accordance with the latter character. In the Life of James II., written by himself,† an attempt is made to exculpate the king from the guilt of these unheard-of cruelties. 'His imprudent zeal,' observes the royal biographer, speaking of Jefferies, 'or as some said, avarice, carrying him beyond the terms of moderation and mercy, which were always most agreeable to the king's temper, he drew undeservedly a great obloquy upon his majesty's clemency, not only in the number but the manner, too, of several executions.' The following letter, addressed by James II. to the Prince of Orange, and dated the 24th of September, 1685, seems to prove that the king was well acquainted with the course of these proceedings, during which it will be seen that he did not neglect to solace himself with the recreation of fox-hunting :—'Since I came back from Winchester I received yours of the 21st from Loo, by Mr Sidney, and having been a fox-hunting on Tuesday last, had not then time to let you know it. I was this day again at the same sport, the weather being now very proper for it, having ended stag-hunting the day I returned hither. As for news, there is little stirring, but that lord chief justice has almost done his campaign. He has already condemned several hundreds, some of which are

* State Trials, vol xi. p. 500.

* Historical Account, &c, of James Duke of Monmouth

† Vol. ii. p. 43.

already executed, some are to be, and the others sent to the plantations, which is all that I have now time to tell you, but that I shall always be as kind to you as you can desire.'* The singular story of Major Holmes is mentioned by the king as a proof of his own clemency and of the severity of Jefferies. 'This gentleman had been engaged with Monmouth, had lost a son and his arm in the battle, was taken prisoner, and brought up to town. The king being desirous to see him, he behaved himself in such a manner as gained an esteem from every body. His carriage was free from dejection, yet full of respect. He owned his fault, but had recourse to his majesty's mercy; but told him that, considering his losses and his age, the favor he asked would be more advantageous for his majesty's reputation to grant than beneficial to him to receive. The king, who loved courage even in an enemy, could not refrain countenancing of him, discoursed freely with him, and no one was more frequently in the king's antechamber, till it was thought fit to send him down into the west, as one who could best inform the lord chief justice who were the most criminal, and who most deserved mercy, and that he might do some service before he received his pardon, which was deferred only for that reason till after his return. But instead of that, the first news the king heard of him was that he had been hanged with the rest. This his majesty was very much surprised at, and made him question the chief justice at his return: but he palliated that and his other severities with the pretence of necessary justice, which the king having made him judge of, knew not how to contradict, especially since he had the precaution not only to send four other judges as his assistants along with him, but Mr Pollexfen likewise, in quality of his solicitor, who being a known favorer of the presbyterian party, he hoped would moderate the chief justice's heat; so that after all this care and foresight his majesty had reason to acquiesce to what had been done, though it was a great disservice to him at the bottom; but my lord chief justice making it pass for an excess of zeal hindered not his majesty from conferring the title of a baron upon him as a reward for his former merit.'†

The progress of Jefferies through the western counties might have been tracked by the blood which he so lavishly shed; and some anecdotes of his cruelties have been preserved which strike the reader with indignant horror. When the sisters of one of the prisoners who had been convicted stopped his coach, to the wheels of which they clung, begging mercy for their brother, he ordered his coachman to cut their arms and hands with his whip.‡ And upon another occasion, when a lady interceded for the life of one of the prisoners, to whom she was betrothed, he answered her with a jest so cruel, so coarse, and so unmanly, that the very relation of it rouses the feelings almost like a present insult.§ The avarice of Jefferies is alluded to by the king, and there is no doubt that in many instances, persons who had been implicated in the rebellion purchased their lives from him with money. From Mr Prideaux, a gentleman of Devonshire, he received so large a sum as £15,000 for not bringing him to trial.‖

One of the most barbarous of the many cruel executions which took place at this time was that of Mrs Lisle, a gentlewoman of upwards of seventy years of age, who had been in fact, guilty of no offence whatever. She had harbored two men who had escaped from the rout at Sedgmoor; but it did not appear that she was acquainted with their participation in the rebellion. One of the witnesses, for the prosecution was a person of the name of Dunne a presbyterian, whom Jefferies suspecting to be an unwilling witness, attacked with a coarseness of language and violence of demeanor, which appear almost to have deprived the man of his senses. A few passages will sufficiently illustrate the temper of the chief justice. 'Why, thou vile wretch! dost thou think, because thou prevaricatest with the court here, that thou canst do so with God above, who knows thy thoughts? And it is infinite mercy that with those faleshoods of thine he does not strike thee into hell! Jesus God! there is no sort of conversation or human society to be kept with such people as these are, who have no religion, but only in pretence.' Soon afterwards, addressing himself to the jury, he said, 'I hope, gentlemen of the jury, you take notice of the strange and horrible carriage of this fellow, and withal you cannot but observe the spirit of that sort of people, what a villanous and devilish one it is. Good God! that ever the thing called religion (a word that people have so much abused) should ever wind up persons to such a height of impiety, that it should make them lose the belief that there is a God of truth in heaven! * * * A Turk is a saint to such a fellow as this; nay, a pagan would be ashamed to be thought to have no more truth in him.' Colonel Penruddock having stated that Dunne, the witness, had asserted, that he apprehended the persons who had taken refuge with Mrs Lisle to be rebels, the following examination took place —

'*Jefferies.* What do you say to that, Dunne? It seems you told Barton that you apprehended them to be rebels.

'*Dunne.* I apprehended them for rebels, my lord!

'*Jefferies.* No, no! you did not apprehend them for rebels; but you hid them for rebels. But did you say to Barton that you took them for rebels?

'*Dunne.* I take them to be rebels!

'*Jefferies.* You blockhead! I ask you, did you tell him so?

'*Dunne.* I tell Barton so!

'*Jefferies.* Ay, is not that a plain question?

'*Dunne.* I am quite cluttered out of my senses; I do not know what I say.

'*Jefferies.* But to tell the truth would rob thee of none of thy senses, if ever thou hadst any; but it should seem that neither thou nor thy mistress, the prisoner, had any, for she knew nothing of it neither, though she had sent for them thither.'

At length the case went to the jury, who manifested a desire to retire, 'upon which the Lord Jefferies expressed a great deal of impatience, and said he wondered that in so plain a case they would go from the bar.' Having retired, 'he would have sent to them with an intimation, that if they did not come quickly, he would adjourn, and let them lie by it all night.' The jury in about half an hour appeared, but it was only to express a doubt as to the sufficiency of the evidence. Jefferies told them that the fact they referred to had been proved. The foreman replied that they did not remember it. Jefferies repeated his assertions, and, added, that 'if there were no proof, the circumstances and management of the thing were as full proof as need be.' Upon this the jury, after some deliberation, brought in a verdict of *guilty*. It is stated by many historians, that the jury, three several times, brought in a verdict of acquittal, which, by the threats of the chief justice, they were induced to retract; but this fact does not appear from the report in the State Trials.*

Mrs Lisle was convicted on the 27th of August. 'Look you, Mrs Lisle,' said Jefferies; 'when I left his majesty, he was pleased to remit the time of all executions to me, that, wherever I found any obstinacy or impenitence, I might order the executions with what speed I thought best. Therefore, Mr Sheriff, take notice, you are to prepare for the execution of this gentlewoman this afternoon; but withal I give you, the prisoner, this intimation: we that are the judges shall stay in town an hour or two; you shall have pen, ink, and paper brought you; and if, in the meantime you employ that pen, ink, and paper, and this hour or two well (you understand what I mean), you may hear further from us in a deferring the execution.'

At the intercession of several divines, a respite was granted till the 2d of September, and in the mean time an application was made to the king, by Lady St John and Lady Abergavenny for mercy; and a petition was presented from the prisoner herself, praying for a commutation of the punishment, from burning to beheading. To the appeal for mercy, James replied, 'that he would do nothing in it, having left all to the chief justice,' —to the petition, 'that he would not reprieve her one day; but, for altering the sentence, he would do it, if there were any precedents for it.'† Here, at all events, was an opportunity afforded to the king of extending mercy, and as he chose to reject it, the grievous odium of this unjust and cruel punishment must rest with him: yet, with a meanness proportioned to the cruelty of the act itself, he endeavors in his own memoirs to affix the stigma wholly upon Jefferies.‡

* Dalrymple's Appendix, part ii. p. 165.
† Life of James II., vol. ii. p. 113.
‡ Granger, vol. ii. p. 543.
§ See Dalrymple and Ralph.
‖ Dalrymple's Mem. p. 140.

* Vol. xi. p. 371.
† State Trials, vol. xi. p. 376.
‡ Life of James II., vol. ii. p. 43.

## THE LORD CHANCELLOR.

Keeps the *Great Seal*, not to judge according to the common law, as other courts do, but to dispense with such parts as seem in some cases, to oppress the subject; and to judge according to equity, conscience and reason. He presides in the High Court of Chancery, which is the most important of all the King's civil courts of justice. He takes precedency of every temporal lord, and is by office Speaker of the House of Lords. To him belongs the appointment of justices of the peace throughout the kingdom; and he is patron of all the ecclesiastical benefices, under the yearly value of £20 in the King's Books. He is also the general guardian of all infants, idiots, and lunatics. The Court of Chancery in which the Lord Chancellor alone sits and determines without a jury, judges causes in equity, in order to moderate the rigor of the law, to defend the helpless from oppression, and especially to extend relief in cases of accident, fraud, and breach of trust. From this court an appeal lies immediately to the House of Peers which is the Supreme Court of Judicature in the kingdom.

The office is filled at present by Mr Brougham.

For the Jurisprudent.

It is not wonderful that judicial tribunals even those composed of the ablest men, in seeking for distinction to justify an exception to a settled rule of law, should sometimes overlook the reason of the rule, and virtually abolish the rule itself. It has appeared to me that such has been the fate of the rule, which excludes the confessions of a party accused of a crime, as inadmissible in evidence against him, if they were influenced by promises of favor. If I am mistaken in my views upon this subject, it is a mistake in which many others have participated; if otherwise, it may not be amiss to point out an error, which ought not to remain uncorrected in a code claiming to be the perfection of reason.

The rule alluded to has been established in consequence of the danger of trusting to declarations made under an improper influence. Innocent persons, when accused of crimes, will sometimes declare their guilt, with a view of avoiding the risk of a trial. Their fears being alarmed by the accusation and the circumstances attending it, they are easily persuaded that their best course is to purchase safety by confessions of guilt. In countries where the administration of justice is regulated by the true principles of civil liberty, conscious innocence will generally, no doubt, hazard a trial of criminal charges rather than propitiate the ministers of justice by admitting the truth of an accusation which is unfounded. Persons are to be found, however, in the most enlightened countries, who are liable, when placed in an untried situation, to be intimidated into an acknowledgment of guilt, although innocent, especially if by so doing they should expect to insure their safety. This infirmity of human nature, of the existence of which there can be no doubt, is sufficient to sanction the principle of excluding evidence of confessions when induced by promises of favor.

Where hopes of favor have been held out to the accused and confessions have immediately followed, the presumption is, that the confessions were influenced by the promises, unless there be circumstances sufficient to control such presumption. And if confessions, which may have been influenced by promises of favor or made with a view of obtaining security from apprehended danger, are not admissible in evidence because the party may have been induced thereby to confess what is not true, it will be difficult to discover a difference in principle between such confessions as are induced by absolute promises and those induced by conditional ones, whether the condition be performed or not. Suppose, for instance, that indemnity be promised on condition that the party accused will testify against a supposed accomplice, and confessions be thereupon made which implicate the latter, but the accused afterward refuses so to testify. How can confessions obtained by such means be regarded as better evidence of guilt than if there had been no such condition? In either case, the promised indemnity is the inducement to confess; and a person who would accuse himself falsely for the sake of security, would hardly hesitate to implicate others; nor would his refusal afterward to testify upon oath to the facts disclosed by him have any tendency to give them a stamp of truth which they would not have without that circumstance. A refusal to comply with the condition, upon which impunity is promised, can have no other effect, in the reason of things, than to leave the party accused without any claim for the performance of the promise: at any rate, it cannot alter the character of the confessions. He will be liable to be proceeded against as if no such promise had been made; but his refusal to perform the condition annexed to the promise can have no tendency to show that the confessions were not induced by hopes of favor; and to admit them on that account would be inconsistent with the principle by which they are excluded in other cases. Why then should so much importance be attached to such refusal, as to permit it to vary the rule of evidence? Surely the party accused gains no advantage from an annexed conditional promise of favor. Is there such an obligation on him to perform the condition, upon which the promised indemnity depends, as that a refusal to perform it ought to subject him to the penalty of being convicted upon evidence which otherwise would have been inadmissible? It would require a more thorough adept in casuistry than I am, to discover any such imperious obligation; and in no view of the subject which I have been able to take, can I see any more reason in admitting confessions in evidence, because the party refuses to testify upon oath against one whom he has implicated by his confessions, than because he refuses to repeat confessions which criminate none but himself.

If confessions of guilt, when they are obtained by promises of favor, are inadmissible in evidence, on the ground that the party accused may have been induced by such promises to confess what is not true, the same reason would seem sufficient to exclude them in all cases where similar causes may produce similar effects. But besides the inconsistency in not permitting that reason to operate in all cases, an exception to the rule, grounded on a refusal to testify upon oath against a person implicated as an accomplice, is liable to a more serious objection. If the exception should be applied in practice, this consequence will follow;—that where a party, by his confessions, implicates another as an accomplice, indemnity having been promised on the condition that he will testify against the person thus implicated, his only safety must lie in his persisting in the charge and supporting it by his testimony whether it be true or false. If the confessions, in such case, are true, he will be rewarded by an exemption from punishment for betraying an accomplice. If they are not true, and the party, for that reason, should afterward refuse to give them the sanction of his oath, he will be bound by them as if they were true, it being presumed that they are so, although experience says they may be false. Having once confessed under such circumstances, he cannot retract. He must either bear false testimony against him whom he has once implicated, or be condemned on a confession obtained by promises of favor.

LUCIUS.

## ENGLISH CASES.

COURT OF KING'S BENCH—OCT.

(Sitting at Guildhall, before Lord Chief Justice Tenterden and Common Juries.)

*Morgan and Another vs. Read.*

This was an action brought by two Gravesend pilots, to recover salvage from the owners of the East India ship Providence, which had run aground on the Chaplin Sands, when coming up the river on her voyage home, heavily laden with East India produce.

It appeared, from the evidence for the plaintiffs, that they had exerted themselves from three o'clock in the afternoon until half-past one o'clock in the morning, when, on the return of the tide, they, with other assistance, succeeded in getting her off the sands with little damage. The evidence also went to show that, had she not been got off that tide, she must have gone to pieces; for on the return of the next ensuing tide it blew a strong gale, and at high water the tide did not rise within three feet of what it was when the vessel was got off.

For the defence, it was admitted that the services had been performed in a skilful manner; but it was contended that the ship was never for one moment in danger, and the owners had offered 13*l.* to the plaintiffs, and other parties who exerted themselves, as remuneration for their time and labor on the occasion. It was also contended that the case could not in law be considered as a case of salvage, for there must be peril of life attending the services rendered, or the parties could only claim for work and labor in the ordinary way, and not for salvage. It was further attempted to be shown, though the evidence on the point was rather vague, that an agreement was made by the Captain with the parties, and that in a subsequent interview, when this agreement was mentioned by him, they replied that they never were bound by agreements in cases of that kind.

Evidence was adduced by the plaintiffs to show that, viewing the case as one of salvage, the services rendered would not be too well paid at the rate of from 30*l.* to 50*l.* per man.

On the other hand evidence was adduced by the defendant to show that the sum offered to the men (13*l.*)was sufficient for their services.

Lord Tenterden charged the Jury that they must find a verdict for the defendant, if they believed that an agreement had been entered into with all the parties engaged on the occasion, because, having entered into an agreement together they had no right subsequently to bring separate actions. They should, in that case, therefore, become together plaintiffs in one action. There was no peril in the case, nor was there any very extraordinary skill required; but still the services were such as could not be brought under the denomination of ordinary work and labor; though at the same time the sum of 50*l.* each man appeared to be far too great to meet the justice of the case.—Should they therefore be of opinion that there was no agreement, they would award such damages as the promptness with which the assistance was afforded might seem to them to merit.

The Jury returned a verdict for the plaintiffs —Damages 10*l.*

It was then arranged between the Counsel that in the case of the other parties a verdict should be taken, giving to each man 5*l.* being the same damages as in the case which was tried. There being seven persons in all, the total amount awarded in both actions was of course, 35*l.*

ROLLS COURT.

*Humphreys vs. Howes.—Judgment.*

In this case a testator had given property to one person for life, with remainder to a class of children, and he directed that if any of the latter should die before his interest became due and payable, his share should go over to the survivor or survivors. It so happened that one died during the life of the testator, and the question was, whether, in that event, the interest of such a child, after the death of the tenant for life, should survive to the other

children? On referring to the cases cited, his Honor said he found that in that of Williams v. —, 3d Pere Williams, an interest had been given to two persons, to be vested at 21, with a proviso that that if either died before that age, then the whole should go to the survivor. One died during the life of the testator, and it was held that his share went over to the survivor. In the argument on the case before the Court, it had been stated that Williams v. —— contained an important distinction in not having a tenant for life. The objection founded on this distinction had been supported by various cases, and chiefly by that of Bone v. Cook. Upon reference to that case, he (the Master of the Rolls) was of opinion that the principle on which it proceeded was inapplicable to the present case. There a testator gave an interest for life, and, after the death of the tenant for life, remainder to another, and he declared that, if that other should die before the interest given to him should become due and payable, then it should accrue to his executors and administrators. The remainder-man died during the life of the testator, and it was held that his legacy lapsed, on the ground that the testator, having given a life interest, must have intended that the death by which the right should be transferred to the executors, &c, should not take place before the death of the testator, but should happen during the tenancy for life. The case of Walker v. Beam (as we understood his Honor to say) had decided the peculiarity of the present case, and it has there been held that the death of one child during the life of the testator did not cause the legacy to lapse, but to go over to the survivors. Judgment should be given accordingly.

## RECENT ENGLISH DECISIONS.

### EQUITY.

Parol evidence of collateral circumstances relating to the ages of the devisees, and the situation of the parties and to their being married or unmarried, is admissible in evidence for the purpose of construing the will.—*Low vs. Lord Huntingtower*, 4 Russ. 532.

In construing the meaning of a devise to the next of kin of a deceased married couple; the chancellor made use of the fact that they were not related, as aiding the construction. This fact not appearing on the face of the will, was of course obtained by parol evidence.—*Pycroft vs. Gregory*, 4 Russ. 530.

Parol evidence is admissible for the purpose of identifying a plan referred to in a contract concerning lands.—*Hodges vs. Horsefall*, 1 Russ. & 4 M. 116.

Where an executor was employed by his co-executor, who had alone power to sell under the will, to sell the testator's estate, and handed over the proceeds of the sale to the co-executor by whom they were misapplied; it was held that he was not answerable for the misapplication, as he had no right to retain the money, he being a mere agent.—*Davis vs. Spurling*, R. & M. 64.

Where an executor, after settlement of accounts, confesses there was an error, and before suit, corrects it and pays over the amount, and a bill is afterwards filed to surcharge and falsify, the error is not a ground for the decree prayed; for at the time of the bill filed there was, in this respect, no existing error, and no cause of complaint by the plaintiff.—S. C.

A feme covert may execute a power of appointment, when, in the instrument creating the power, she was described *as a married woman*.—*Downs vs. Timperon*, 4 Russ. 334.

The Court refused to set aside a voluntary deed executed by an old and infirm man, in favor of a person who had attended him as surgeon and had been occasionally consulted by him respecting the management of his property, and received the dividends of some stock for him, it appearing that there was no undue influence, and that the deed was explained to the grantor by his solicitor.—*Pratt vs. Barker*, 4 Russ. 507.

If an agent employed to purchase an estate, become the purchaser for himself, he is to be considered as a trustee for his principal.—*Lees vs. Nuttall*, 1 Russ. & M. 53.

Surety paying the specialty debt, for which he was liable for his principal, is entitled to stand in in the place of the creditor, even although he take an assignment of the debt, but he is only a simple contract creditor of his principal.—*Jones vs. Davids*, 4 Russ. 277.

The vendor's lien on the estate sold for his unpaid purchase money, exists as well for the benefit of others as himself. If therefore, on the decease of the purchaser, the purchase money is paid out of the personal estate of the purchaser, so as to exhaust it to the prejudice of simple contract creditors, they and as it seems, even legatees, are entitled to have the assets marshalled against the devisee of the purchaser and to stand in the place of the vendor to the extent of his lien.—*Selby vs. Selby*, 4 Russ. 336.

An infant cannot sustain a suit for specific performance of a contract, because the remedy is not mutual.—*Flight vs. Bolland*. 4 Russ. 298.

The statute of frauds requiring a contract for purchase of lands to be signed only by the *party to be charged*; a specific performance can be enforced against one who has signed at the suit of a party who has not signed.—Dictum in S. C.

A purchaser is not compelled to take a title depending upon the words of a will which were too doubtful to be settled without litigation.—*Sharp vs. Adcock*. 4 Russ. 374.

Where the title is doubtful, a case will not be directed to the judges, as to the title at the request of the *vendor*, for even if the judgment were found in favor of the title, it would not bind the purchaser to accept it.—S. C.

Vendor is bound to convey to purchaser, notwithstanding before conveyance the purchaser has incumbered his equitable estate and the incumbrancer gives him notice not to convey. If he does not he will have to pay costs of suit to compel him.—*Walford vs. Walford*, 4 Russ. 372.

If a good title cannot be made to part of the property agreed to be sold, which is material to the enjoyment of the rest, the purchaser is not bound to complete the contract, even with compensation for the defective part.—*Smith vs. Tolcher*, 4 Russ. 302.

A vendor during the treaty for sale assumed to be the agent of another. The purchaser will be compelled to complete his contract, notwithstanding this deception, provided it had not the effect of obtaining better terms and not the inducement for the purchaser to enter into the contract. —*Fellows vs. Lord Gwydyr*, 1 Russ. & Mylne, 83.

Notice to a purchaser that a certain person was the late occupier of the estate contracted for, does not render it necessary for him to inquire the nature of his title.—*Miles vs. Langley*, 1 Russ. & M. 39.

The purchaser of an estate had no notice at the time of his contracting with the vendor, that any part of the estate was in the occupation of a third person: Held, that the mere occupation of part of estate by a stranger, was not constructive notice to the purchaser of the agreement under which he held.—S. C.

The vague and exaggerated description of a particular of sale is not such a misrepresentation as will avoid a contract. Thus, if *land imperfectly irrigated*, is described in a particular of sale, as *uncommonly rich water-meadow*, the purchaser must complete his contract.—*Scott vs. Hanson*, 1 Russ. & M. 128.

A testator bequeathed the lease and good-will of a public-house, with the stock therein to J. M., in consideration of his paying all the testator's debts, and appointed him residuary legatee and executor. J. M. proved the will, and entered and carried on business in the house. He afterwards filed a bill, praying, as the debts far exceeded the value of the personal assets, that the deficiency might be raised rateably out of the different freeholds devised. But, held, that he having accepted the bequest, must be bound by the condition annexed, and pay the debts.—*Messenger vs. Andrews*, 4 Russ. 478.

Where a testator bequeathed to the two sons, and the daughter of T. L. 50*l*. each, and at the making of the will, there were five children of T. L. namely, one son and four daughters: the court held, that each of the five were entitled to a legacy of 50*l*.—*Harrison vs. Harrison*, 1 Russ. & M. 72.

Equal sums given by a will and codicil were held to be substitutional, and not accumulative, although the latter was only conditional: the question always is, whether from the whole of the instruments taken together, an intention on the part of the testator to substitute the one legacy for the other can be collected.—*Fraser vs. Byng*, 1 Russ. & M. 90.

A testator gave the interest of a fund to his widow for life, with a power of appointment among all his children, and in default of appointment, among all such children with a gift over to the widow, in case all the children should die before their shares should become payable. The widow appointed the fund to her children, one of whom died in her life time: Held that the survivor took the whole fund.—*Bielefield vs. Record*, 2 Sim. 334.

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Oglander, in his Memoirs of the Isle of Wight, written in 1700, gives us the following record of a blessing formerly enjoyed by that favored spot. 'I have heard,' says our author, 'and partly know it to be true, that not only heretofore was there no lawyer nor attorney in the Wight, but in Sir George Cary's time, 1588, an attorney coming to settle there was, by his command, and with a pound of candles hanging at his breech, lighted with bells about his legs, hunted out of the island.'

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The croakings against the new Lord Chancellor in the House of Commons on Tuesday night has brought to general remembrance that very venerable adage—'Those who are *out*, will pout.'

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*Ohio.*—Hon. John C. Wright, late member of Congress, has been elected by the legislature of Ohio, in joint ballot, a judge of the Supreme Court of that state.

LORD BROUGHAM'S FAMILY.—An account of the family of Lord Brougham has run the round of the London Journals, copied from the Leeds Intelligencer, which contains nearly as many errors as it contains lines. Henry, Lord Brougham, is the eldest son of a gentleman of small fortune, but ancient family, (the Chancellor had, we believe, a latent claim as heir-general to the Barony of Vaux, and hence his creation by that title,) in Cumberland. His mother was the daughter of a Scotch clergyman; in the mansion of whose widow, on the Castle Hill of Edinburgh, the father of Lord Brougham lodged when prosecuting his studies at the University there. Chambers, the laborious topographical historian of the Modern Athens, says that Lord Brougham was born in St Andrew's-square, in that City, though we have heard this disputed. The family of the late Mr Brougham consisted of four sons:—Henry; John, an extensive wine-merchant in Edinburgh, who died at Boulogne about eighteen months ago; James, the Chancery Barrister, who sat with Baron Abercromby in the last Parliament for Tregony, and sits at present for Calne: and William, who is, we believe, an Equity draughtsman—he is noticed as such in the Law List.*—Lord Brougham, sat first for Camelford, afterwards for Winchelsea, then for Knaresborough, and lastly for Yorkshire. It is an instructive example of the working of our admirable system of representation, that up to the 16th of last October, Henry Brougham, the greatest orator and statesman that perhaps ever enlightened Parliament, was indebted for his seat to the patronage of a borough holding Peer. In 1812, he contested Liverpool with Mr Canning, and failed: in the same year he was nominated, as we have elsewhere noticed, for the Inverkeithing district of boroughs, and failed there also. In 1818 he contested Westmoreland, with the Lowthers; and again in 1826, but unsuccessfully in both instances. Lord Brougham was originally a Scotch barrister, and practised for some time in the Supreme Court there. It was while at the Scotch bar, that, in conjunction with the late Mr Francis Horner and Mr Jeffrey he planned and established the celebrated Edinburgh Review, of which he was for many years a most able and constant supporter. Lord Brougham married, in 1816, Mary Anne, relict of John Spalding, Esq. of Holme, in Gallowayshire; by whom we believe he has had two children, a boy and a girl. Lady Brougham's maiden name is Eden: she is a near kinswoman of the Auckland and Hendley families. At her marriage with Mr Spalding, in 1808, she was accounted an extremely beautiful young woman, and she was still possessed of great personal charms at the period of her second union. Lady B. had by her former marriage a son, who inherits his father's estate, and is an officer in the army, and a daughter. Lord Brougham is, we believe, about fifty years of age.—*Spectator.*

* Mr William Brougham is a pleader of considerable talent, who will probably obtain in time nearly as high a reputation at the Bar as his brother Henry, the present Lord Chancellor.—EDITOR.

## SCOTTISH MARRIAGE LAW.

The following is an abridged report of a case of marriage and legitimacy, published in a late number of the *Scottish* Jurist:—The defendant, Sir R. Honeyman, had endeavored to secure the affections of a Miss Campbell, who was governess in his father's family. She hesitated to accept his proposal to marry her, because she was afraid that he would make a sacrifice in the estimation of his relatives, which might injure his future prospects, she having neither connexions nor wealth to qualify her for such a union. He persisted in paying his addresses, and, at length she consented that he should *call her wife*. He, in return had asked her to call him *husband*, to which she replied, '*Dearest, dearest Dick, you are my husband.*' It was proved that afterwards he had frequently admitted her to be his wife. Subsequently she bore two children to him. This was established: and it was further shown, from the language used in his correspondence, that the connexion was virtuous. The Judges were of opinion that the *promise*, followed by cohabitation, constituted marriage; and that it was not necessary to prove such promises by written documents.

She was accordingly declared by the law of Scotland to be the legal wife of Sir R. Honeyman.

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*Superior Court.*—The December Term of the Superior Court for this county commenced at Fairfield on Tuesday last; his Hon. Judge Hosmer on the Bench. Three causes only were submitted to the consideration of the Jury during the past week; the most important one was that of Holly v. Pond and others. Some time after the failure of the Eagle Bank, Sheriff Pond, one of the defendants in this case, by virtue of a writ of attachment in favor of said Bank against Wm. C. Holly, of New York, levied upon a large quantity of iron, at that time in possession of the plaintiff, D. Holly. at his Rolling Mill in this place, as the property of the said Wm. C. Holly—the iron was removed, and subsequently sold under an execution by Sheriff Pond, the sales amounting to about 19,000 dollars. D. Holly brought an action of trover against the defendants for taking the aforesaid iron, claiming it as his property, and demanding 25,000 dollars damages. The cases by appeal from the Court below and continuances, came to this term for trial, and was ably argued on the part of the Plaintiff by T. Betts, of Norwalk and Calvin Goddard, of Norwich; and for the defendants by N. Smith, of New Haven, and R. M. Sherman, of Fairfield. Verdict for the Defendants.—*Stamford Sentinel.*

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LIBEL SUIT.—A cause, which has excited great interest in New York, has been recently tried before the Court of Sessions in that city. The indictment charges Doctors Vaught and Anderson with publishing a libel in the American Lancet of 15th October, of which the defendants are editors. Said libel charged that there was a secret society in existence among certain physicians of the city of New York, and gave the names of seventeen belonging thereto. The indictment was laid for a libel on Doctors Beck, Ludlow, and others. After a trial which occupied the court about three days, the cause was given to the jury, who, in a few minutes returned a verdict of Not Guilty.

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The Court of King's Bench, for the District of Montreal, has decided that proprietors of steamboats are to be considercd as common carriers, and legally responsible for the safe delivery of all goods entrusted to them, notwithstanding every clause to the contrary in their advertisements, bills of lading, or other documents. The Chief Justice maintained in his charge, that as bills of lading could not contain any valid clause annalling the existing laws, all such stipulations were void. The law is the same as to stage proprietors.

SUNDAYS.—At the Court of Exchequer, a case was decided in the latter part of November, in which the payment of a bill of exchange was objected to on account of its having been drawn and accepted on Sunday. Baron Garrow observed that the statute did not apply to all work done on Sundays—the object of it was, to prohibit persons from following their ordinary occupations—that a servant might be lawfully hired on Sunday. This bill, he said, came within the 'works of necessity,' and was therefore valid.

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Sir R. Peel declined the Peerage which was offered him by the King when he tendered his resignation—probably preferring at present to take a part in the discussions of the Lower House to enjoying a seat in the Upper, where he and his great antagonist, Lord Brougham, must once more have come into hostile collision. The late Home Secretary, when he declined the Peerage, asked one favor of his Majesty, and that was, that his brother-in-law, Mr George R. Dawson, should be nominated a Privy Councillor, which his Majesty immediately granted.

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It is reported that one of the first measures of the new Administration will be to separate the political from the judicial duties of the Lord High Chancellor, and thus prevent the great inconvenience and expense to which suitors in this Court are exposed from a change in Ministers.—*Standard.*

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## EPIGRAM.

'The *lateness* of the *hour* at which the House despatches a great part of its business accounts for a great deal of the *foolish* and *reckless* legislation which disgraces the Statute book, and reflects anything but credit on the intellect of the country.'—*Morning Herald*, 3d Sept. 1830.

'I wonder,' quoth John, to his friend t'other day,
Why our *Laws* are so DARK and *obscure*;
If the *wisdom's* employed in the manner you say,
The *Laws* should be all that is pure.'

'The reason is clear,' quoth his friend, in reply—
And as plain as the sun it is bright;
They are made when good folks are asleep, by the bye,
And are passed in the SHADES of the night.'

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*How to raise a Bell.*—The *Boston Commercial Gazette* recommends a small bell, which, it says, could be raised 'by subscription,' to announce to the merchants the arrival of the steam-boats and mails. 'The suggestion,' it adds, 'did not emanate from us, but from a friend at our elbow.'

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A TREATISE on the principles and practice of the Action on Ejectment, and the resulting action for Mesne Profits. By John Adams, of the Middle Temple, Esq. Barrister at Law. From the last London edition.—To which are added, Notes of the Decisions made by the Supreme and Circuit Court of the United States, and by the Courts of the several States, whose decisions have been reported upon the Addition of Ejectment, and the Action for Mesne Profits, and Notes of Decisions upon those subjects, made in the English Courts to the present time, except those cited in the text; together with the Statutory Provisions, in relation to those Actions, contained in the Revised Statutes of the State of New York; and Precedents of entries, pleadings and power adapted thereto.—By John L. Tillinghast, Counsellor at law.

THE JURISPRUDENT.

BOSTON, SATURDAY, FEBRUARY 5, 1831.

## AMERICAN REPORTS.

The following is we believe nearly a perfect list of the reports of cases decided in the federal and state Courts of the United States:—

SUPREME COURT OF THE UNITED STATES.

*Dallas'* Reports, 3 vols. The 2d, 3d, and 4th vols. of Dallas contain all the Reported Cases decided in the United States Supreme Court previous to the 1st Cranch; and all the Reported Cases decided in the U. S. Circuit Court for the 3d Circuit previous to 1st Washington.
*Cranch's* Reports, 9 vols.
*Wheaton's* Reports, 12 vols.
*Peters'* Reports, 4 vols.

CIRCUIT COURTS OF THE UNITED STATES.

*Gallison's* Reports, in the 1st Circuit, 2 vols.
*Mason's* Reports, " " 4 vols.
*Paine's* Reports, 2d " 1 vol.
*Wallace's* Reports, 3d " 1 No.
*Washington's* Reports, 3d " 4 vols.
*Peters'* Reports, 3d " 1 vol.

Washington's and Peters' Circuit Court Reports contain the whole series of the late Judge Washington's Decisions from 1803 to October Term, 1827, inclusive.

STATE OF MAINE.

Greenleaf's Reports, 5 vols.

VERMONT.

Chipman's Reports, 1 vol.
Tyler's Reports, 2 vols.
D. Chipman's Reports, 1 vol.
Aiken's Reports, 2 vols.
Brayton's Reports 1 vol.
Vermont Judges' Reports, 1 vol.

NEW HAMPSHIRE.

New Hampshire Reports, 4 vols.

MASSACHUSETTS.

Massachusetts Reports, 17 vols.
Pickering's Reports, 8 vols.

CONNECTICUT.

Kirby's Reports, 1 vol.
Root's Reports, 2 vols.
Day's Cases, 5 vols.
Connecticut Reports, 6 vols.

NEW YORK.

Caines' Term Reports, 3 vols.
" Cases in Error, 2 vols.
Coleman and Caines' Cases, 1 vol.
Anthon's Nisi Prius Cases, 1 vol.
Johnson's Cases, 3 vols.
Johnson's Reports, 20 vols.
Johnson's Chancery Rep. 7 vols.
Cowen's Reports, 9 vols.
Wendell's Reports, 3 vols.
Hopkins' Chancery Reports, 1 vol.
Rogers' City Hall Recorder, 1 vol.
Wheeler's Criminal Law in New York and elsewhere, 3 vols.
Paige's Chancery Reports, 1 vol.

NEW JERSEY,

Pennington's Reports, 2 vols.
Coxe's Reports, 1 vol.
Southard's Reports, 2 vols.
Halsted's Reports, 5 vols.

PENNSYLVANIA.

Dallas' Reports, 4 vols.
Addison's Reports, 1 vol.
Peters' Admiralty Decisions, 2 vols.
Binney's Reports, 6 vols.
Yeates' Reports, 4 vols.
Sergeant & Rawle's Reports, 17 vols.
Rawle's Reports, 1 vol.
P. A. Browne's Reports, 2 vols.

MARYLAND.

Harris & M'Henry's Reports, 4 vols.
Harris & Johnson's Rep. 7 vols.
Harris & Gill's Reports, 2 vols.

VIRGINIA.

Call's Reports, 3 vols.
Hening & Munford's Reports, 4 vols.
Munford's Reports, 6 vols.
Gilmer's Reports, 1 vol.
Randolph's Reports, 6 vols,
Leigh's Reports, 1 vol.

NORTH CAROLINA.

Taylor's Reports, 1 vol.
Cameron & Norwood's Reports, 1 vol.
North Carolina Law Repository, 2 vols.
Heywood's Reports, 2 vols.
Murphey's Reports, 3 vols.
Hawkes' Reports, 4 vols.
Ruffin's Reports.
Martin's Reports.

SOUTH CAROLINA.

Bay's Reports, 2 vols.
Bee's Reports, 1 vol.
M'Cord's Chancery Reports, 2 vols.
Nott & M'Cord's Reports, 2 vols.
Harper's Law Reports, 1 vol.
M'Cord's Reports, 4 vols.
Desaussure's Chancery Reports, 4 vols.
Constitutional Court Reports, 4 vols.
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KENTUCKY.

Hughes' Reports.
Hardin's Reports.
Bibb's Reports, 4 vols.
Marshall's Reports, 3 vols.
Littell's Reports, 6 vols.
Monroe's Reports, 6 vols.

TENNESSEE.

Overton's Reports, 2 vols.
Cooke's Reports.
Heywood's Reports, 3 vols.
Peck's Reports, 1 vol.

LOUISIANA.

Martin's Reports.

GEORGIA.

Charlton's Reports.

*Law Intelligencer.*

## ENGLISH COMMON LAW REPORTS.

The Volumes published of the *English Common Law Reports Condensed*, edited by THOMAS SERGEANT and JOHN C. LOWBER, Esquires, contain as follows:

Vol. 1. Taunton's Reports, C. P. vol. 5 and 6.
2. " " 7.
Starkie's " N. P. 1.
3. Starkie's " N. P. 2.
Holt's " N. P. 1 vol.
4. Taunton's " C. P. vol. 8.
Marshall's " C. P. 2 vols.
Moore's " C. P. 3 vols.
5. Broderip & Bingham, C. P. 1 vol.
Barnewell & Alderson, K. B. 3.
Gow's Reports, N. P. 1. part 1.
6. Broderip & Bingham, C. P. 2.
Barnewell & Alderson, K. B. 4.
7. Broderip & Bingham, C. P. 3.
Barnewell & Alderson, K. B. 5.
8. Bingham's Reports, C. P. 1.
Barnewell & Cresswell, K. B. 1.
9. " " 2.
Bingham's Reports, C. P. 2.
10. Barnewell & Cresswell, K. B. 3 and 4.
11. " " K. B. v. 5, p. 1 and 2.
Bingham's Reps. C. P. v. 3, p. 1 and 2.
Carrington & Payne, N. P. 1.
12. Barn. & Cress. K. B. 5, p. 3 and 4.
Carrington & Payne, N. P. 2.
13. Bingham's Rep. C. P. 3, p. 3 and 4.
" " 4, p. 1 and 2.
Barnewell & Cresswell, K. B. 6.
14. " " 7.
Carrington & Payne, N. P. 3.
Starkie, N. P. 3 part 1.
15. Barnewell & Cresswell, K. B. 8.
Bingham, C. P. 4, p. 3 and 4.
" C. P. 5.
Dowling & Ryland, K. C. & N. P. 8 vols.
Moore, C. P. & E. C. vols. 4 and 5.
17. Moore, C. P. & E. C. vols. 6 to 10.
Moore & Payne, " " 1 and 2.
Manning & Ryland, C. B. vols. 1 and 2.
Barnewell & Cresswell, K. B. vol. 6.

Subscription Price of the *first* sixteen Volumes, $5 per Volume; of the seventeenth and subsequent Volumes, $4 per Volume.

## NEW PUBLICATIONS.

The Law of Attorneys, with Practical Directions, in Actions and Proceedings by and against them, and for the Taxation and Recovery of Costs; also the Law of Costs, at Common Law, in Equity, in Bankruptcy, and in Criminal Proceedings and Penal Actions. By John Merrifield, Esq. of the Middle Temple, Barrister-at-law.

The Acts relating to the Administration of Law in Courts of Equity, passed in the Session 11 Geo. IV. and 1 W. IV. with an Introduction and Notes. By W. T. Jemmett, Esq. of Lincoln's Inn, Barrister-at-law.

Supplement to the Practice of the Courts of King's Bench and Common Pleas, containing all the Statutes, Rules of Court, and Reported Cases on Practical Subjects, since the Publication of the Ninth Edition; particularly the late Act for the more effectual administration of Justice in England and Wales, and also a practical Treatise on the Tender of Money, and the Law relating to Fees of Officers of the Courts; with an Appendix of practical Forms under the above Act, and a copious Index. By W. Tidd, Esq. of the Inner Temple, Barrister-at-law.

The Slavery of the British West India Colonies Delineated, as it exists both in Law and Practice, and compared with the Slavery of other Countries, ancient and modern. Vol. 2. being a Delineation of the State in point of Practice. By James Stephen, Esq.

Russell's Reports in Chancery. vol. 4.

Russell and Mylne's ditto. vol. 1. part 1.

Barnewell and Cresswell's Reports in K. B. vol. 10 part 1.

Bingham's ditto, in C. P. vol. 6. part 5.

A Collection of all the Statutes relating to indictable Offences in England, passed during the Reign of George 4. and 1 W. 4. and now in force, with Notes and recent Decisions thereon; to which are prefixed the Statutes relating to Treason. By J. B. Greenwood, Esq. of Lincoln's Inn, Barrister-at-law.

Hansard's Parliamentary Debates. vol. 23.

LIBRARY OF EDUCATION.
This day published by GRAY & BOWEN,
The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

WHITMAN'S LETTERS.
This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe; from the Epitome of Universal Geography. For sale at GRAY & BOWEN's, 141 Washington Street. Price 50 cents, bound. Jan. 1.

PARLEY'S ASIA.
This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED,
by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

GIRL'S OWN BOOK.
This day published by CARTER, HENDEE, & BABCOCK,
'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Eveniugs in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semi-annual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

GRAY AND BOWEN,
have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

GRAY AND BOWEN,
No. 141, Washington Street, Boston, have recently published the following valuable works.

I. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

II. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

III. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near,
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

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AMERICAN ALMANAC,
Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY.
This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

EVENTS IN PARIS,
during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

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THE JURISPRUDENT
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# THE JURISPRUDENT.

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## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

These are propositions of great practical importance, and it may be useful, therefore to illustrate them by a few instances. An action was brought* for the price of certain chairs, treating them as goods sold and *delivered*. The plaintiff had been in the habit of supplying chairs to the defendant, and the usual mode of delivery was this: They were sent to a wharf, from whence they were forwarded by water. Sometimes they were booked, at other times not; all, however, except the present consignment, had arrived safe. The goods in question, which never came to hand, had been taken to the wharf—there laid down in the presence of one not known to be a servant of the wharfinger—no entry made, and no receipt taken. There was consequently a verdict for the defendant, Lord Ellenborough saying: 'A delivery of goods to a carrier or wharfinger with due care and diligence is sufficient to charge the purchaser. But he has a right to require that in making this delivery due care and diligence shall be exercised by the seller. Before the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or to some person who can be proved to be his agent for the purpose of receiving them.'† In one case,‡ the doctrine was carried so far, that a vendor, who had omitted to pay the extra premium required by the carrier for insuring parcels beyond the value of *5l.* was held to have precluded himself by this neglect from recovering the price of the goods, which had been lost on the passage. 'He had,' said Lord Ellenborough, 'an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carriers.' But however unquestionably sound the principle of this decision, a month had not elapsed before Lord Ellenborough himself doubted whether it had not been pushed to an unwarrantable extent in the case just cited, and from the result of this latter decision§ with the observations which accompanied it, it may be safer to lay down the rule thus: that the vendor is bound to insure, when either he has instructions to that effect from the vendee, or such has been the course adopted in former dealings between them.‖ Where this is not the case, it is undoubtedly the duty of the seller to advise the buyer of the consignment, in order that he may either insure or take such other steps as may be necessary for indemnifying himself against the consequences of loss. Accordingly such is universally the practice —where the carriage is inland, notice being ordinarily given by the post; and when by ship, the bill of lading and invoice being transmitted to the consignee on the earliest opportunity.

But we have said that the goods are not at the risk of the buyer *until* they are in the due and regular course of conveyance, and of this the following is an instance:* A quantity of wine, represented as the finest Pouillac claret, was purchased to be transmitted from Lubec to London. The vendors, however, sent it overland from Lubec to Hamburgh, from whence it was shipped for England. On arrival it was found not to answer the representation of its quality, and the purchasers thereupon brought an action against the seller for a breach of his contract. It was proved on the one side, that the wine was of good quality when it left Lubec, and on the other that on its arrival in London it was altogether unfit for sale or consumption, but where or how the deterioration took place, did not appear. On this state of facts Lord Tenterden directed a verdict for the plaintiff, saying, 'If any accident happened to the wine *after it was shipped at Hamburgh*, the defendant must have a verdict, for he is not liable for a loss subsequent to the time of shipment. The defendant has proved in what state the wine was when it left Lubec, but he does not show what became of it after it left Lubec for Hamburgh, nor of what quality it was when put on board at Hamburgh. The plaintiffs expected, as was natural, that it would be shipped direct from Lubec, and the carriage overland therefore from thence to Hamburgh was at the risk of the defendant. There was no delivery to the purchaser until the wine was put on board.'

Hitherto we have supposed an actual removal of the commodities from the possession of the seller. It may, however, and often does happen, that the goods are too bulky for immediate transfer, or that the buyer may wish, for his own convenience, that they should remain where they are, in the keeping of the vendor. Accordingly the law, departing from its ancient simplicity, has in later times recognised, under the name of emblematic or constructive transfer, certain acts as evidence from which delivery may be presumed: 'Where,' says Lord Kenyon, 'goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property.'† In one respect, this doctrine of constructive delivery was carried by Lord Ellenborough to an extent, from which the courts at present seem anxious to escape. That eminent judge decided, that the charging of warehouse rent by the seller to the buyer, for goods remaining in his warehouse with the permission, or at the request of the latter, amounted to a complete and executed delivery. 'The acceptance of warehouse rent,' he said, 'is a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine; the goods are transferred to the person who pays the rent, as much as if they were removed to his own warehouse, and there deposited under lock and key.'* In the case to which these observations were applied, the charge of warehouse rent had been made, not in pursuance of any agreement to that effect with the buyer, but simply in consequence of his delay to fetch away the goods at the time appointed; and it certainly seems a somewhat forced construction of such an act, to presume that the seller, in making the charge, intended to waive the privilege, resulting from his possession, of retaining the goods in case of non-payment or insolvency. Accordingly, in the later decisions, that circumstance alone has not been considered equivalent to, or even evidence of delivery.† If, indeed, the goods remain in the warehouse by the *express request* of the purchaser and upon an agreement by him for the payment of rent, there will be great force in the reasoning of Lord Ellenborough. In that case, in all but the manual formality of tradition, the transfer will be complete. The goods which were in the warehouse of the seller, are now in the warehouse of the buyer; and to the objection, that it would be hard by presumption only to deprive the seller of his lien, it may be answered, that the consequences are before him when he assents to the agreement, and takes upon himself for hire to become the warehouseman of the purchaser.‡ Reasonable, however, as the doctrine to this extent undoubtedly is, and although not unsupported by other authority,§ it has nevertheless been determined, in a recent case,‖ where there was an express stipulation for the payment of warehouse rent, that the vendor's right to retain was not forfeited by that agreement. 'There is no difference,' Mr Justice Bayley observed, 'in principle, whether the seller charges the buyer with a rent or not. The goods are still in his possession.' And upon the whole, therefore, it may be concluded that the charge, or even payment of warehouse rent is by no means a criterion of delivery on which much reliance can be placed.

Another circumstance indicative of a deliberate transfer of possession, and therefore received as strong evidence of delivery, is the marking of the goods after the sale by the buyer in the presence

*Buckman v. Levi, 3 Campb. 414.

† Compare with this case Cooke v. Ludlow, 2 N. R 119.

‡ Clarke v. Hutchins, 14 East, 475.

§ Cothay v. Tute, 3 Campb. 129.

‖ The proof of which lies upon the vendee.

*Ulock v. Reddelen, Dan. and Lloyd's Mer. Cases, 6.

† In Chaplin v. Rogers, 1 East, 194. See also 1 Taunt. 460.

*Hurry v. Mangles, 1 Campb. 452. And his lordship expressed the same opinion in the subsequent case of Harman v. Anderson, 2 Campb. 243.

† Bloxam v. Sanders, 4 B. & C. 941. Winks v. Hassall, 9 B. & C. 372. Dan. & Lloyd, 312.

‡ The case of Elmore v. Stone, 1 Taunt. 460. was decided on this principle. The defendant had bought two horses, at the same time requesting the plaintiff, as he had neither stable nor servant of his own, to keep them *at livery* for him. The plaintiff did so, and afterwards sued him for the price, treating the horses as *delivered*. A question arose upon the statute of frauds, which resolved itself into this; whether the circumstances amounted to a delivery; and the court held that they did, Mansfield, Ch. J. observing that the plaintiff by assenting to the buyer's request had waived his lien, and that the latter would have been entitled (on tendering the rent and keep) to take away the horses without payment of the price.

§ Elmore v. Stone, see last note.

‖ New v. Swain, Dan. & Lloyd, 193.

and with the permission of the seller. Thus, where the purchaser went to the vendor's cellar, and selected several pipes of wine at a certain price, whereupon the spills or pegs by which the wine is tasted were cut off, the buyer's initials marked in his presence on the casks, and the gauge numbers taken by him, these acts were considered as amounting to a delivery.*

A mere assumption of ownership or control by the purchaser is not of itself sufficient evidence of a delivery. Two cases, it is true, are to be found, which seem to warrant a contrary opinion :† but as the decision in each of these is attributable in part to an unwillingness of the court to disturb the finding of a jury, and as the result has been not only questioned, but is in fact repugnant as well to principle as to subsequent authorities,‡ little hazard will be incurred in altogether disregarding them. Indeed, the general doctrine of constructive delivery is at present held in little favor; and it must be carefully borne in mind, that as it is avowedly founded on presumption, any circumstance inconsistent with that presumption, will prevent the consequence from attaching. Thus where the seller expressly declares,§ or it may be reasonably inferred from the terms of the bargain,‖ or the previous course of dealing,¶ that he does not intend to part with the goods without payment, the strongest acts unaccompanied by actual change of possession will not amount to a delivery. Again, the presumption is negatived where there has been no specific appropriation, such as separating the quantity sold from a larger mass, or where something remains to be done, such as counting, weighing, &c, either for putting the goods into a deliverable state, or for ascertaining the price, without which the seller in the one case could not, and in the other case cannot be supposed to have intended to divest himself of the actual possession by delivery.*

We now come, in the second place, to the consideration of those cases in which the goods are not, at the time of sale, in the personal custody of the seller. These, where an actual tradition takes place, with the concurrence of the seller, have of course little to distinguish them from the like cases, where the goods are in his own possession; but where there is no such removal, other acts are admitted as evidence of a constructive transfer of possession. Thus, where the goods sold are in the hands of a warehouseman or wharfinger, a transfer in his book to the name of the buyer, by order of the seller, amounts to a complete and irrevocable delivery, making the middle-man the custodier or warehouseman of the buyer.† Lord Ellenborough, indeed, went further; for he decided that the same effect was to be given to the mere order of the seller, even though the transfer was not made ;‡ but although this may well operate as a delivery for the purpose of changing the property, and taking the possession *out of the seller;* it may not unreasonably be doubted whether, without some indication of assent on the part of the middle-man, the goods can be supposed to have come *into the possession of the buyer*, so as to put an end to the right of stoppage in transitu,§ or to constitute an acceptance, where necessary, under the statute of frauds.‖ The change of mark from that of the seller to that of the buyer, made by the direction of both parties on goods in the possession of a warehouseman, is also equivalent to delivery. But, as in the former instances of constructive delivery, so these cases also are to be taken with the qualification, that all has been done which must necessarily precede actual delivery. The first case which determined this important limitation was an action of trover, brought by the assignees of a bankrupt, for a quantity of starch sold to the bankrupt. A note had been given by the seller to the buyer, and by him taken to the warehousekeeper, in whose custody the starch was lying, directing him to *weigh* and deliver it to the buyer. A part was accordingly weighed and delivered, and the rest remained with the warehousekeeper unweighed, when, the buyer becoming bankrupt, the seller countermanded the order for delivery. For this residue the action was brought; but the court was of opinion, that it could not be maintained, Lord Ellenborough saying, 'the weight must be ascertained, in order that the price may be known and paid, and unless the weighing precede the delivery, it can never, for these purposes, effectually take place at all. If anything remain to be done on the part of the seller, as between him and the buyer before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer.'¶ The rule thus laid down has been since followed up in other instances,** and may now, therefore, be regarded as an established principle in the doctrine of constructive delivery. A distinction, however, was once taken where the goods sold, though subsisting in bulk, and not specifically appropriated, had been resold to another, and an order at the same time given, directing the original vendors to hold the goods to the account of the latter, which order was assented to by them; and it was thought that the non-separation of the quantity sold from the bulk was no objection to an action of trover by the second purchaser, between whom and his vendor all had passed which was necessary for perfecting the transfer.* But this decision seems contrary to the general rule, that the buyer can have no property (which the action of trover supposes) in an undivided portion of a whole; and as it has been since doubted, if not virtually overruled,† its authority may be regarded as at least questionable. Still, where the objection is, not that the commodity is part of a larger bulk, and unappropriated, but merely that some act has not been done, necessary for ascertaining the price, that objection will not be allowed to countervail an express acknowledgment by the person in whose custody the goods are, that he holds them on account of the second purchaser, and he will be, in technical phrase, *estopped* from setting it up in answer to a demand of possession by such purchaser.‡

To be continued next week.

*Anderson v. Scott, 1 Campb. 235. n. It was an action by the buyer for non-delivery. The question was, whether there had been an acceptance by the buyer, to satisfy the statute of frauds. Lord Ellenborough was of opinion that there had been, on the ground that there was a complete constructive delivery assented to by him. It was then retorted that if so the contract was satisfied, and therefore the action must fail. But the learned judge wriggled out of the dilemma, by saying that although there was an *incipient* delivery so as to satisfy the statute, yet it was not *complete*, so as to satisfy the contract. It seems, however, notwithstanding this *ingenious* distinction, that the action should have been in *trover*. See further as to the marking of goods, Stoveld v. Hughes, 14 East, 308.

†Chaplin v. Rogers, 1 East, 192. and Blenkinsop v. Clayton, 1 Moore, 328. The first was an action for the price of a hay-stack sold and delivered. The bulk precluded an actual delivery; but the defendant re-sold it to a third person, who without the consent of the original vendor took away a part. The jury found that there was a delivery to and acceptance by the first vendee, which verdict the court refused to disturb. In the other case, the defendant had bought a horse of the plaintiff's servant, whom he desired to deliver it at his stables. In the meantime the defendant showed it for sale to another, who declined to purchase. The jury found that this was a delivery to the defendant, and the court held that they were warranted in so finding.

‡Tempest v. Fitzgerald, 3 B. & A. 680. and Carter v. Toussaint, 5 B. & A. 855. These were actions for the price of a horse. In both, the horse remained by the permission of the buyer in the vendor's stable; and in both, directions were given by the buyer as to the treatment and disposal of the horse. But the court did not consider these circumstances sufficient to warrant the inference that the seller intended to part with the possession without payment; and unless he did so intend, there was of course no delivery.

§ Goodall v. Skelton, 2 H. Bl. 316. The goods were removed by the vendor to a hovel, from whence they were to be fetched away by the buyer.

Tempest v. Fitzgerald, supra.

¶ Holderness v. Shackels, 8 B. & C. 612. Dan. & L oyd, 203.

* White v. Wilkes, 5 Taunt. 176. Simmons v. Swift, 5 B. & C. 857. and see post.

‡ Searle v. Reeves, 1 Esp. N. P. C. 598. Harman v. Anderson, 2 Campb. 243. Graves v. Hepke, 2 B. & A. 131. Bloxam v. Morley, 4 B. & C. 952.

‡ Harman v. Anderson, ubi supra.

§ We shall have occasion to refer to this subject hereafter. In one case Mr Justice Parke seems to have considered a delivery order not acted upon as *altogether* inoperative. Winks v. Hassell, 9 B. & C. 372.

‖ Bentall v. Burn, 3 B. & C. 423.

¶ Hanson v. Meyer, 6 East, 614.

** Wallace v. Breeds, 13 East. Withers v. Lyss, 4 Campb. 237. Shepley v. Davis, 5 Taunt. 619. Busk v. Davis, 2 M. & S. 397. Simmons v. Swift, 5 B. & C. 857.

*Whitehouse v. Frost, 12 East, 614.

†Austen v. Craven, 4 Taunt. 644. That was trover for certain hogsheads of sugar, of which there had been a re-sale assented to by the original vendors, in whose custody they remained. The sugar was in mass, the quantity sold not having been weighed off. And the court was decidedly of opinion that the action could not be maintained, both on the ground that no property passed, and that there was nothing to raise the inference that it was the intention of the vendors to waive their lien. See also Busk v. Davis, 2 M. & S. 397, where Le Blanc, J. endeavored to distinguish and reconcile the case of Whitehouse v. Frost, but, as it seems, with little success.

Hawes v. Watson, 2 B. & C. 543. That case was as follows; A sells tallow to B, who obtains a delivery order on the wharfinger. B sells to C; and, in order to satisfy him, procures an acknowledgment from the wharfinger that he holds for C. B stops payment, whereupon A countermands the delivery, and C brings trover against the wharfinger. The tallow had been sold at so much per cask, and there had been no weighing so as to ascertain the price; but the court held, that after their acknowledgment, the wharfingers were precluded from saying that they did not hold the tallow as warehousemen of C. It is to be observed that, in this case, the vendors had sold *all their tallow* lying at the wharf. See also Stonard v. Dunkin, 2 Campb. 244.

## LORD JEFFERIES.

Continued from page 219.

During his 'western campaign,' Jefferies discovered a gross abuse which had prevailed for some time at Bristol, but to which he put a very speedy termination. The affair is thus related by Roger North :—'There is one branch of that chief's expedition in the west, which is his visitation of the city of Bristol, that hath some singularities, of a nature so strange, that I think them worth my time to relate. There had been an usage among the aldermen and justices of the city (where all persons, even common shopkeepers, more or less, trade to the American plantations), to carry over criminals, who were pardoned with condition of transportation, and to sell them for money. This was found to be a good trade; but not being content to take such felons as were convict at their assizes and sessions, which produced but a few, they found out a shorter way,

which yielded a greater plenty of the commodity. And that was this: the mayor and justice, or some of them, usually met at their tolsey (a court-house by their exchequer) about noon, which was the meeting of the merchants, as at the exchange at London; and there they sat and did justice-business, that was brought before them. When small rogues and pilferers were taken and brought there, and, upon examination, put under the terror of being hanged, in order to which, mittimuses were making, some of the diligent officers attending, instructed them to pray transportation, as the only way to save them; and for the most part they did so. Then, no more was done; but the next alderman in course took one and another, as their turns came; sometimes quarrelling whose the last was, and sent them over and sold them. This trade had been driven for many years, and no notice taken of it. Some of the wealthier aldermen, although they sat in the court and connived, as Sir Robert Cann, for instance, ever had a man; but yet they were all involved in the guilt when the charge came over them. It appears not how this outrageous practice came to the knowledge of the lord chief justice; but when he had hold of the end he made thorough-stitch work with them; for he delighted in such fair opportunities to rant. He came to the city, and told some that he had brought a broom to sweep them. The city of Bristol is a proud body, and their head, the mayor, in the assize commission, is put before the judge of assize; though, perhaps, it was not so in this extraordinary commission of oyer and terminer. But for certain, when his lordship came upon the bench and examined this matter, he found all the aldermen and justices concerned in this kidnapping trade, more or less, and the mayor himself as bad as any. He therefore turns to the mayor, accoutred with his scarlet and furs, and gave him all the ill names that scolding eloquence could supply; and so, with rating and staring, as his way was, never left till he made him quit the bench, and go down to the criminal's post at the bar; and there he pleaded for himself, as a common rogue or thief must have done: and when the mayor hesitated a little, or slackened his pace, he bawled at him, and stamping, called for his guards; for he was general by commission. Thus the citizens saw their scarlet chief magistrate at the bar, to their infinite terror and amazement. He then took security of them to answer informations, and so left them to ponder their cases among themselves. At London, Sir Robert Cann applied, by friends, to appease him, and to get from under the prosecution, and at last he granted it, saying, "Go thy way; sin no more, lest a worse thing come unto thee." The prosecutions depended till the revolution, which made an amnesty; and the fright only, which was no small one, was all the punishment those juridical kidnappers underwent. And the gains, acquired by so wicked a trade, rested peaceably in their pockets.'*

Stained with the blood of the aged, the weak, and the defenceless, Jefferies returned to the capital to claim, from the hands of the master he had so faithfully and acceptably served, the reward due to his singular merits. That reward was immediately conferred upon him, and on the 28th of September he received the great seal and was appointed lord high chancellor.

Having thus gained the summit of his ambition, Jefferies appears to have in some degree relaxed his activity in carrying into effect the wishes of the court. It is possible, too, that the heart, which no sentiment of humanity could affect, was touched by some religious scruples. He had no bias whatever towards catholicism; and though, for his own advancement, he had ever been ready to forward the designs of the court, he felt no inclination to offend his conscience without some corresponding advantage. Nor is it improbable that he foresaw the dangers to which the king was exposing herself by thus attacking the dearest prejudices of his subject. In consequence, probably, of some advice to this effect tendered to the king, the favor of Jefferies began to decline at court. This is asserted by Burnet, and we have some confirmatory evidence to the same effect in the lately published Ellis Correspondence. 'I am very confident,' says the letter-writer, 'that matters are brewing to break the neck of our wide-mouthed, high-paced ——— &c, and as conjurors throw a dog or a cat to allay the devil with, so he may be thrown as a choosing morsel to the next parliament. Herbert has represented, since his return from the western circuit, the disservice done by the management of the former circuit, and the rapine; and I am creditably told it works to admiration; and his dear friend, the thin great man at Whitehall, quits him.'* To regain his favor at court, Jefferies did not hesitate to abandon his church of England friends, and to suggest to the king the establishment of the celebrated ecclesiastical commission. It was obvious to James, that some measures had become necessary in order to depress the church of England party, who had manifested the strongest opposition to the designs contemplated by the court in favor of the catholics. By the advice of Jefferies, therefore, he resolved to re-establish the court of high commission, though, as the existence of that tribunal had been denounced by statute, it was necessary to bestow a different title upon the new court. A commission was therefore issued, appointing the Archbishop of Canterbury, the Lord Chancellor Jefferies, Lord Rochester, Lord Sunderland, the Bishops of Durham and Rochester, and the lord chief justice to be commissioners, for reforming all abuses of which the ecclesiastical law had cognizance. The proceedings under this commission against the Bishop of London, the University of Cambridge, and Magdalen College, Oxford, were in strict conformity with the character and object of the tribunal. The vice-president and fellows of Magdalen College were cited to appear before the commissioners at Whitehall, and having appeared, they tendered an answer to the charge of disobeying the king's commands. This answer was signed by only five of the delegates, Dr Fairfax, the sixth, not consenting to it. He desired to state to the commissioners his reasons for this refusal, upon which Jefferies, imagining that he was about to tender his submission, exclaimed, 'Ay, this looks like a man of sense, and a good subject; let us hear what he will say.' Fairfax then argued that the matter was cognizable in Westminster Hall, and not before the commissioners. Jefferies replied that he was a doctor of divinity, and not of law. The doctor then demanded by what commission and authority they sat? The boldness of this question threw the chancellor into a most violent paroxysm of passion. 'Pray what commission have you,' said he, 'to be so impudent in court? This man ought to be kept in a dark room.—Why do you suffer him without a guardian? Pray let the officers seize him.'*

The conspicuous part which Jefferies acted on this commission rendered him extremely odious to the nation at large; and his cruelties in the west were almost forgotten in his severities towards the suffering members of the church of England. When, in consequence of the increase of the popular discontents, and of the rumors from Holland of the preparations on foot for the expedition to England, the king was advised to call a parliament in order to appease the people, Jefferies, well aware that on the first meeting of the commons he should probably be assailed as the great grievance of the nation, vehemently opposed, at the council-table, the proposition for calling a parliament.† That proposition, indeed, had been made too late; and Jefferies was saved from the vengeance of the people's representatives only that he might experience the fiercer passions of the people themselves.

The period now approached when Jefferies was to be dragged from the elevated station he had so long disgraced by his violence, his cruelty, and his want of principle. On the approach of the Prince of Orange, and the flight of the king from London, the people, terrified by the report of a popish massacre, rose tumultuously; and Jefferies, justly dreading their vengeance, attempted to make his escape. The following is a circumstantial narrative of this attempt:—'The chancellor, now without protection, having rendered himself obnoxious to most people, and being perfectly hated by the nation, on Monday, between three and four in the morning withdrew, and having in disguise got down safe to Wapping, put himself on board a collier, which was pretended to be bound for Newcastle, but indeed was designed for Hamburg; but some persons having notice thereof, by means of the mate, they went to a justice for a warrant to apprehend him; but he thought fit to put them off, whereupon they applied themselves forthwith to the lords of the council, who granted them a warrant, and they went immediately to search the ship. But he, on Tuesday night, not thinking himself safe on board the collier in which he was to pass, lay in another ship hard by, so that those who came that day to search for him missed of him on board, but had information given them that he was hard by at a little peddling alehouse, where accordingly they found him, being the sign of the Red Cow, in Anchor and Hope Alley, near King Edward's Stairs, from whence they immediately hurried him in a coach, guarded with several blunder-busses, to the lord mayor's; where the crowd was so great, and the rabble so numerous, all crying out together *Vengeance! Justice! Justice!* that the lord mayor was forced to come out into his balcony, with his hat in his hand, and to desire the people to go away and keep peace, and did promise them that he had already sent to the lords of the council about the matter, and that they should have justice done them, and that in the meantime their prisoner should be safely guarded. Whereupon the people withdrew, and soon after my lord, under a strong guard, was sent to the lords of the council, who committed him to the Tower, where he continued to the 18th of April, 1689, when he was freed by death from his earthly confinement. He had for some years before been subject to terrible fits of the

* Life of Lord Guilford, vol. ii. p. 24.

* Vol. i. p. 104. and see ib. p. 222.

* Rennett, vol. iii. p. 504.
† Ellis Cor. vol. ii. p. 144.

stone, which in all probability now accelerated his death, though others gave out he abandoned himself to excessive drinking, thinking to support his sinking spirits by it, and that that helped forward to put a period to his life. He was buried privately in the Tower the Sunday night following by an order his relations got from King William.'*

Burnet adds to his account of the capture of Jefferies, that 'the lord mayor was so struck with the terror of the rude populace, and with the disgrace of a man who had made all people tremble before him, that he fell into fits, of which he died soon after.'

The deep and indignant feelings which cruelty and oppression excite, render it difficult to form a cool and impartial opinion of the character of Jefferies. In all the essential qualities of mind which a judge ought to possess, he seems to have been totally deficient. Unprincipled, cruel, irascible, and impatient, he stained the pure fountains of justice with blood and with corruption. No sentiment of integrity, no feeling of mercy, ever found a place in his bosom. To these qualities he added a brutal levity of conduct, strangely unbecoming the judicial character. His acquirements as a lawyer were of a mean order; and it is not dealing too harshly with him to adopt the censure of Mr Justice Foster, and to pronounce him 'the very worst judge that ever disgraced Westminster-hall.'

The ease with which those who are conversant with courts of justice learn to disregard the sufferings of others, and the faculty, which too often follows of turning those sufferings into ridicule, are but modifications of those brutal qualities which in Jefferies appeared in their full perfection. It may perhaps tend, in some degree, to prevent the growth of those callous and inhuman feelings to observe them in the odiousness of their complete development, and to remark the execration and abhorrence which they never fail to excite in every heart of common sensibility. It is a salutary lesson to see the memory of Jefferies descending to posterity darkened with the indignant reproaches of each succeeding age, and weighed down by an ever increasing weight of infamy. To affix to his polluted name an additional stigma, to brand his dishonored memory with a fresh mark of reprobation, is an office grateful to humanity.

To be concluded.

* Lives of the Chancellors, vol. i. p.185.

## ENGLISH CASES.

### COURT OF COMMON PLEAS—OCT.

*Williams and another vs. C. Woodward, Gent.*

This was an action of assumpsit brought by the plaintiffs to recover a sum of 154*l.* which they alleged had been paid by them in mistake. The defendant pleaded the general issue.

From the statement of Mr Sergeant Wilde, Counsel for the plaintiffs, it appeared that the plaintiffs are bankers, and the defendant was, at the time of this transaction, an attorney in the City, and kept an account at their house, besides drawing cheques upon them in his character of Secretary to the Independent Gas Light Company. On the 3d of Nov. last, a person named Jones, who was a brother-in-law of the defendant, presented at the plaintiff's counter a cheque, the body of which was in his own handwriting, but the signature, to all appearance, that of the defendant, and it was paid without hesitation. On the Monday following, the defendant, when the cheque was shown him, pronounced it to be a forgery, and the plaintiffs, not having reason to doubt his honor, were content to put up with the loss. In the meantime Jones had absconded, but being discovered at Hull, was apprehended, brought to London, and carried before the Lord Mayor, when Mr Woodward attended as a witness, but did not then seem so positive as formerly that the signature was not his, but stated most distinctly that the instrument was not his, and that it had been fraudulently filled upon a signature in blank, which he had made for some other purpose. He afterwards qualified that assertion, and said that, to the best of his knowledge and belief, he had not given the prisoner any authority to fill it up. As such a filling up, if unauthorised, was as much a forgery in law as the counterfeiting the name of an individual, the prisoner was committed for trial. Mr Woodward was one of the witnesses who went before the Grand Jury. What he then stated it was impossible to say; but the result was, that the bill was thrown out. Under these circumstances, the plaintiffs now contended that the defendant was bound to reimburse them the money they had paid him. The case that most resembled this was that of Young v. Grote, in which the Court held a man liable for the amount of a cheque that he had signed in blank, and which was afterwards fraudulently filled up, in consequence of the negligence of the person to whom he had entrusted it.

Witnesses were called in support of this statement, and a letter was put in and read, which the defendant had addressed to a person connected with the Independent Gas Light Company, announcing the fraud committed by Jones, and warning his correspondent against the possibility of Jones' attempting by means of his (the defendant's) signature, or in any other way, to dispose of shares in the Company.

Mr Sergeant Russell (with whom was Mr Sergeant Jones) contended that the plaintiffs had failed in establishing a right to recover this money; but said, that although the Jury might save him from the pecuniary loss which it was the object of this action to fix upon him, it was to be feared that an unfavorable and unjust impression might attach to his character through this proceeding. This last consideration was one of infinitely greater consequence to the defendant than the other. He was still a young man, and had quitted that branch of the profession in which he had began life to pursue his studies at College. What had been his conduct throughout this affair? He was a man who had been defrauded by one in his confidence, but he took the earliest and most effectual means of protecting his friends and connexions from the consequences of that person's dishonesty. The fact of the defendant having at first denied his signature, and then admitted it, denying the instrument to which it was attached, was made to appear a glaring inconsistency; but there was in reality, nothing surprising in it. Every one must know that, when a man sees an instrument which he knows not to have been his, he is strongly, hastily, perhaps rashly, but honestly, inclined to deny the whole instrument, signature and all, and it may be only upon a very deliberate consideration that he some time subsequently discovers the signature to be genuine, though it had been fraudulently employed. The use which the plaintiff's sought to make of the dismissal of the bill of the Grand Jury was a most strange one. Because the Grand Jury had thought the forgery not proved, the plaintiffs would have the Jury assume that the whole instrument was the genuine instrument of the defendant, and that he must bear the loss of his own negligence; but he felt assured they would think that an assumption too strong for them to make on such weak grounds, and would, therefore, feel it to be their duty, under such circumstances, to return a verdict for the defendant.

His Lordship, after summing up the case, told the Jury that, unless the plaintiffs had, subsequently to their re-crediting the defendant's account, discovered something to show them that they had been in error, they could not recover in the present action. If the Jury should be of opinion that the re-credit had been given in mistake, they must find for the plaintiffs; but if otherwise, for the defendant.

The Jury found for the plaintiffs; but said they wished it to be understood that they did not cast the least imputation on the character or conduct of the defendant.

### POLICE.—MARYLEBONE.

Yesterday John Williams, a young man respectably dressed, and apparently about 24, was charged before Mr Griffith with obtaining money under false pretences.

Mrs Mary Anne Trody, a lady residing at 13, Edward street, Portman-square, stated that on Monday last the prisoner came to her house, and represented himself as the son of a Welch Clergyman. He said he was at present in great distress, that he had been brought up to no profession, although he was educated at one of the Universities; but that he had obtained an engagement in a school, through a Mr Johnson, residing in Warwick-court, Holborn; that he was not to go into the situation for three months, and requested Mrs Trody to give him a small sum to relieve his present necessities. The complainant offered him a shilling, which he refused at once as inadequate to his wants; and fixing the minimum of her bounty at three shillings, refused to leave the house until the same was furnished him. Mrs Trody unwilling to have any disturbance, was alarmed into compliance, and he received the money, with which he departed. Mrs Trody hoped she had got rid of the Clergyman's son, but the prisoner's success was too brilliant not to induce him to pay her a second visit, and accordingly he made his appearance yesterday morning again, when, as a *dernier resort*, the lady called in a police constable, and gave him in charge.

Mr Griffith (to the prisoner)—Why, it appears, Sir, that you are a common beggar.

'A common beggar! a common beggar!' exclaimed the prisoner, elevating his voice to an octave, 'I am not a common beggar, Mr Griffith, I *borrowed* three shillings of that person, and will pay her when 'tis in my power; and surely you do not call that being a *common beggar?*'

'I think,' said Mr Griffith, 'I have seen your face before somewhere.'

'Oh, yes, yes,' replied Williams, with the most perfect nonchalance. 'Pray, Mr Griffith, have you no recollection of you and I having taken a glass of wine together in your little parlor?'

Mr Griffith—I do now recollect your having called upon me three or four times with a tale of distress, and that I relieved you.

The prisoner—Yes, so you did, and you spoke to me as a father and a countryman; but from your tone today, you don't seem disposed to behave

like either; *you lent* me some money too, which I'll pay you.

'Was your father a Clergyman?'—'My father is now dead, and it matters not what he was.'

'You represent yourself as having been educated at one of the universities—at which of them?'

'Now, I'll tell you what, Mr Griffith; old men are very curious, but I am determined not to gratify your curiosity in that respect. This much I'll tell you,' he added, elevating his voice and striking the bar violently with his clenched fist, 'I received a better education than ever you did.'

'Don't speak so loud, Sir.'

'Oh!' rejoined Williams ironically, 'I was given to understand that you were a little deaf, Mr Griffith, and spoke loud entirely for your sake.

'You are a very insolent rascal,' replied the Magistrate.

'There, there,' resumed Williams; 'that proves what I said about having received a better education than you did to be true; for, in the whole of our conversation, I never called *you* a *rascal*. However, when we had the wine together in your little parlor, you then treated me as a gentleman.'

Mr Griffith—I am very sorry I did.

The prisoner—Sorry! why, how else should two gentlemen behave to each other?

Mr Griffith—I shall remand you until Saturday, and direct inquiries to be made in the interim into the story you told about Mr Johnson, of Warwick-court, and if I find it out to be untrue, I shall commit you for obtaining money under false pretences.

'Ay, do; commit me for anything,' exclaimed Williams, as he left the bar, with the same sang froid which marked him there, 'commit me for anything but being a common beggar.'

## RECENT ENGLISH DECISIONS.

### EQUITY.

The rule that a gift confined expressly to the donee's life with a power of disposition superadded, confers a power only over the remainder after the estate for life, while a gift to a person indefinitely with a superadded power of disposition passes the absolute interest, applies to personal state as well as real.—*Reith vs. Seymour*, 4 Russ. 263.

Therefore the testator bequeathed all his personal estate to his wife for life, and after her decease one moiety thereof was to be at her disposal, either by will or otherwise the other moiety being given to other persons, she had the moiety for her life with a mere power of appointment. S. C.

Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty, there the annuities shall be paid clear of legacy duty.—*Smith vs. Anderson*, 4 Russ. 352.

A gift to A. and B., 'whom I appoint my executors, of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be,' will pass the fee simple of real estate.—*Thomas vs. Phelps*, 4 Russ. 348.

Testator devised real estates to his daughter, or such person as she should first marry, (if before the age of twentyone years, with the consent of guardians); He then bequeathed to her a legacy of 5,000*l.* upon her marriage with such consent as aforesaid, and the sum of 5,000*l.* two years afterwards; she married under age without consent; her husband died; having attained her full age, she marries again; Semble that neither she or her husband is entitled to the legacies.—*Clifford vs. Beaumont*, 4 Russ. 325.

Testator gave an annuity and pecuniary legacies, and then devised all the *rest, residue and remainder* of his freehold, copyhold and leasehold estates to trustees for the use and benefit of the children. Inasmuch as the words *rest, residue and remainder* evince that some *prior* purpose was to be satisfied out of the estates, held, that the annuity and legacies were charged on those estates.—*Cole vs. Turner*, 4 Russ. 376.

'Child or children,' may mean 'issue.' A testator bequeathed property to trustees upon trust to pay the income thereof to his daughter during her life, and directed that in case she should leave any *issue* living at her death, that the property should be disposed of, and the produce thereof paid to and among *such child or children* as she should appoint, and in default of appointment, to and among such *issue* as tenants in common, or if there should be but one *child*, the whole to be paid to such one; and if there should be no *issue* of his daughter living at her decease, or they should die infants, then over. Held, that the words '*child or children*,' must be construed 'issue,' and therefore, that an appointment to the children to the exclusion of the grandchildren was void.—*Dalzell vs. Welch*, 2 Sim. 326.

Bequest to one for life, with remainder to the eldest surviving son of A, and failing *the male issue* of A, to the daughters of A, living at the demise of *such male issue*. Held that '*male issue*,' meant '*sons*.' *Murray vs. Addenbrook*, 4 Russ. 407.

Bequest to one for life, with the remainder to the eldest *surviving* son of A. This does not mean a surviving of the *testator*, but of the *tenant for life*. The words 'surviving,' and 'living,' in such cases being to be referred to the time when the interest falls into possession. S. C.

Under a bequest of 'all moneys, goods, chattels, clothing, &c, my property, which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death,' the testator's interest in moneys and stock will pass.—*Kendall vs. Kendall*, 4 Russ. 361.

The words 'moneys,' 'goods,' or 'chattels,' will include 'stock,' or not, according to the context. —S. C.

The words 'family and relations' may mean 'family in general,' 'next of kin,' or 'heir,' according to circumstances. In a will of personality, if testator give a person a power of appointing among a family or relations, the terms will be taken in the popular and large sense.—*Grant vs. Lynam*, 4 Russ. 292.

But if there be a direct bequest of personality to a family or relations, convenience has given rise to the rule to confine the distribution to next of kin.—S. C.

Where the word '*heir*' is used to denote succession, it may well be understood to mean such persons as would legally succeed to the property according to its nature or quality; and therefore, in the case of personality, in such a case it would mean *next of kim*. But where the word is used to described a legatee, it will be taken in its legal and ordinary sense, unless controlled by the context. Therefore a legacy to testatrix's *heir* was held to vest in three persons who formed her *coheirs*.—*Mounsey vs. Blamire*, 4 Russ. 384.

The court will not, unless forced by the plainest words, adopt a construction, by which the interest of a child of full age and settled in life, would be devested, if he happened to die before the youngest child attained twentyone.—*Crozier vs. Fisher*, 4 Russ. 401.

A codicil does not revoke or alter a will to a greater extent than was intended. A testator, by his will, gave certain legacies exclusively charged on real estate. By a codicil, after reciting so much of the will, as related to those legacies, he revoked that part of his will, and in lieu of the legacies therein given, gave smaller ones. The object of the codicil being only to alter the amount of the legacies, held that it could not extend to charge the personal estate, and not being attested by three witnesses, could not alter the legacies charged on the real estate. —*Kirke vs. Kirke*, 4 Russ. 435.

Obliterations and interlineations by the testator in his will, coupled with an ineffectual codicil, does not amount to a revocation, but is a substitution, which failing, the original disposition stands good.—S. C.

A person served with a *subpœna ad testificandum* is not protected between the service and the day appointed for this examination.—*Gibbs vs. Phillipson*, 1 Russ. & M. 19.

If a person comes from the country to London for the purpose of being examined, he is protected during the whole time of his remaining there *bonâ fide* for the purpose of giving his testimony. —S. C,

A witness is not proteced in going to the solicitor's office to look at the interrogatories, prepartory to his examination.—S. C.

## RECENT AMERICAN DECISIONS.

### TAXES.

No presumption is raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceeding; and the proof of the regularity of the procedure devolves upon the person who claims under the collector's sale. *Rokendorf vs. Taylor*, 4 Pet. 349.

### TIME.

Where a collector was required to give public notice of the sale of real estate, for taxes, by advertising in a newspaper once a week for three months, it was *held*, that an advertisement, within the week succeeding a former advertisement, but after an interval of eleven days, was sufficient. *Rokendorf vs. Taylor*, 4 Pet. 349.

### USURY.

1. The taking of interest in advance by a bank for sixtyfour days, on a note given for sixty days, is not usury, if by the usage and custom of the bank the note was not due and payable until the sixtyfourth day. *Thornton vs. The Bank of Washington*, 3 Pet. 37.

2. Where such a note is renewed by the discount of another note on the sixtythird day, though on the new note interest for sixtyfour days is deducted, it is not usury. *Ib.*

3. The requisites to constitute usury, are: 1. A loan either express or implied: 2. An understanding that the money lent shall or may be

returned: 3. That a greater rate of interest than is allowed by law, should be paid. Per *M'Lean*, J. *Lloyd vs. Scott*, 4 Pet. 205.

4. The intent with which the act is done is an important ingredient to constitute this offence. An ignorance of the law will not protect the party from the penalties of usury, where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear on the face of the contract, or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches. Per *M'Lean*, J. *Ib.*

5. In consideration of $5000, A granted to B an annuity or rent charge of $500, payable annually, to be issuing out of and charged upon certain houses and lands, with a right to distrain in case of non-payment of the annuity, and B covenanted that if A, at the expiration of five years, paid to him $5000, with all arrears of the rent, he would release and extinguish the annuity thus created. A afterwards conveyed the houses and lands to C, subject to the payment of the annuity. *Held*, that as this was admitted to be a contract for the loan of money, it was a usurious transaction, and that C might avail himself of the usury as a defence against a claim for the rent, asserted by a distress. *Ib.*

6. An annuity may be purchased like other property, and inequality of price, of itself, will not make the contract usurious. *Ib.*

7. If a party agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. Per *M'Lean*, J. *Ib.*

8. Where a loan is made to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury. Per *M'Lean*, J. *Ib.*

9. Usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are strangers to the transaction. *Ib.*

10. Where a note, originally founded on a good consideration, is afterwards sold for less than it is nominally worth, this does not make a case of usury. *Harick vs. Jones*, 4 M'Cord, 402.

VERDICT.

Where, in an action on a bond on a plea of *nil debet*, the jury have found a verdict for ten cents, the court will not, after a lapse of ten years, interfere with the verdict, although an error might possibly have been committed. *Belser vs. Irwin*, 4 M'Cord, 380.

WAGER.

1. No wager concerning any human being, is recoverable in a court of justice. *Phillips vs. Ives*, 1 Rawle, 36.

2. Therefore, a wager, whether or not *Napoleon Bonaparte*, would, within a specified time, be released or escape from the island of *St Helena*, was *held* to be illegal and void. *Ib.*

WILL.

1. A testator used the following words in the first clause of his will: 'My widow to remain and enjoy this my mansion house and farm during her widowhood.' He, in a subsequent clause, devised the same premises with an additional quantity of land, to his grandson *forever*. *Held*, that the latter clause was not inconsistent with the former, and that the grandson took a fee simple subject to the use of the wife during her widowhood. *Petters vs. Petters*, 4 M'Cord, 151.

2. All the personal estate which a man has, at the time of his death, passes by his will, although acquired after the time of its execution. *Case of Elcock's Will*, 4 M'Cord, 39.

3. A will, as to personal property, is considered as having existence only from the death of the testator, and not from the time of its execution; and must be executed according to the provisions of the law in force at the time of the death of the testator. *Ib.*

4. Thus a testator, in 1823, made his will of personal property, which was attested by two witnesses only, according to the provisions of the law in force at that time. By the statute of 1824, of South Carolina, it is required, that wills of personal property shall be attested by three witnesses. The testator died in 1825, leaving no other will. It was *held*, that the will was void. *Ib.*

5. A testator bequeathed to his wife his negroes, naming them. The will then proceeds as follows: 'Item, I bequeath to my wife one sorrel mare, one brown cow. Item. All my household furniture, and the increase of the said negroes, *during her natural.*' *Held*, that all the sentences were to be considered as one clause, and that the wife took a life estate in the negroes, the word *life* being clearly omitted. *Geiger vs. Brown*, 4 M'Cord, 418,

6. Where a testator, after bequeathing to his wife a life estate in certain negroes, proceeds thus: 'To my son I bequeath all my lands, &c, and my other negroes, with the *remainder of my personal estate*, shall be kept together for the use of my children.' *Held*, that the residuary bequest did not include the reversionary interest which would be left after the death of the wife in the negroes given to the wife. *Ib.*

7. A testator in his will used the following words: 'I give unto my wife H. B., my two female slaves, L. and H; I also give her one third of my *income* annually, during her life, to revert after her decease to my estate.' He then gave to his son and to his heirs, one third of his income, and to his daughter, the remaining third of his income, for her sole benefit during life, and then to descend to her heirs lawfully begotten. The will then proceeds; 'After the decease of my wife, the whole of my estate to be equally divided between my son and daughter, and their heirs lawfully begotten.' *Held*, that the wife took an absolute estate in the two slaves, and not merely a life estate. *Blewer vs. Brightman*, 4 M'Cord, 60.

8. Where a testator bequeaths slaves to a tenant for life, without any further disposition of them, they revert, upon the death of the tenant for life, to the testator's legal representatives. *Geiger vs. Brown*, 4 M'Cord, 418.

9. A subsequent statute cannot affect a devise of land by a testator who died before the act was passed. *Boatwright vs. Faust*, 4 M'Cord, 439.

10. A will made in another state, and executed according to the laws of that state, will be effectual to pass the personal property of the testator in South Carolina, though not executed according to the laws of the latter state. *Gause vs. Gause*, 4 M'Cord, 382.

THE JURISPRUDENT.

BOSTON, SATURDAY, FEBRUARY 12, 1831.

## STUDY OF THE LAW.

Advice on the Study and Practice of the Law; with Directions for the choice of Books. Addressed to Attorneys' Clerks. By WILLIAM WRIGHT. Third edition: London, 1828.

When Fulbeck, in the year 1620, published in London his 'Preparative to the Study of the Law,' his professed object was to show what things ought to be observed, and what ought to be eschewed and avoided, by the law student. If at that early period, there was occasion for such admonition, how much more necessary is it in our time, when, to read the numerous treatises, abridgments, essays, &c, that have been published upon the multifarious divisions and subdivisions of municipal law, since the appearance of the work from which we have just quoted,—to say nothing of Reports,—would require a greater portion of time than is ordinarily allotted to human existence! No legal noviciate of the present day ever dreams of qualifying himself for practice, without some direction as to what he should 'eschew' and what 'avoid;' and this preparatory knowledge he either derives from some one of the several works which have in later years been designed to afford him instruction, or from the preceptor in the school, or the head of the office where he is placed for tuition. Among the different courses of legal study that have been marked out for the student, it would be singular if any two of them should be found to exactly correspond; and some we know differ from each other essentially. It is not our design, however, on this occasion to point this difference, or to discuss the merits of any of the plans that have been recommended; but, inasmuch as it is probable that some satisfaction and even advantage may be derived from a comparison of one course with another, we propose to call the reader's attention to the views and suggestions contained in the work of an author, who has lately assumed the office which was systematically undertaken by the ancient writer we have mentioned, more than two centuries ago.

Mr Wright cautions the student not to commence his studies with the laws of his own country alone; for if he does, he will soon perceive he has begun with works which, while unacquainted with technical language, he cannot clearly understand. The student in fact should not endeavor 'to acquire from the rivulets what is only to be gained from the fountain of jurisprudence.' An elementary knowledge of the law of nature and nations and the civil law is earnestly insisted on, instead of beginning, as English lawyers too often do, with books of English law only. After recommending Grotius and Puffendorf, and bestowing some critical remarks on those celebrated publicists, he says the student may afterwards have recourse to the Elementa Juris Naturæ et Gentium of Heineccius, and to the works of Vattel and Wood. The best way, Mr W. thinks, to obtain a sound knowledge of the *civil law*, is to study the Corpus Juris Civillis itself, and more especially the Digests. Mr W. has devoted an entire chapter to this subject, and thus manifests a high degree of respect for a system of jurisprudence which has hitherto, generally speaking, commanded too insignificant a share of attention with English jurists. For the purpose of acquiring a knowledge of the civil law, Mr W. also recommends the *fortyfourth* Chapter in Gibbon, the Elementa of Heineccius, Justinian's Institutes by Harris, and Observations on the Study of the Civil Law by Dr Irvin. As some parts of the

Digests cannot be studied with advantage, without a Lexicon of Civil law, Mr W. recommends Calvin's Lexicon Juridicum.

The subject to which the student is next advised to bestow attention is *history;* and a particular knowledge of the history of England is considered to be very essential. Hume's History, Miller's View of the English Government, and Turner's History of the Anglo-Saxons are referred to in terms of great approbation. When the student has comprehended the principles of the law of nature and nations, and acquired a knowledge of English history, he is to study. De Lolme on the English Constitution,—then Lord John Russell on the same subject,—then Eunomus,—then Hale's History of the common Law, and Sullivan's and Woodeson's Lectures on the Constitution and Laws of England. Reeves' History of the English Law is next recommended. Of Reeves, Mr W. says:

'Reeves has studiously avoided inquiries beyond the pale of the English law, and confined himself to those of more utility to young students. He might have enlarged many parts of his history, had it been written for lawyers; but he wrote for students, and by closely pursuing his labors, his work is more useful than if it had contained many useless though erudite discussions. Some parts of our law will perhaps forever remain in obscurity, and it is not a fit employment for young men in their clerkship to puzzle themselves with unimportant theories.' p. 86.

Of Blackstone's Commentaries, which Mr W. says should next be read, he says:

'This very valuable elementary work reflects honor on the author and the profession, and it is no less admired by the lawyer for the general accuracy of its contents, than by the critical scholar, for the elegance of diction and the correct didactic style in which it is written.'

Much stress is laid on an accurate knowledge of the *feudal tenures,* and to the information on this subject which is to be acquired from the works before enumerated, must be added, says Mr W., an intimate acquaintance with Wright's Law of Tenures. The learning and ability which Mr Butler has displayed upon the same subject in one of his notes to Coke upon Littleton, is also referred to. After these books the student is to proceed to the perusal of treatises on the different branches of English law. The books of this class which are recommended are Jones' Essay on Bailments, Toller's Law of Executors, Fonblanque's Treatise on Equity, and the late edition by Mr Preston of Watkins' Principles of Conveyancing. The student is next allowed to take successively in hand Cruise's Digest and Preston's edition of the Touchstone of Common Assurances; and as an introductory work on suits in the courts of common law and on special pleading, Saunders' Reports by Williams. The latter book is thought to be peculiarly worthy the attention of students. From that and from Atkyns' Reports—Peere Williams' Reports, and the English edition of Plowden's Reports, the student, says Mr W., will acquire very important and necessary information. Mr W. then proceeds with his directions and observations as follows:

'From great attention to the books already mentioned, the student will perhaps find that his progress has exceeded his most sanguine expectations. After he is well acquainted with their contents, but not till then, he should study the Notes to Coke upon Littleton, by Hargrave and Butler,—Saunders on Uses,—Watkins on Descents,—Adams on Ejectment,—Powell on Devises, and on Mortgages,—Sugden on Powers,—Fearne's Essay on Contingent Remainders, and on Executory Devises,—and Preston's Essay on Estates, on Conveyancing, and on Abstracts.'

After mentioning the above works, the author proceeds to give a piece of very wholesome advice to law students in relation to a fault which, as far as our observation has gone, is somewhat common in this country.

'In these books, several cases of almost similar import are placed before the eyes of the student. To draw the conclusions which they warrant, these authors have bestowed great pains; and on some occasions their distinctions are so very nice, that he will be at a loss, without considerable attention and repeated perusal, to draw a proper inference from them; yet ultimately he will clearly comprehend their reasoning. This should animate him to persevere in his labors; *and it will tend to repress that absurd arrogance which prompts young men to decide dogmatically on doubtful points without having qualified themselves by reading or reflection, to discuss such subjects.*'

It has been customary, our author says, to recommend Coke upon Littleton *immediately after* reading Blackstone; but of that order he does not approve. In the study of *Pleading,* Chitty is recommended; and with regard to *Evidence,* 'the student will find Mr Phillips' an excellent work, and with it he may read Selwyn's Nisi Prius, which is the best book we have on the subject.' We shall here take the liberty of mentioning Mr Starkie's work on evidence, which is not referred to by Mr Wright, the first volume of which we humbly imagine, would tend very much to enlighten the mind of the law student, upon the subject of which, with great clearness and method, it treats.

The student is recommended by Mr W. to attend occasionally to the *modern* Reports, while engaged in the preceding course of study, but not, however, until he has obtained a copious fund of *elementary* knowledge; and in reading Reports, 'he is to distinguish between those points which are determined on the argument, and the *obiter dicta* of the judges—the latter never being entitled to the respect which is due to *formal* decisions.' For occasional reading, or rather reference, Comyn's Digest and Bacon's Abridgment will be found very valuable. The former is an estimable production, but the cases are too much abridged for a student, and require constant reference to illustrate the author's positions.'

From the above analysis, it will appear that the work before us, (although 'addressed to *Attorneys' Clerks,*') is yet well worth the perusal, as 'Advice on the Study and Practice of the Law,' to *all* students of law.

In reference to an opinion which it seems exists in England, as well as in this country—viz: that a person who is in the situation of an 'articled clerk' should content himself with doing the work of the office, and with the knowledge he may acquire from routine,—Mr Wright says, that 'a man of acute understanding and ready wit may be able to go through the ordinary routine of practice without ever having been a diligent student, and indeed without having pursued any regular course of study; but this cannot be done early in life, or without having seen extensive practice.' The men who maintain the opinion alluded to, in England, we are told belong to 'rather an antiquated school.' Mr Preston (who, as we conceive, is entitled to very high respect) in the preface to his Essay on Conveyancing, has lamented the consequences arising from an opinion so mistaken. We shall conclude by adducing his remarks on the subject, and we quote them because we think they are far from being inapplicable in our own country. If the student undertakes to qualify himself for the practice of the law without a regular course of study, according to Mr Preston, 'he is taught by form or precedent rather than by principle. He is made to copy precedents without knowing either their application or those rules on which they are grounded. When he begins to prepare draughts, he is led to expect all his information from these forms, and his knowledge is in the end as limited as the means by which he has been instructed.'—*Law Int.*

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We subjoin the following list of the cases in which the Supreme Court of the United States have decided that State laws were unconstitutional, embracing all the cases of this description, from the establishment of that Court to the present time, a period of more than thirtysix years, citing the volumes in which they are reported, and the years in which they were decided, viz:

| | | | | |
|---|---|---|---|---|
| Georgia v. Brailsford, | 3 | Dallas' Rep. | 4 Georgia, | 1794 |
| Vanhorne v. Dorrance, | 2 | do | 304, Penn. | 1795 |
| Ware v. Hylton, | 3 | do | 199, Virginia, | 1796 |
| U. States v. Dorrance | 2 | do | 371, Penn. | 1797 |
| Clerke v. Harwood, | 3 | do | 342, Maryland, | 1797 |
| Ogden v. Blackledge, | 2 | Cranch's Rep. | 272, N. C. | 1804 |
| Hopkirk v. Bell, | 3 | do | 454, Va. | 1806 |
| U. States v. Peters, | 5 | do | 115, Penn. | 1800 |
| Fletcher v. Peck, | 6 | do | 87, Geo. | 1810 |
| N. Jersey v. Wilson, | 7 | do | 164, N. J. | 1812 |
| Terrett v. Taylor, | 9 | do | 43, Va. | 1815 |
| Town of Rawlett v. Clark, | | do | 292, Vt. | 1815 |
| Chirac v. Chirac, | 2 | Wheaton's Rep. | 259, Md. | 1817 |
| Sturgis v. Crowninshield, | 4 | do | 122, N. Y. | 1819 |
| M'Millan v. M'Neil, | 4 | do | 209, Lou. | 1819 |
| M'Culloch v. Maryland, | 4 | do | 316, Md. | 1819 |
| Dartmouth College case, | 4 | do | 518, N. H. | 1819 |
| Farmers' & Mech. Bank v. Smith. | 6 | do | 131, Penn. | 1821 |
| Green v. Biddle, | 8 | do | 1, Ken. | 1823 |
| Gospel Soc'y v. Wheeler, | 8 | do | 464, Vt. | 1823 |
| Gibbons v. Ogden, | 9 | do | 1, N. Y. | 1824 |
| Osborn v. U. S. Bank, | 9 | do | 738, Ohio, | 1824 |
| Ogden v. Saunders, | 12 | do | 213, N. Y. | 1827 |
| Brown v. Maryland, | 12 | do | 419, Md. | 1827 |
| Western v. City Counsel, | 2 | Peters' Rep. | 449, S. C. | 1829 |
| Bank of Hamilton v. Dudley, | 2 | do | 525, Ohio, | 1829 |

It appears by the above statement, that 2 State laws of Georgia have been pronounced unconstitutional, 4 of Pennsylvania, 3 of Virginia, 4 of Maryland, 1 of North Carolina, 1 of New Jersey, 2 of Vermont, 3 of New York, 1 of Louisiana, 1 of Kentucky, 2 of Ohio, 1 of South Carolina, and 1 of New Hampshire—in all 24.

In the following cases the decisions of the Supreme Court were in favor of the constitutionality of State laws, viz:

| | | | | |
|---|---|---|---|---|
| Cowper v. Telfair, | 4 | Dallas' Rep. | 14, Georgia, | 1800 |
| Houston v. Moore, | 5 | Wheaton's Rep, | 1, Penn. | 1820 |
| Owings v. Speed, | 5 | do | 420, Virginia, | 1820 |
| Williams v. Norris, | 12 | do | 117, Tenn. | 1827 |
| Montgomery v. Hernandez, | 12 | do | 129, Lou. | 1827 |
| Wilson v. Blackbird, | 2 | Peters' Rep. | 251, Del. | 1829 |
| Satterlee v. Mathewson, | 2 | do | 380, Penn. | 1829 |
| Bank of Hamilton v. Dudley, | 2 | do | 523, Ohio, | 1829 |
| Wilkinson v. Leland, | 2 | do | 627, R. Isl. | *1829 |
| Providence Bank v. Billings, &c. | 4 | do | 627, do | 1830 |

* The act of Rhode Island confirmed in this case, was a *private* one, passed with the view of perfecting title to an estate.—*Pat.*

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NEW PUBLICATION.

A Treatise on the Doctrine of Presumption and Presumptive Evidence, as effecting the Title to Real and Personal Property. By John H. Mathews, Esq. of Lincoln's Inn, Barrister at Law. —With Notes and References to American Cases, by Benjamin Rand, Esq.

LIBRARY OF EDUCATION
This day published by GRAY & BOWEN,
The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

WHITMAN'S LETTERS.
This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

PARLEY'S ASIA.
This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED,
by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

GIRL'S OWN BOOK.
This day published by CARTER, HENDEE, & BABCOCK,
'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semiannual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

GRAY AND BOWEN,
have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

GRAY AND BOWEN,
No. 141, Washington Street, Boston, have recently published the following valuable works.

I. THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION. Published under the Direction of the President of the United States, from the Original Manuscripts in the Department of State, conformably to a resolution of Congress, of March 27, 1818. Edited by JARED SPARKS.

This important Correspondence, now for the first time published, will form eleven volumes. Eight are already published and the remainder will appear very shortly.

II. JEFFERSON'S WORKS, In four Volumes. Accompanied with a Portrait on steel, and a fac-simile of the original draft of the Declaration of Independence. Second Edition.

III. THE NEW TESTAMENT, conformed to Griesbach's Text. 1 Vol. 12mo.

THE TOKEN, a Christmas and New Year's Present, for 1831. Edited by S. G. Goodrich.

'Then take my flower, and let its leaves
Beside thy heart be cherished near.
While that confiding heart receives
The thought it whispers to thine ear.'

The engravings for the Token of this year are executed by Cheney, Ellis, Gallaudet, and others; among the contributors are Dewey, Greenwood, Miss Sedgwick, Mrs Sigourney, Hall, Peabody, Wetmore, author of a Year in Spain, author of Tales of the Northwest, Neal, Thatcher, Mrs Hale, and others of the first reputation.

The work is larger than heretofore, and is done up in splendid embossed morocco. The literary department is considered decidedly superior to the former years, and in all respects it has received the greatest care and attention. Oct 23.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

CONTENTS.

Art. 1. Mill's Phenomena of Mind. 2. Tytler's and Scott's Histories of Scotland. 3. Memoirs, Correspondence, and Papers of Thomas Jefferson. 4. Niebuhr's Geography of Herodotus. 5. Galt's Southennan. 6. Floods in Morayshire. 7. Troades of Euripides. 8. The Belgian Insurrection, and De Potter's Trial. 9. Alexander's Travels. 10. London Bridge. 11. Hydrophobia. 12. Mr Brougham and Local Judicatories. 13. Novels and Travels in Turkey. 14. The Three Days of Paris. 15. Brasse's Sophocles. 16. Geometry without Axioms. 17. Revolution of 1830. List of Books, Index, &c. Jan. 22.

AMERICAN ALMANAC,
Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY.
This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

EVENTS IN PARIS,
during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS.
This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

THE JURISPRUDENT
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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, FEBRUARY 19, 1831. NO. XXX.

## MERCANTILE LAW.

### CONTRACT OF SALE.

Continued.

But goods are frequently secured in bond warehouses, as well as deposited for temporary custody, in the private warehouses of individuals. The warehousing acts* have, however, with one exception which will be presently noticed, left the mode and validity of transfer, on the sale of goods so secured, to the ordinary rules of the common law: and, therefore, upon the principle laid down by Lord Ellenborough, as applicable to the case of wharfingers, a delivery order to the warehouse-keeper is here also recognised as a sufficient transfer of possession. But where goods are bonded in the warehouses of docks,† the usual and regular mode of transfer is by indorsement and delivery of the dock warrant or certificate. Indeed, the original warrants contain a blank form of indorsement, to be filled up as occasion may require, and by long established mercantile usage the handing of the indorsed warrant from the buyer to the seller is recognised, both in practice and in the law, as a complete transfer of the goods into the possession of the former.‡ But a difficulty arose where the proprietor of the warehouse was also the owner of the goods; because a delivery order addressed to himself, or an entry of transfer in his own books could hardly be relied upon as evidence of delivery. To obviate this, it is expressly provided by the act, that if any goods lodged in any warehouse shall be the property of the occupier of such warehouse, and shall be *bonâ fide* sold by him, and upon such sale there shall have been a written agreement signed by the parties, or a written contract of sale made, executed, and delivered by a broker or other person legally authorized and the amount of the price stipulated in the said agreement or contract shall have been actually paid or secured, every such sale shall be valid, although the goods remain in the warehouse, provided that a transfer of the goods according to such sale shall have been entered in a book to be kept for that purpose by the officer of the customs having charge of the warehouse, who is thereby required to keep such book, and to enter the transfer upon application of the owners of the goods.*

For this mode of transfer by indorsement of the dock warrant, a ready precedent was furnished in the practice which had for ages prevailed as to the indorsement of bills of lading.† This practice, however, was derived out of the nature of the instrument itself. The master, by the delivery of a bill of lading to the shipper, binds himself to deliver the goods, which he acknowledges to have received on board in good condition, either to the shipper or his order, or assigns; or to the bearer; or to the consignee or his assigns. Where it is made to the order of the shipper, he indorses it either specially or in blank; i. e. either with an order to a particular person by name, in which case it has the same effect as if the name of that person had been inserted in the body of the instrument, or without the addition of a name. The effect, therefore, is, that the master is bound to hold the goods shipped on board for the benefit of him who shall acquire by indorsation the right to the bill of lading, and to deliver them to the holder of that instrument: and thus it is that goods on their passage at sea may be sold, and the right of immediate possession transferred to the purchaser by the simple act of indorsement.‡

One question only remains as applicable to the general doctrine of delivery, and it is this: Whether delivery, to the purchaser of a *part* of the goods bought will have the effect of transferring the property and right of immediate possession as to the whole, so as consequently to defeat the right of the seller to retain for the price. And it seems that, whatever may be the case when the goods have passed out of the possession of the seller, and are in their transit to the buyer, as to which we shall have occasion to inquire hereafter, yet as between the vendor and vendee immediately, part-delivery will have no such effect, but the former will still be entitled to his lien over the rest.*

We have now examined, in the order prescribed, the doctrine of delivery, whether actual or constructive, and we have hitherto viewed it principally, and as far as possible exclusively, with reference to its effect in transferring the property, and with it the risk, entitling the seller to payment, and devesting him of his lien for the price. It remains that we consider it more particularly as to the arrival of the goods at the hands of the vendee, with reference both to the statutory requisite of acceptance by the buyer, and the doctrine of stoppage *in transitu* and restitution.

And first, as to the acceptance of goods by the buyer. The words of the statute, we may recollect, are these: 'Unless the buyer shall accept part of the goods so sold, and *actually receive the same into his possession*.' And if words have any force, the meaning of the legislature plainly was, that there should be an acceptance in the way of *final appropriation to himself* of the whole or some part of the subject of his purchase.† Now the question whether there has been such an appropriation is evidently two-fold; first, whether there has been a quitting of possession by the seller, and secondly, whether there has been a taking into the possession of the buyer. Of the first, something has been said already; and, from the principles laid down it may be collected, that unless the vendor either had no lien for the price, or it be clear that he intended to waive it in favor of the purchaser, nothing but an actual tradition into the keeping of the buyer will be received as a delivery. This principle has been frequently adverted to by the courts.‡ In one case, Mr Justice Holroyd observed: 'upon the sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession; and, therefore, so long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.'§ Accordingly it has been decided that directions given by the buyer as to the treatment of a horse which he had purchased—the horse in the mean-

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* Consolidated in the 6 Geo. 4 c. 112. This act has for its object the warehousing of goods imported into England, for home consumption, so as to secure the duties payable on importation, without calling for payment till the goods are finally taken into the market. The commissioners of the treasury are empowered to appoint by warrant certain ports to be warehousing ports, and therein certain warehouses, either of special or of ordinary security; the first being intended for more effectual security against the introduction into the English market of prohibited merchandise, imported only for re-exportation; the other having merely in view the safe deposit of the goods, and insuring payment of the duties. To secure these duties a bond is given either by the proprietor of the warehouse, for payment within three years of the full duties of importation, on all goods which shall be warehoused therein, or otherwise for the exportation thereof; or by the importer, in respect of the particular goods, which is to be in force for three years, and no longer; and which may be superseded by the bond of the purchaser, in case of sale, without removal.

† Dock Companies, usually incorporated by act of parliament, are established in all the principal ports of Great Britain, having extensive warehouses attached to the docks. Such are the London Dock Company, the East, and West India Dock Companies, and others in the port of London. The company, or the proprietors and directors (if not incorporated) stand in the situation of warehousemen to the owners of goods bonded in their warehouses. In general, in these establishments, the enfries and transfers in the books are made with great regularity and precision. A warrant is usually given on the depositing of the goods. To this is added a certificate of the transfer into the books of the warehouse, signed by a clerk, and describing the goods, ship, name of the importer, &c, with a schedule of the marks and weight of each bale or cask. To this again is subjoined a blank delivery order, to be filled up as occasion may require.

‡ Spear v. Travers, 4 Campb. 251. Lucas v. Dorrieu, 7 Taunt. 278. Zwinger v. Samuda, 7 Taunt. 265.

* Section 9. The officer here mentioned is a person appointed by the crown, having only a superintendence and key for the security of the duties.

† We must conclude then that the negotiation or assignment of an invoice or bill of lading, completes the transfer to the person receiving them, without waiting for the actual tradition, or requiring notice; like the indorsation of a letter of exchange, or a note payable to the bearer. Valin. i. 608. As to the nature of a bill of lading, see Abbott on Shipping, 5 ed. p. 214, & seq.; and as to the indorsement, p. 368, & seq. We shall have occasion to recur to this subject hereafter.

‡ Evans v. Martlett, 1 Lord Raymond, 271. Lickbarrow v. Mason, 2 T. R. 74. 75. Abbott on shipping, 369.

* Payne v. Shadbolt, 1 Campb. 427, is an express authority to this effect, and the same result seems to follow from the case of Holderness v. Shackels, 8 B. & C. 612. But see an observation of Littledale J., in Simmons v. Swift, 5 B. & C. 865.

† See the observations of Abbott, Ch. J. in Howe v. Palmer, 3 B. & C. 321. Where the act is equivocal, and depends on the intention of the party at the time, it is properly a question for the jury. Thus in Phillips v. Bertolie, 2 B. & C. 571, a lot was knocked down to the defendant who took it into his hand, and after keeping it for three or four minutes, returned it, saying that he had been mistaken as to the price. By the conditions of sale, the purchaser was also to pay an immediate deposit. And the court was of opinion on motion for a new trial, that it ought to be left to the jury to say whether there was an intention on the part of the auctioneer, to give up the goods without payment of the deposit, or on the part of the buyer to take them finally to himself.

‡ Carter v. Toussaint, 5 B. & A. 855. Baldey v. Parker, 2 B. & C. 44. Phillips v. Bistoli, 2 B. & C. 513. Smith v. Surman, 9 B. & C. 577. per Parke, J.

§ In Baldey v. Parker.

time remaining in the vendor's stable in one case,* at livery in his name in another case,† though in compliance with the request of the buyer—constituted no acceptance, the circumstances not being inconsistent with an intention on the part of the vendor to keep possession until payment; and upon the same principle, where the buyer had agreed for various articles from a linen-draper, of which, some he marked with a pencil, others were measured in his presence, and others he assisted to cut off from a larger bulk, finally desiring the whole to be sent with a bill of parcels to his house, these circumstances were not considered sufficient to satisfy the statute. The buyer in short could not be said 'actually to receive the goods into his possession,' so long as the seller had the control over them, and might refuse, if so minded, to deliver them without payment.‡

Neither, secondly, can the buyer be considered as taking the goods by way of final appropriation, so long as he has a right to object to either the quantity or quality of the goods when actually delivered to him. It follows, therefore, that in general the goods must have arrived at their ultimate destination, before there can be such an acceptance as will satisfy the statute. Accordingly, though it was once held at nisi prius,§ that delivery to the master of a ship, (the course of conveyance being that which was customary between the buyer and seller) was an acceptance by an authorized agent of the buyer, and therefore within the statute, yet in the greater accuracy of construction which has prevailed in later times, that doctrine has been altogether exploded,‖ and the principle above laid down may be considered as immoveably established. Indeed, in an early case,¶ Mr Justice Heath had well expounded the statute thus: 'According to the words of the statute, the exception does not apply, unless the vendee both receive and accept. Now that acceptance I cannot consider to be any other than the *ultimate acceptance*, and such as *completely affirms* the contract.' Upon the whole it may be safely laid down, that no receipt of the goods by a mere carrier or middle-man, on their way to the buyer, will be construed into an acceptance by him, so long as the right remains to him of inspection and repudiation on their ultimate arrival.

It had been determined in one case, that a delivery order to a wharfinger handed by the seller to the buyer, constituted an acceptance by the latter, even though no transfer took place in the books of the wharfinger.** But upon this decision it might well be asked, how could the terms of the statute, which requires an actual taking into the possession of the buyer, be fulfilled, when there was not even a constructive transfer by the change of entry. And accordingly it has been lately decided, that until the order is assented to by the warehouseman to whom it is addressed, the requisite of the statute is not complied with.*

Of part-acceptance by the taking of samples we have spoken already.† Our next will be devoted to the important subject of stoppage in transitu.

To be continued.

* Tempest v. Fitzgerald, 3 B. & A. 680.
† Carter v. Toussaint.
‡ Baldey v. Parker.
§ Hart v. Sattley, 3 Campb. 588. per Chambre, J.
‖ Astley v. Emery, 4 M. & S. 264. Hanson v. Armitage, 5 B. & A. 559. In the latter case tea had been despatched to the defendant according to order, and sent by the usual mode in which former parcels had been forwarded to the same purchaser. The tea never arrived, having been lost on its passage, but it was contended that the acceptance by the wharfinger was an acceptance by the vendee, and consequently that the plaintiff might recover the price, though there had been no contract in writing. From this notion the whole court dissented. The principle had been before laid down in Howe v. Palmer, 3 B. & A. 321.
¶ Kent v. Huskinson, 3 Bos. & Pul. 233.
** Searle v. Reeves, 1 Esp. N. P. C. 598.

* Bentall v. Burn, 3 B. & C. 423. The sale was of a hogshead of wine lying in the warehouses of the London Dock Company. A delivery order was handed by the seller to the buyer, but no transfer made in the books of the company. *P. Cur.* 'There could not have been any actual acceptance of the wine by the vendee, until the dock company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee. It has been said that the London Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action, for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him, until he actually took possession of them.'
† Ante, p. 147. And see Rohde v. Thwaites, 6 B. & C. 388.

## LORD JEFFERIES.

Concluded from page 226.

In his personal character, Jefferies was remarkable for his laxity and disregard of the decencies of his station. Roger North has left a character of him, which, though perhaps highly colored, is certainly, in its main representations, correct. 'His friendship and conversation lay much among the good fellows and humorists, and his delights were accordingly drinking, laughing, singing, kissing, and all the extravagances of the bottle. He had a set of banterers for the most part near him, as in old times, great men kept fools to make them merry, and these fellows, abusing one another and their betters, were a regale to him; and no friendship or dearness could be so great in private, which he could not use ill, and to an extravagant degree, in public. No one that had any expectations from him was safe from his public contempt and derision, which some of his minions at the bar bitterly felt. Those above, and that could hurt or benefit him, and none else, might depend on fair quarter at his hand. When he was in temper, and matters indifferent came before him, he became his seat of justice better than any other I ever saw in his place. He took a pleasure in mortifying fraudulent attorneys, and would deal forth his severities with a sort of majesty. He had extraordinary natural abilities, but little acquired, beyond what practice in affairs had supplied. He talked fluently and with spirit: and his weakness was, that he could not reprehend without scolding and in such Billingsgate language as should not come out of the mouth of any man. He called it *giving a lick with the rough side of his tongue.* It was ordinary to hear him say, *Go, you are a filthy, lousy, nitty rascal*, with much more of like elegance. Scarce a day passed that he did not chide some one or other of the bar, when he sat in the chancery, and it was commonly a lecture of a quarter of an hour long. And they used to say, *This is yours; my turn will be tomorrow.* He seemed to lay nothing of his business to heart, nor care what he did, nor what he left undone, and spent in the chancery court what time he thought fit to spare. Many times on days of causes at his house, the company have waited five hours in a morning, and after eleven he hath come out inflamed, and staring like one distracted, and that visage he put on when he animadverted on such as he took offence at, which made him a terror to real offenders, whom also he terrified with his face and voice, as if the thunder of the day of judgment broke over their heads, and nothing ever made men tremble like his vocal inflictions. He loved to insult, and was bold without check, but that only was when his place was uppermost. To give an instance: A city attorney was petioned against for some abuse, and affidavit was made that, when he was told of my lord chancellor, "My lord chancellor!" said he, "I made him!" meaning his being a means to bring him early into city business. When this affidavit was read, "Well," said the lord chancellor, "then I will lay my maker by the heels," and with that conceit, one of his best old friends went to jail. One of these intemperances was fatal to him. There was a scrivener of Wapping brought to hearing for relief against a bummery bond: the contingency of losing all being shown, the bill was going to be dismissed; but one of the plaintiff's counsel said that he was a strange fellow, and sometimes went to church, sometimes to conventicles, and none could tell what to make of him, and it was thought he was a *trimmer.* At that the chancellor fired: "A trimmer!" said he; "I have heard much of that monster, but never saw one. Come forth, Mr Trimmer! turn you round, and let us see your shape!" and at that rate talked so long, that the poor fellow was ready to drop under him; but at last the bill was dismissed with costs, and he went his way. In the hall, one of his friends, asked him how he came off. "Came off!" said he; "I am escaped from the terrors of that man's face, which I would scarcely undergo again to save my life; and I shall certainly have the frightful impression of it as long as I live." Afterwards, when the prince of Orange came, and all was in confusion, this lord chancellor, being very obnoxious, disguised himself, in order to go beyond sea: he was in a seaman's garb, and drinking a pot in a cellar. This scrivener came into the cellar after some of his clients, and his eye caught that face, which made him start; and the chancellor, seeing himself eyed, feigned a cough, and turned to the wall with his pot in his hand: but Mr Trimmer went out and gave notice that he was there, whereupon the mob flowed in, and he was in extreme hazard of his life; but the lord mayor saved him, and lost himself. For the chancellor being hurried, with such crowd and and noise, before him, and appearing so dismally, not only disguised but disordered, and there having been an amity betwixt them, as also a veneration on the lord mayor's part, he had not spirit to sustain the shock, but fell down in a swoon, and not many hours after died.'*

Evelyn, who was acquainted with Jefferies, tells us, that being present at the wedding of Mrs Castle, a city lady, he met there 'Sir George Jefferies newly made chief justice of England, who, with Mr Justice Withings danced with the bride, and was exceeding merry. These great men,' adds Evelyn, 'spent the rest of the afternoon, until eleven at night, in drinking healths, taking tobacco, and talking much beneath the gravity of judges, who had but a day or two before condemned Mr Algernon Sidney.'† Sir John Reresby‡ also has left us an account of a dinner party at the house of Jefferies, while he was chancellor, at which the lord mayor and some other gentleman were present. Jefferies according to custom, drank deep at dinner and in order, as he said, to divert

* Life of Lord Guilford, vol. ii. p. 31.
† Memoirs, vol. i. p. 530.
‡ Memoirs.

the company, he called for Mountfort, one of his gentlemen, who had been a comedian, and who was an excellent mimic. Mountfort was then desired to plead before them, which he did, imitating all the great lawyers of the day, to the great diversion of the lord chancellor.

The person and character of Jefferies have been thus sketched by an anonymous writer:—'He was rather above the middle stature; his complexion fair; his face well enough, though mixed with an air a little malicious and unpleasant. He was a man of tolerable sense, and had, by long practice, acquired some tolerable knowledge of the law, though, as little as it was, more than he had occasion to make use of. He had a pretty large stock of ill nature and wit, in which lay his greatest excellence, though an unenvied one. But, in short, his *law* and his *tongue* were the two best accomplishments he was master of; by the help of which he sometimes put falsehood, but more frequently truth, out of countenance.

'He spoke many pleasant things, but very few handsome ones, disgracing his wit by his intolerable railing, and mean passions; and would frequently, even upon the bench itself, fall into such heats as were not only unworthy of a judge, but even of a private man. To do him justice, he had a great deal of baseness and cruelty in his nature, having a particular delight and relish in such things as give horror to the rest of mankind.'*

On some rare occasions Jefferies did indeed display feelings approaching to kindness and gratitude. When chief justice of Chester, certain proceedings instituted against the celebrated Philip Henry, for attending a conventicle, were brought to his notice; but in this instance, at least, he manifested no desire to persecute a man whose conscientious discharge of his duty had already subjected him to much suffering. 'He did not,' says the biographer of Mr Henry, 'in private conversation, seem to applaud what was done in this matter, as was expected; whether out of a private pique against some that had been active in it, or for what other reason is not known; but it was said, he pleasantly asked some of the gentlemen, by what new law they pressed carts, as they passed upon their occasion along the road, to carry away goods distrained for a conventicle? It was also said that he spoke with some respect of Mr Henry; saying, he knew him, and his character well, and that he was a great friend of his mother's (Mrs Jefferies of Acton, near Wrexham, a very pious, good woman), and that sometimes, at his mother's request, Mr Henry had examined him in his learning, when he was a schoolboy, and had commended his proficiency. And it was much wondered at by many, that of all the times Sir George Jefferies went that circuit, though it is well enough known what was his temper, and what the temper of that divine, yet he never sought any occasion against Mr Henry, nor took the occasions that were offered, nor countenanced any trouble intended him, though he was the only non-conformist in Shropshire.'†

Mr Seward, in his collection, has preserved another anecdote favorable to the character of Jefferies. On his arrival at Taunton, previously to opening the commission for the trial of the persons concerned in Monmouth's rebellion, he was waited upon by the minister of the church of Saint Mary Magdalen, in that town, who, in a very mild manner, remonstrated with him on the barbarity of his proceedings. Jefferies listened to him with great calmness, and soon after his return to London, sent for the clergyman, and presented him to a stall in the cathedral of Bristol.*

* Life and Character of Jefferies, p. 44.

† Life of Mr Philip Henry, p. 150. ed. 1825.

* Seward's Anecdotes, vol. ii. p. 85.

## IMPRISONMENT FOR DEBT.

### DANIEL WEBSTER'S OPINION.

We have never seen a document on the subject of Imprisonment for Debt, which corresponded so entirely with our own views as the following letter from the Hon. Daniel Webster, to the Secretary of the Prison Discipline Society at Boston. We approve of his sentiments, not because they are his, but because they are the dictates of sound sense united with humanity, regarding alike the interests of debtor and creditor, and making a just distinction between honesty and fraud.—*New York Journal of Commerce.*

LETTER FROM HON. DANIEL WEBSTER, DATED MAY 2, 1830.

SIR—I have received your letter of the 19th April, asking my opinion upon several questions, all relative to the subject of imprisonment for debt. I am quite willing to express my general opinions on that interesting subject, although they are not so matured as to be entitled to influence other men's judgments.—The existing laws, I think, call loudly for revision and amendment. Your first four questions seek to know what I think of imprisonment for small sums. I am decidedly against it; I would carry the exemption to debt of thirty or forty dollars at least. Individual instances of evil or hardship might, I am aware, follow from such a change; and I am persuaded the general result would be favorable, in a high degree, to industry, sobriety, and good morals, as well as to personal liberty.

You ask, in the next place, what I think of imprisonment for debt in any case where there is no evidence of fraud. Certainly I am of opinion that there should be no imprisonment for debt where it appears that no fraud has been practised or intended either in contracting the debt, or in omitting to pay it. But, then, it seems to me, that, when a man does not fulfil a lawful promise, he ought to show his inability, and to show also that his own conduct has been fair and honest. He ought not to be allowed merely to *say* that he cannot pay, and then to call on the creditors to *prove* that his inability is pretended or fraudulent. He ought to show why he does not and cannot fulfil his contract, and to give reasonable evidence that he has not acted fraudulently; and this being done, his person ought to be held no longer. In the first place, the creditor is entitled to the oath of his debtor, and, in the next place to a satisfactory explanation of any suspicious circumstances.

There are two sorts of fraud, either of which when proved, ought to prevent a liberation of the person, viz. fraud in contracting the debt, and fraud in concealing, or making way with the means of payment. And the usual provisions of the bankrupt act ought to be added, that no one should be discharged, who is proved to have lost money in any species of gaming; and I should include in this class, *all adventurers in lotteries.* Having tendered his oath, and made just explanation of any circumstances of suspicion, if there be such, and not having lost money by gaming, the debtor ought to be discharged at once; which answers another of your questions; for the detention of thirty days, before the oath can be taken, appears to me wholly useless.

You are pleased to ask, whether, in my judgment, Christians can, with a good conscience, imprison either other Christians or infidels. He would be very little of a Christian, I think, who should make a difference in such a case, and be willing to use a degree of severity towards Jew or Greek, which he would not use towards one of his own faith. Whether conscientious men can imprison anybody for debt, who they do not believe dishonest or fraudulent, is a question which every man, while the law allows such imprisonments, must decide for himself. In answer to your inquiry, whether I have found it necessary to use such coercion in regard to debts of my own, I have to say, that I never imprisoned any man for my own debt, under any circumstances; nor have I, in five and twenty years' professional practice, ever recommended it to others, except in cases where there was manifest proof, or violent and unexplained suspicion, of intentional fraud.

Imprisonment for debt, my dear sir, as it is now practised, is, in my judgment, a great evil; and it seems to me, an effectual remedy for the larger part of the evil is obvious.

Nineteen-twentieths of the whole of it would be relieved, in my opinion, if imprisonment for *small debts* were to be abolished.—That object I believe to be attainable; and to its attainment, I think, the main attention of those who take an interest in the subject should be directed. Small credits are often given, on the confidence of being able to collect the debt by the terrors of the Jail; great ones, seldom or never.

Three simple provisions would accomplish all, in my opinion, that may be considered as absolutely required to a just state of the law, respecting imprisonment for debt in Masschusetts.

1. That no imprisonment should be allowed, when the debts, exclusive of costs, did not amount to $30.

2. That there should be no necessity of imprisonment for thirty days, as preliminary to taking the poor debtor's oath; nor any longer detention than such as is necessary to give parties notice, and time to prepare for examination; and that a convenient number of magistrates, in every county, should, for the purpose of administering the oaths, be appointed by the government; and that such magistrates should be clothed with such further powers as might be thought expedient in order to enable them to make a thorough investigation of the fairness or fraud of the debtor's conduct.

3. That in cases where the debtor had been discharged, if the creditor would make oath to newly discovered evidences, proving original fraud, or to his belief that the debtor had subsequently received property, and concealed or withheld the same from his creditors, it should be competent to such creditor to have investigation of such charge, and, it made out, to have execution against the person and if not made out, that the creditor should pay the cost of the proceeding.

Other provisions might doubtless be useful; but if these three alone could be obtained, they would, in a great measure, clear the jails of debtors, and give general satisfaction, I have no doubt, to creditors.

I ought to add that the imprisonment of females in the common jails, for mere debt, is a barbarism which ought not to be tolerated.—Instances of such imprisonment, though rare, do yet sometimes occur, under circumstances that shock every human mind. In this respect, the law ought, in my judgment, to be altogether reformed

## ENGLISH CASES.

COURT OF CHANCERY—JULY.

*Exparte elsee in the Matter of Joiner.*

When this petition was called on this morning, the following discussion ensued between the solicitor-general and Mr Montague, with reference to the system of giving retaining fees to the Gentlemen of the Bar; and, as the question is one of some public interest, and particularly to the suitors of the Court, we give the following full report of what transpired:—

The Solicitor-General said that he was instructed by a Mr Leigh, a solicitor, to appear for the petitioner. Mr Jacob and Mr Montague were on the other side. He had just suggested to his Learned Friend, Mr Montague, whether he could with propriety appear on this occasion against the petitioner. He was frequently himself placed in a very painful situation with regard to retainers. The public, he thought, was much deceived with respect to the feelings of Counsel who had received retainers. If a barrister had a retainer on one side, another person comes and gives him a retainer on the other. Nothing was more painful to a Gentleman of the Bar than to exercise his right of appearing, if he had that right, on a subsequent occasion, against a party whom he had formerly supported. He (the Solicitor General) had very often to entreat persons to take back their retaining fee under such circumstances.

The Lord Chancellor observed, that it was much to the inconvenience of Counsel to be so retained.

The Solicitor General said that he was fully sensible that it was so, but that it was also contrary to the best feelings of Gentlemen at the Bar; and the public, he was very sorry to say, was much deceived with regard to their feelings on this subject. He thought, however, that the system became one of important consideration; when a party claimed his right to act, it then became necessary to see whether that right existed or not.

The Lord Chancellor said that that was a point which he believed was never referred to the Court for its decision.

The Solicitor-General said that the objection might be taken, and it had been taken in Court.

The Lord Chancellor said that he thought that such points were generally settled by a reference to the feelings of the Bar.

The Solicitor-General said that it might be in the recollection of his Lordship, a case in which he (the Solicitor-General) was stopped upon a similar objection being taken, and the case was adjourned, that it might be referred to a Gentleman of the Bar to say for which party he should appear, both parties claiming his service.

The Lord Chancellor said that he could understand such a mode of proceeding, but he could not take upon himself to say that a Gentleman of the Bar had not a right to appear. If there was any doubt about the matter, perhaps Mr Montague would not appear until the doubt was removed.

Mr Montague said that he entertained no doubt about the matter, and he should now appear.

The Lord Chancellor said that he did not think he had any power to prevent him.

Mr Montague said that it had been decided by Lord Eldon, upon a petition presented to restrain him (Mr M.) from so acting, on which occasion he argued that the Court had nothing to do with the matter, only the Counsel themselves, and he (Lord Eldon) decided that the Court could not interfere. The regular proceeding in such cases had been followed in this case. A case was drawn and settled by both parties; that case was referred to Mr Bell, and he had declared that he (Mr M.) was at liberty to act for the party for whom he then appeared, although he had originally a retainer on the other side.

The Solicitor-General said that his Learned Friend was mistaken. The present petition arose out of his client's original petition. Mr Montague was retained on the original petition, and the question referred to Mr Bell was, the propriety of Mr Montague's appearing on a supplemental petition.

*The Lord Chancellor*—Has the case been mentioned to Mr Bell at all?

The Solicitor-General apprehended not.

Mr Montague said that a day or two ago Mr Leigh, who was the Solicitor-General's client, required his (Mr M.'s) services on this occasion. He (Mr M.) told him that if he would send a brief to his (Mr M.'s) chambers, he would direct another case to be laid before Mr Bell for his opinion, but Mr Leigh had not done it.

Mr Leigh said that he had not done so. He insisted, and did insist, on his right upon his retainer.

The Lord Chancellor said that the party ought not to be put to the expense of sending a brief, and also of sending a case upon it to another gentleman. That he thought was never done.

Mr Leigh said Mr Montague had made a motion to the Court in this matter, of the very same nature which was now made; he made an indorsement on his brief of the result of that application, and now he came to the Court to appear against his former clients, who presented this petition.

Mr Montague said that he was much flattered by Mr Leigh, by his being so desirous of having him as his Counsel.

Mr Leigh said he only desired what was right.

Mr Montague said that if it was desired that this case should stand over until tomorrow he had no objection.

The Lord Chancellor said that if there really existed any doubt about the strict propriety of his acting, he thought it would be better that the case should stand over until the point was settled.

The Solicitor-General thought that it ought really to stand over; all he wished was that they should proceed regularly upon the subject of their retainers, for there was a very strong feeling excited in the public mind upon this subject although, he thought, erroneously. He thought it was highly necessary that the public should be made aware of what the feelings of the Bar was upon the subject.

The Lord Chancellor said he had heard dissertations upon many and most subjects, but he never had heard of any upon retainers.

Mr Montague informed his Lordship that he had written a work upon this subject, and he would send his Lordship a copy if he would condescend to accept it. It was stated that, in the time of Queen Elizabeth, there was but one Sergeant in the Court of Common Pleas, and that he used to take fees from both sides.

The Solicitor-General said that was what often happened in cases at the Quarter Sessions.

The Lord Chancellor told Mr Montague that he thought the case ought to stand over, to have an opinion on the point, and, if possible, to have it settled.

Mr Montagu assentede, and said he would send his Lordship a copy of his book on this subject.

The Lord Chancellor said he would be glad to see it. In the meantime the case should stand over.

Here the matter ended for the present.

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COURT OF COMMON PLEAS—NOV.

This was an action to recover the sum of 450*l.* as the price of a horse named Criterion, alleged to have been sold by plaintiff to the defendant. At the trial of the cause two letters were produced as evidence that such a sale had been made; and the defendant's Counsel having shown that the defendant knew that a few days before the same horse had been sold for 100*l.* and in the interval had received a kick from another horse; and having also proved, from the evidence of several persons, that they never considered the horse worth more than 100*l.* went to the Jury on the improbability of such a contract as that now attempted to be enforced having ever been entered into. The Jury, after considering the circumstances, gave a verdict for the defendant.

A rule had been obtained to set aside the verdict and have a new trial, and cause was now shown against it by Mr Sergeant Wilde and Mr Sergeant Adams: and the rule was supported by Mr Sergeant Taddy and Mr Sergeant Andrews.

The Chief Justice said, it seemed to him that the question here had properly gone to the Jury, and that their verdict ought not to be disturbed. The whole of the plaintiff's case consisted of two letters, which were read not as the contract between the parties, but only as evidence that such a contract had been made. He did not think the evidence sufficient for that purpose. It was utterly improbable that such a contract should have been entered into. The defendant knew that the horse had just before been purchased for 100*l.* and the two letters, which were relied on as evidence of the contract, differed from each other. In the first, the contract was spoken of as complete and absolute; in the next, it was described only as an offer. Besides this, it appeared that the defendant had, before then, paid above 100*l.* for the defendant's use, and it was quite improbable that he would make such a contract without stipulating for the payment of the money he had advanced. The whole question was one for the Jury, whose verdict in his Lordship's opinion, ought not to be disturbed.

The other Judges concurring, the rule for a new trial was discharged.

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THE BEER BILL.—At Stockport Petty Sessions last week, informations were exhibited against ten retailers of beer, for suffering beer to be drunk or consumed on their premises after ten o'clock at night. Mr Brandt, the barrister, appeared for the defendants, and contended that, by the 14th clause of the Retail Beer Act, his clients were exempt from any penalty for *consuming* at that hour; for though the former part of the clause distinctly states that they shall not sell or suffer beer to be drunk after the hour of ten o'clock in the evening, yet in the penal or latter part of the clause, the law does not recognise *consuming* as any offence, all mention of it being omitted. On that ground the cases were dismissed.—*London pap.*

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Lord Lyndhurst, the ex-chancellor, has, it is said, accepted the office of Chief Baron of the Exchequer.

## RECENT AMERICAN DECISIONS.

### WILL.

A will made in another state, according to the laws of that state, but not according to the provisions of the laws of South Carolina, either as to real or personal property, cannot be admitted to probate in the latter state, in the first instance. *Gause vs. Gause*, 4 M'Cord, 436.

The decree of the ordinary against a will is not conclusive against the rights of a devisee of the lands, or of one who takes a power to sell lands, or their privies. *Crosland vs. Murdock*, 4 M'Cord, 217.

So, if he allows a will, his probate is not evidence against the heir at law. *Ib.*

An instrument in the form of a deed being voluntary, and to take effect at the death of the maker, may operate as a devise of real estate. *Singleton vs. Breman*, 4 M'Cord, 12.

A testator directed his real estate to be sold by his executors, and that when sold and the money collected, they should pay all his just debts and all the just debts of his son L. contracted up to the date of the will, but none that he might contract after that date. He then directed that his wife should have and enjoy all his estate, real and personal, during her life, and that at her death, one moiety should be left at her own disposal. The other moiety he directed to be put out at interest for the use and benefit of his son L., for him to receive the interest of the same annually during his natural life; and at his decease, the principal and interest of the same to be at his own disposal. The wife survived the testator, and died intestate. The son L. survived his father and mother, and died intestate, leaving the the plaintiff, his only child.

*Held*, that after the death of the widow, without appointment, one half of the estate vested absolutely in the son L. as next of kin, and was liable to his debts; and that as to the other half, it went to the son L. for life, and after his death without appointment to the plaintiff as next of kin to the testator, and was not liable to the debts of the testator's son L. *Thomas vs. Thomas*, 1 Rawle, 112.

Although land devised is not expressly charged with the maintenance of infirm children of the testator, yet, if such an intention can be clearly collected from all the parts of the will, considered in reference to the testator's circumstances, the charge will attach upon the land, and follow it into the hands of subsequent purchasers. *Ripple vs. Ripple*, 1 Rawle, 386.

The words '*any earthly property*,' in a will, if they appear from the context not to have been intended to include real estate, will be confined to personal property. *Brown vs. Dysinger*, 1 Rawle, 408.

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### WITNESS.

Where a third person brings an action on an administration bond in the name of the ordinary, indorsing his name on the record, aud acknowledging himself liable for costs, the ordinary is a competent witness to prove the bond. For the record can never be given in evidence for him in any future action in which he may be individually concerned. *Price vs. Gregory*, 4 M'Cord, 261.

A party of record to an action cannot be examined as a witness. *Vineyard vs. Brown*, 4 M'Cord, 24.

Thus an executor, party to an issue of *devisavit vel non*, though he takes nothing by the will, is inadmissible as a witness in the cause. *Ib.*

The declarations of a witness, that he is interested in the event of the suit, are not *per se* sufficient to deprive the party by whom he is called, of the benefit of his examination. *Cotchell vs. Discon*, 4 M'Cord, 311.

To exclude a witness it is not enough, that he has an interest in the subject matter in litigation, but it must be an interest in the event of the particular cause. *Ib.*

A witness is presumed to be admissible till his incompetency is proved and either by an examination on his *voire dire*, or by evidence *aliunde*. *Ib.*

In a suit by the city council of Charleston for a penalty for retailing without a license, a citizen of the town, though one the corporators, is a competent witness. *City Council vs. King*, 4 M'Cord, 487.

An agent authorized to settle an account, and to give a note in the name of the principal for the balance, is a competent witness to prove his agency and the fact of giving the note, where suit is brought upon the note. *Covington vs. Bussey*, 4 M'Cord, 412.

The maker of a usurious promissory note against whom a judgment has been recovered by the indorsee (the lender) is a competent witness to prove the usury in action by such indorsee against the indorser. *Recheley vs. Cheer*, 4 M'Cord, 397.

Merchants, shopkeepers, &c, are permitted to prove their book-entries, although parties to the suit. *Ib.*

A party to a fraud is competent to prove it. *Langer vs. Felton*, 1 Rawle, 141.

In an action against the indorser of a promissory note, the drawer, to whom the defendant has executed a release, is not incompetent as a witness for the defendant, on the ground of interest, though he has given to the indorser a judgment and mortgage, to secure him against the indorsement. *Griffith vs. Reford*, 1 Rawle, 196.

But he is incompetent, (on the ground that a witness cannot impeach a writing he has given,) to prove that the consideration of the note was usurious; that the indorsee was in fact the lender, and that the security was put into a negotiable form, merely for the sake of convenience. *Ib.*

A legatee who has assigned his interest under a will to another person is a competent witness to prove the will, although the consideration of the assignment is a bond for a giving sum, payable to him at future day. *M'Ilroy vs. M'Ilroy*, 1 Rawle, 433.

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### HOUSTON SUPERIOR COURT.

*Central Bank vs. H. Kendrick and his securities.*

The facts in this case are as follows:

By the third section of the act of 1824, (page 90) on the subject of the Macon Bridge, certain commissioners thereof, were authorised to rent the same annually, at public outcry, to the highest bidder, taking bond and security for the faithful payment to the state of the sum for which the bridge should rent. The bridge, (which was the property of the state) was rented accordingly. In the year ———, Harvey Kendrick became the highest bidder, and the commissioners took his promissory note with security for the amount of the rent. By virtue of the act of 1828, incorporating the Central Bank, all debts due to the State were vested in said Bank, and under the authority of said act the note above mentioned was transferred to said Bank. An action has been instituted upon the note by the Bank, and the defendants have plead that the note is void, not having been taken in conformity with the statute, which requires *a bond*. The question to be determined is, shall the plea prevail? My opinion is, that it ought not to be sustained. The taking of a promissory note, although not in conformity with the *mere letter*, was certainly not violative of the *spirit* and *object* of the law. It is hardly necessary to remark, that the bond intended by the statute, was of course to be a mere money bond, viz:—a written engagement under the hands and seals of the obligor and his securities, binding themselves to pay a certain sum of money at a certain time. Now, as to the end in view, and the obligations incurred, there is no difference between such a bond and a promissory note executed by the same parties, and for the same sum, and payable at the same time.

The difference is only in the *form* of the undertaking; the substance is the same in each case. A promissory note is not exempt from the operation of the statute of limitations for as long a period as a bond—but in that respect, (if the maxim, '*nullum tempus occurit regi*,' would not apply in a case of this kind) the taking of a note instead of a bond was *beneficial* to the defendants, and furnishes no ground of legitimate objection on their part. For every purpose contemplated by the legislature, the taking of a promissory note was a *substantial*, though not a *literal* compliance with the statute. For that part of the statute, which designates a bond as the security to be taken, I regard as directory to the commissioners, but not as absolutely *prohibitory* of every other form of security. On the part of the defendants, an attempt has been made to analogise the present case, to cases which have arisen under the statute 23d H. 6, c. 9, in relation to bail bonds. As to bail bonds, it is true the courts have freqnently adjudicated that any variance from the form and condition required by statute, is fatal; and for the obvious reason that the statute is not only imperative as to the form and condition of the security, but expressly enacts that every security other than that prescribed by the statute, shall be void—10 Co. 101—1 T. R. 418—7 T. R. 109—4 East, 568—1 Archbold's Practice, 74.

Besides, the principal object of the statute was to prevent the extortion and oppressive exactions to which defendants were often subjected by Sheriffs, *Colore Officii* previous to the statute. There is no analogy then between the statute 23 H. 6, and the act of 1824, under which the commissioners acted.

They are equally dissimilar in their objects and terms. One was enacted to correct *abuses*, and prescribes the form and requisites of a bail security, at the same time declaring every obligation different therefrom, to be void. The object of the other was to invest certain commissioners with authority to rent a certain portion of the public property. It directs them to take bond and security from the lessee for the payment of the rent, but does not inhibit them from taking any other equivalent security, nor does it declare that any security other than a bond shall be void. These are essential points of difference between the two statutes. The statute of New York on the subject of bail bonds was copied from the

English statute. Hence the remarks made concerning the latter, will apply with equal force with the former, and to the cases which have occurred under it, some of which have been cited on the part of the defendants—8 *John. Rep.* 76—7 *ib.* 159. *and* 19 *ib.* 223.

That there is a well founded distinction between an imperative requisition of a statute and a clause merely directory to an officer, is illustrated even in the case of a bail bond. Thus a sheriff may take a bond with *one security* only notwithstanding the statute mentions *securities*, in the plural number—2 *Saunders*, 61 c.—1 *Archbold's Practice*, 75.

Again the, statute, 12 G. 1 c. 29, enacts that the sheriff shall take bail for the sum indorsed on the writ and no more, yet if the bond be taken for more it will not avoid it if no intention to oppress the defendant appear—2 Willes 60—1 Burr. 331—1 Arch. Pr. 74. The same distinction is supported in the case of Speak et al. vs. U. S.—9 Cranch, 28—in which the court held 'that a bond taken by virtue of the 1st section of the Embargo Law of January, 1808, was not void, though *taken after* the vessel had sailed by consent of parties—the statute, as to the time of taking the bond, was merely *directory* to the collector.' On the subject of statutory bonds generally, I am aware that the authorities go to the extent, that the insertion of conditions not authorized by law, renders such bonds void *in toto*—3 Wash. C. C. Rep. 10. If the point, however; were now *res integra*, it might be well worthy of consideration, whether it would not better comport with reason and justice that the unauthorized conditions only should be held void—1 Gallis, 86. But without engaging in that inquiry now, I will remark, that the present case does not fall witin the reason of those authorities, as no onerous or authorised conditions have been exacted from the defendants. The obligation incurred by them under their contract, is only co-extensive with that which the legislature intended to impose. The departure from the statute consists in the *form*, not in the *substance* of the contract. Where there has been a substantial compliance with the law, the want of a rigid conformity with the mere letter of a statute requiring a bond to be taken is not a fatal objection to the bond. In the case of the United States vs. Morgan et al. (3 Wash. C. C. R. 10) the court held that although the second section of the Embargo law of December, 1807, directs the bond which therein required, to be given *to the collector*, yet it is valid if taken to the *United States*—(see also U. States vs. Smith et al.—2 Hall's American Law Journal, 458.)

The case of Cole et al. vs. Gower and Piggott, 6 East, 110, has been cited on the part of the defendant. In that case, certain parish officers had taken from the putative father of a bastard child, a promissory note for an absolute sum, whereas by the statute, (6 G. 2 C. 31) they were only authorised to take security from him to *indemnify* the parish. Upon a suit brought upon the note, the defendants pleaded a tender of a sum less than the note called for, as the amount of the charge actually sustained by the parish. The court held that the parish officers were not authorized to make a note for an absolute sum, and that the plaintiffs could not recover beyond the amount tendered. At the first blush this case seems to be somewhat in point, but is really not so. The taking of a note for an absolute sum was not only contrary to the letter, but to the whole spirit of the law. By the statute, the liability of the putative father, was limited to the mere indemnity of the parish; but by taking a note for an absolute sum, the statutory measure of his liability was wholy disregarded, and an arbitrary one substituted. On the one hand, if the amount of the note *exceeded* the actual charge incurred by the parish, then more was exacted from the defendant than the law required; on the other hand, if the amount of the note was *less* than the actual charge, then the parish was not indemnified, and the object of the law was defeated. The proceeding too, as was justly observed by the court, was contrary to public policy, Grose, J. said, 'that the parish officers could not convert a power given to them for the mere purpose of indemnity, into a matter of bargain and speculation, upon the life and the death of the child, thereby making it the interest of the parish to get rid of the child as soon as possible.' To show the want of analogy between this case in East, and the present, it is only necessary to observe that the commissioners of the Macon bridge in taking a note, did not vary in the least degree the legal measure of the defendants, liability, and that the transaction was in no wise inconsistent with public policy.

Authorities relating to mercantile and commercial agencies have been adduced to show that an agent acting under a particular and not a general authority, cannot bind his principal beyond the extent of the authority granted—(Paley on Agency—2 John. 48, 3 T. R. 757.) This doctrine is admitted, but the present case does not fall within its limits. If the defendants were *principals*, seeking to avoid some act of *their* agent upon the ground that he had transcended his power, then the authorities cited would not be inapplicable. The commissioners, however, by taking a promissory note did not subject the state whose agents they were, to any unauthorised liability. If this were a case of private commercial agency, another principle no less true than that which has been already stated would apply. It is this—Although an agent cannot bind his principal by an act, exceeding the agent's authority, the want of such authority may be supplied by a subsequent express, or implied ratification of the act by the principal,' *omnis ratihabitio retrotrahitur et mandato equiparatur.*'—1 *Bosanquet et Puller*, 316. 13 *John.* 367. 2 *John. Ca.* 424, 1 *Livermore on Agency*, 44. In this instance the note taken by the commissioners was accepted by the state through its proper public functionary; and under the authority of an act of the Legislature, it has been transferred and delivered to the plaintiff as an evidence of debt due to the state. Similar acts of adoption in the case of a private mercantile agency would cure any defect of authority on the part of the agent. I do not insist upon the application of this principle to the present case, but advert to it to show that the defendants can derive no aid from the law of commercial agencies.

As a general proposition, it is not denied that a special or particular authority must be strictly pursued. But in the several which have been cited on the part of the defendants, wherein the principle has been practically applied, it will be found that the rights, duties, obligations or liabilities which were attempted to be created by an undue execution of a limited authority, were in some degree variant from those, for the creation of which, the power was given. Hence the decision that such an execution of a limited power is not valid. But from the manner in which the commissioners of the Macon bridge executed the authority delegated to them, no such variance results. Under the promissory note which they accepted, the right which thereby accrued to the state, and the obligation and liability incurred by the maker, were exactly commensurate with those which it was the object of the statute to create, to wit, a right on the part of the state to receive—and a corresponding obligation on the part of the lessee of the bridge and his securities to pay a certain sum of money at a specified period. Reference has been made by defendant's council to a class of cases which have arisen under special statutory powers, affecting the property and vested rights of individuals without their assent. In all such cases it is admitted that a strict pursuance of the authority delegated is indispensable—1 *Burr.* 377, *Cowp.* 26, 7 *T. R.* 363, 3 *Johns Ca.* 107.

Thus it has been repeatedly determined that a collector of taxes or other officer empowered in particular cases to sell land for taxes, must strictly pursue the statutory direction in every matter which the law required to precede the exercise of the power delegated to him: and that no title is conveyed by a sale when any pre-requisite act has been omitted—4 *Wheat.* 77, 6 *ib.* 119, 4 *Cranch*, 402, 9 *ib.* 64.

It is an obvious dictate of justice, that no man shall be deprived of his property *against his will*, except under circumstances defined, and in the manner prescribed by law. But these decisions do not reach the case under consideration. The authority of the commissioners of the Macon bridge, was not a power affecting compulsorily, the private interests of individuals. The defendants were *voluntary* parties to the instrument now sought to be invalidated.

The doctrine of powers whereby estates are limited and settled, has been referred to by counsel—1 *T. R.* 707, *Willes*, 169. That doctrine, however, has but little application to a case like the present. In the case of Taylor vs. Herde et al. (1 *Burr*, 120,) Lord Mansfield doubtless laid down the correct rule in relation to the construction of such powers. 'The *intent* of the parties who gave the power ought to govern every construction. He to whom it is given, has a right to enjoy the full exercise of it—they, over whose estate it is given, have a right to say 'it shall not be exceeded.' The condition shall not be evaded; it shall be strictly pursued, in form and substance.' The reason that such powers are to be strictly pursued, is that the rights of remainder-men, or parties having reversionary interests in the estate, are connected with, and affected by the execution of such powers—a reason wholly foreign to the case before the court.

Finally, the note was given for a valuable consideration, it was voluntarily executed by the defendants—it created no right in the state, and imposed no obligation upon the defendants beyond the purview of the statute; but the right on the one hand, and corrective obligation on the other, are the same as would have arisen under the security mentioned in the statute. I hold, therefore, that the commissioners *substantially* executed their power, and that the note is not void.

LUCIUS Q. C. LAMAR.

Whereupon, it is ordered, that the rule Nisi for a new trial, in this case, be discharged, and that the execution do proceed.

C. B. STRONG, *Judge.*

THE JURISPRUDENT.

BOSTON, SATURDAY, FEBRUARY 19, 1831.

*Tillinghast's Edition of Adams on Ejectment.*—The revised statutes of New York have made a sweeping provision on the subject of real actions, having substituted ejectment for all other actions to try claims relating to real property. P. 3, 4, 5, tit. 1, s. 1 and 2. Vol. 2. p. 303. The provisions are as follows, s. 1: 'The action of ejectment is retained and may be brought in the cases and manner hereafter accustomed, subject to the provisions hereinafter contained.' S. 2. 'It may also be brought in the same cases in which a writ of right may now be brought by law, to recover lands, tenements, or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee, or purchaser.' S. 2. 'By any widow entitled to dower, or by a woman so entitled, and her husband, after the expiration of six months from the time of her right accruing, to recover her dower of lands, tenements, or hereditaments.' And again, Part 3, c. 5. tit. 7, s. 24. vol. 2, p. 343: 'All writs of right, writs of dower, writs of entry and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in this chapter, and all other writs and other process heretofore used in real actions, which are not specifically retained in this chapter, shall be and they hereby are abolished.' The real actions enumerated and retained in the chapter are waste and nuisance. But these provisions will make no great alteration in the practice as far as the form of action is concerned, that of ejectment having, as our readers very well know, been in general use there as in England, to try titles to real estate. One alteration made by the revised statutes we are glad to see, to wit, the absolute proscription and outlawry of '*Jackson ex dem.*' the legal representative of the *Roe ex dem.* of the English reports, to whom all the lands of England have heretofore been demised and to farm let for these many years past, but who was notwithstanding by no means a great land-*holder*, for no sooner was an interest in real estate at any time granted to him, than one *Casual Ejector*, a pestilent persecutor of Doe, was instantly upon him with an ouster, and has been, time out of mind, and still is, chasing him from place to place, all over England, never giving him a moment's rest in the possession of any lands, tenements, or hereditaments whatsoever. And so it has fared with *Jackson ex dem.* his representative in the state of New York. But to settle the matter, both he and Casual Ejector, his tormentor, have been banished from that state forever, by p. 3, c. 5, tit. 1, s. 6, of the revised statutes, whereby it is enacted, that 'the use of fictitious names of plaintiffs or defendants, and of the name of any other than the real claimants and the real defendants, and the statement of any lease or demise to the to the plaintiff, and of an ejectment by a casual or nominal ejector are hereby abolished.'

These innovations render Mr Tillinghast's new edition of Adams on Ejectment very opportune. To the last London edition the editor has added one hundred and thirty or forty English, and seventeen or eighteen hundred American cases.—*Jurist.*

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*Examination of Parties in Civil Suits.*—Lord Wynford, better known as Mr Chief Justice Best, of the Common Pleas, has introduced into the British House of Lords a proposition to abridge the expense of testimony in lawsuits, by subjecting the parties to examination on interrogatories, as is already done in chancery and in trials before the commissioners of bankruptcy. The testimony by witnesses and all the proceedings in the trial would thus be narrowed down to the questions actually in dispute.

In regard, at least, to actions *ex contractu* this practice would suppress such a mass of litigation, —would tend so effectually to prevent surprise and circumvention,—would so materially reduce the expense of trials,—and is, withal, so just between the parties, that we are only surprised at its not having been long since universally introduced in England and the United States. This practice is, as we see by the trial of the French ex-ministers, adopted in criminal trials in France.

*Revival of County Courts in England.*—Mr, now Lord Chancellor, Brougham is also pressing the measure of establishing county courts, distinct from the assizes held by the judges of Westminster Hall, with a jurisdiction in actions of debt, for sums not exceeding £100, and in actions for damages for tort, not exceeding £50. This he considers not so much an innovation as the restoration of the old county courts, which originally had jurisdiction of claims under 40*s.* equal, in the opinion of Chief Justice Hale, to £10 in his time, and, in that of Lord Brougham, to £40 at the present time. He proposes that the experiment shall first be made in only two counties.—*Ib.*

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IMPORTANT TO STAGE OWNERS.—An interesting case was yesterday, 14th inst. decided in the Supreme Court of this State, sitting in this City. It was a prosecution against the proprietors of the Providence and Boston Citizens' line. The plaintiff took passage in one of their coaches, and on Boston neck, was overturned, thrown under the carriage, had his leg severely fractured and was otherwise injured. An action for damages resulted yesterday, in a verdict for the plaintiff of *Fifteen Hundred Dollars.*

The counsel for the defendants argued that the overturning of the coach was an accident, which no care could have avoided, and the injury was owing to the carelessness of the plaintiff.

The Judge in his charge very clearly pointed out the responsibilities of proprietors of stages.—They are bound to prepare proper accommodations for passengers; to have good and sufficient coaches, horses, harness and drivers—to keep them always in such repair that full dependence can properly be placed upon them—and in case of the overturning of the coach, running away of the horses; breaking of the harness or breaking down of the carriage, and injury thereby occurring to passengers, the proprietors are liable, unless they can prove the accident to have arisen from causes wholly without the control of the driver.—But it is not suffcient that the agents of the proprietors are properly directed; they must carry their orders into execution. If a carriage break down while upon a smooth road, the presumption in law (as laid down by the judge) is, that it arose from neglect on the part of the owner of the stage, and the burden of proof lies with the stage proprietor to rebut the charge.

The result of this case is of great importance to the public whether interested in stages as proprietors or passengers. Decisions have been made in England which have established the principle of reponsibilities of stage and steam boat owners: but we have now for the first time a decisive opinion upon this subject and learn the law in this Commonwealth to be the same in this respect as that of England. Accidents in steam boats and stages have become too frequent, and it is full time that the public are informed that the law will afford them some relief against the carelessness of stage drivers and steam boat engineers. Loss of a limb, or a maim for life, it is true, cannot be compensated by pecuniary restitution: but as great expense and loss of time are always attendant upon extensive injuries, it is some satisfaction to know that a remedy in law lies against the employer of reckless drivers.—*Traveller.*

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## NEW PUBLICATIONS.

*American Jurist and Law Magazine, No. IX.*

CONTENTS.

Art. I. Address of Chief Justice Shaw—An Address delivered before the Bar of Berkshire, by Lemuel Shaw, on his first taking his seat as Chief Justice of the Supreme Judicial Court of Massachusetts, September Term, 1830.

II. Written and Unwritten Systems of Laws—De la Codification en general, et de celie de l'Angleterre en particulier en une serie de lettres addresses a M. C. P. Cooper, A vocal Anglais. par J. D. Meyer, Chevalier de l'ordre Royal du Lion Belgique, &c, &c.

III. Corporators' Liability Laws—Opinion on the constitutionality of the Massachusetts Statutes of 1808, c. 65, 1817, c. 183, and 1821, c. 38, rendering the members of manufacturing corporations personally liable on the contracts of the corporation, and subjecting their property to attachment as mesne process, and their persons liable to arrest and imprisonment, and their property liable to be seized and sold on executions in actions against such corporations.

IV. Opinion of the Right of Set-Off.

V. Angell on Limitations—A Treatise on the Limitation of Actions at Law, and Suits in Equity. To which is added an Appendix, containing an Abstract of the Statutes of Limitation of the several States, Brook's Reading upon the Statute of Henry VIII. &c. By Joseph K. Angell.

VI. Legislation on Banking.

VII. Rules of Evidence, No. II—Incompetency of Witnesses from Infamy of Character. Digest of Recent Decisions—Principal Cases in Wendell's Reports, vols. 2, 3 and 4. Legislation, Maine—Short Reviews and Notices. Tillinghast's Forms and Precedents—Tillinghast's Edition of Adams on Ejectment—Goodwin's New England Sheriff—Eunomous' Letters on British Law Reform—Juridical Letters addressed to the Right Hon. Robert Peel, in reference to the present crisis of Law Reform, Lettters I. and II. By Eunomous—Intelligence and Miscellany.—Shipper's Lien on the Ship for Damage to the Goods—Cases in the General Court of Virginia, November, 1830—Examination of Parties in Civil Suits—Revival of County Courts in England—New Judges in Westminster Hall and new Regulations as to Writs of Error and Bail—Judge Barbour's Valedictory to his Constituents—Rules of Chancery Practice in Maine—Georgia and the Cherokees—List of Judges—Quarterly List of Law Publications.

A General Collection of Forms and Precedents of Process, Entries, and Pleadings, in Civil Actions at Law; adapted to the Revised Statutes of New York. By John L. Tillinghast, Counsellor at Law.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I.—Containing 'Some Thoughts concerning Education,' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semiannual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M.

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

Nos. 13 and 14, North American Series.

These numbers contain articles on Motion of Fluids—Iron Brestramers—Caoutchouc—Liverpool and Manchester Railway—Weight and Pressure in Ships of War—Steam Canal Navigation—Improved Electrical Apparatus—Stephenson's Locomotive Engine—On Flying—Mariner's Life Grapple—Marine Steam Engine—Perpetual Motion, &c, &c; with very numerous engravings. Subscriptions received as above. Feb. 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

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Art. 1. Mill's Phenomena of Mind. 2. Tytler's and Scott's Histories of Scotland. 3. Memoirs, Correspondence, and Papers of Thomas Jefferson. 4. Niebuhr's Geography of Herodotus. 5. Galt's Southennan. 6. Floods in Morayshire. 7. Troades of Euripides. 8. The Belgian Insurrection, and De Potter's Trial. 9. Alexander's Travels. 10. London Bridge. 11. Hydrophobia. 12. Mr Brougham and Local Judicatories. 13. Novels and Travels in Turkey. 14. The Three Days of Paris. 15. Brasse's Sophocles. 16. Geometry without Axioms. 17. Revolution of 1830. List of Books, Index, &c. Jan. 22.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

EVENTS IN PARIS, during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, FEBRUARY 26, 1831. NO. XXXI.

## JUDGE JACKSON'S OPINION,

AS TO THE MODE OF ADJUSTING PARTIAL LOSSES IN CERTAIN CASES.

A question has lately arisen among the Insurance Companies in Boston, as to the mode of adjusting a partial loss on a ship when the old materials or a part of them have been saved. It is said that the uniform practice in this town has been, first to deduct from the cost of the repairs the allowance of one third, new for old, and from the balance to deduct the value of the old materials, and that the residue is the amount for which the insurers are liable: and this is said to be the usage in most, if not all, of the commercial States in Europe. It appears however that our Supreme Judicial Court in a late case (Brooks v. The Oriental Insurance Company of Salem) which is not yet reported, have decided that the value of the old materials must first be deducted from the costs of the repairs, and the allowance of the one third be made only on the balance. A like decision was made in New York in the year 1823, 1 Cow. Rep. 265, Byrnes v. The National Insurance Company; and this opinion was adopted as the settled law by Chief Justice Savage in the case of Dickey v. The New York Insurance Co. 4 Cow. Rep. 222, 245. Chancellor Kent also in his Commentaries, 3. 283, states the law in the same way, but without citing any authority, probably considering the point as settled by the two cases in Cowen's Reports.

Under these circumstances several of the Insurance Companies in Boston have proposed to present this question anew to the consideration of the court; and they wish for an opinion upon it, considered as an open question, independently of the authority of any decisions or usage.

The Boston policies, in the clause containing the enumeration of the perils insured against, after specifying the seas, fire, enemies, &c, add, 'and all other losses and misfortunes which have or shall come to the damage of the said ship, &c, to which assurers are liable by the rules and customs of Assurance in Boston.' The insurance companies therefore inquire,

2dly. Whether this clause, coupled with the uniform practice or custom above mentioned, will not settle the question on all policies effected in this town, whatever may be the general rule of law.

### OPINION.

From the sketch which I have seen of the opinion of the court in the case of Brooks v. The Oriental Insurance Company, it does not appear whether this question was fully argued, and deliberately considered by the court; or whether it was hastily decided as a point already settled by the two cases in New York. However that may have been, as the point has never been considered but once in our court, it is no proof of disrespect to present it again for a revision by the same court. In New York also, it may be said to have been argued and considered but once only; as in the second case the point was not at all discussed, but was taken for granted; and if those decisions are opposed to the common usage and the opinions of practical men, in this country and in Europe, it ought not perhaps to be deemed presumptuous if the insurers attempt to obtain a removal of them. I presume therefore that the court would have no objection to see the question brought again before them, and that they would readily give it a new examination.

When in repairing a ship her old rigging or other materials are replaced by new, it must generally happen that the ship is better than she was before the accident; and therefore if the assured recover the whole expense of the repairs he will be more than indemnified. If we could always ascertain exactly the extent to which the value of the ship was increased, we ought to deduct that amount from the sum paid for the repairs, and the balance (when there is no salvage) would be the real amount of the loss to the assured. If he receive more or less than that balance, he receives so much more or less than an indemnity. But as it is difficult, and sometimes impossible to ascertain precisely the amount of this increase in value, the law has assumed one third as the difference in all cases between the new and the old materials; and if the fact always corresponded with this legal presumption, I believe there would never have been any doubt on the question now under consideration. The sum which goes *to increase the value of the ship* is obviously not paid *to repair the damages caused by the perils of the seas;* that sum therefore should always be first deducted, and the residue of the expenses is the amount of the actual loss, when there is no salvage. If there is anything saved from the old materials and sold, and the proceeds applied to pay for the repairs, this does not alter the proportion previously existing between the value of the ship before the accident, and her value after the repairs. If fifteen hundred dollars are expended in repairs, and her value is thereby increased five hundred dollars, it can make no difference whether the fifteen hundred dollars is received from one source or another; whether part of it is derived from the sale of the old materials, or the whole advanced by the assured or his agents. The allowance therefore, on account of the increased value, should always be made on the gross amount expended for repairs.

The proportion of one third new for old, established by law, however convenient and just as a rule of practice, is often very far from the truth; and it is, I think, by imagining and stating strong cases arising out of that rule, that so much obscurity and doubt have been thrown on the other rule, which respects the manner of making or deducting the allowance.

If, in stating a case, we take in one part of our statement, the increased value at one third, as established by law, and in another part we take the increased value according to the fact, as for example, at one sixth, it is not surprising that the result should appear to be incorrect and unjust. But if, as before observed, the fact corresponds with the presumption; or if, in settling the present question, we look only to the fact, and disregard the presumption; or, thirdly, if we adhere to the presumption throughout the whole of the case, I believe it will appear that the rule which I am recommending will in every instance give to the assured a complete indemnity and no more.

Let us suppose for example, that the ship loses a cable which is one third worn, and which in that state is worth two hundred dollars; and this is immediately replaced with a new cable which costs three hundred dollars. The loss is two hundred dollars, and if the assurer pay that sum, the assured is fully indemnified. If after this payment, the old cable should be recovered, and taken by the assured for his own use, it is obvious that he would receive more than an indemnity. But if the assurer takes it to his own account, the assured is still indemnified. He has lost nothing in consequence of the cable being fished up, and delivered to the assurer, and as he was indemnified before, he is not the less so now. If the cable, when thus restored to the assurer, is still worth the 200 dollars, the latter will have lost nothing; and this is as it should be, because in the events which have happened there has been no loss. If it had been recovered in like manner and restored uninjured to the assured before the purchase of the new cable, it is obvious that he would have sustained no loss; and it does not alter the amount of the actual damage sustained by the ship, whether the cable is thus recovered before, or after an adjustment of the loss. So if the cable, instead of being slipped, had parted in a storm, so that when recovered it was worth only half of what it was before, say 100 dollars; the assurer having paid the 200 dollars towards the cost of the new cable, would be entitled to the 100 dollars for which the old cable was sold, or else the assured would receive more than an indemnity. Then suppose in this latter case that the old cable had been recovered and sold by assured before purchasing the new cable, it would make no difference in the amount of his actual loss, nor in the sum due from the assurer. He would still have (as before) a new cable, worth 100 dollars more than his old one; and he would receive 200 dollars for the loss of that old one; and the assurer in both cases ought to pay eventually but 100 dollars, which is the actual amount of the loss. It is then evident that when the fact corresponds with the legal presumption, and the value of the old materials at the time of the accident is exactly two thirds that of the new, the allowance of new for old should be made from the whole cost of the repairs, and the proceeds of the old materials should be deducted from the balance, in order to give to the assured an exact indemnity and no more.

We shall find that this rule will lead to the same result, whatever may be the proportion between the value of the old and the new materials, provided that value be estimated alike in every stage of the adjustment. Suppose for example that the cable is *half* worn at the time of its loss, and is then worth 150 dollars, and that it is replaced with a new one worth 300 dollars. The loss to the assured is obviously 150 dollars, and if it were not for the rule as to the one third, the assurer would pay 150 dollars, and the assured would be fully indemnified. If the old cable was afterwards recovered, and the assurer should take

it or the proceeds of the sale of it, the assured would still remain fully indemnified. So if the old cable at the time of the loss had been only one sixth worn, and worth 250 dollars, and it had been replaced with a new one worth 300, the loss to the assured would have been 250 dollars, and, but for the rule as to the one third, he would be entitled to this sum. Suppose he had received it, and the old cable had been afterward recovered and delivered to the assurer, the assured would still have had his indemnity and no more. If in this latter case the old cable had been broken by the accident, so that it was worth only 125 dollars when recovered, this sum, whether received by the assured or the assurers, would reduce the actual loss from 250 dollars to 125.

If in the preceding case the allowance to the assurer on the account of new for old, instead of one sixth, according to the fact, had been one third, according to the legal presumption, and the assurer had accordingly paid only 200 dollars towards the loss, it is evident that the assured would receive less than an indemnity by the sum of 50 dollars: and this would be his condition whether the old cable were recovered or not.—This injustice to the assured arises from the operation of the general rule as to new for old, and not from any disposition of the salvage, because this is his condition when there is no salvage. If then the cable in this latter case is afterwards recovered, and is taken by the assurer, it is true that he gets 50 dollars more than he had paid, and more than he is equitably entitled to. But he would have gained, or *saved*, this same sum of 50 dollars if there had been no salvage; that is, by paying 50 dollars less than was equitably due from him. This gain therefore to the assurer arises not from the manner of disposing and accounting for the salvage, but from the operation of the rule as to the one third.

So in the other case above stated, where the cable was half worn, the assurer would be required by the rule to pay 200 dollars, although the real loss was only 150 dollars, and the assured would receive 50 dollars more than an indemnity; and if the old cable should be afterwards recovered and taken by the assurer, he would still have paid 50 dollars more than was equitably due from him. In this case the rule operates unjustly on the assurer, as in the other it did on the assured; but in both it is attributable to the cause before mentioned; and the result does not tend in any measure to impeach the justice and equity of the principle which I am endeavoring to establish.

I have supposed a simple case, of the loss of one article only, for the more convenient illustration of my views, but the principle will equally apply to the most complicated cases. Suppose for example that a ship is dismasted, and that it costs 1500 dollars to repair her. If her masts and rigging were one third worn and decayed at the time of the accident, the loss to the owner, if there were no salvage, would be 1000 dollars. But some of the spars and rigging, having been saved at the time of the disaster, though not in a condition to be used in the repairs, are sold by the owner for 500 dollars; and the consequence is, that, instead of 1500 dollars, he advances out of his own pocket only 1000 dollars for the repairs. Still his ship is worth 500 dollars more than it was before, and therefore his loss in the latter case is only 500 dollars: and if he receives more than this he gets so much more than an indemnity.

If the loss in this latter case were adjusted according to the rule adopted in Byrnes v. The National Insurance Company, the 500 dollars proceeds of the old materials would be deducted from the 1500, the whole cost of the repairs, and the allowance of one third would be made on the balance, making 333 dollars only; when according to the fact, and according to the legal presumption also, the ship was really increased in value by the sum of five hundred dollars. It is no answer, to say that the 500 dollars, proceeds of the old materials, was not the property of the assurer. It is not the less true, that *the ship is worth* $500 *more than she was before the disaster*, and that the assured has advanced and expended only 1000 dollars in making her so, and has therefore lost only 500 dollars; and if he receives 666 dollars as he would upon the New York rule, he gets 166 dollars more than an indemnity.

But if it were necessary to the argument, I think it would not be difficult to maintain the proposition, that the old materials are, to certain purposes, the property of the assurer. If he has paid the full amount of the loss, and the materials are afterwards recovered, it is evident from some of the cases first stated above, that the assurer alone is entitled to them, unless the assured can claim more than an indemnity. So if they are recovered before the adjustment of the loss, they are applied, either specifically or by the proceeds of their sale, to reduce the amount which the assurer must otherwise have paid for the repairs. If part of a cargo is lost, and after the loss is paid by the assurer, the lost articles are recovered, would any one doubt that those articles would belong to the assurer? And yet there is not in that case any actual and formal abandonment of the lost articles of the cargo, no more than there is in the other case, of the old materials of the ship. So in the case of a partial loss of the cargo, if the articles are recovered before the adjustment of the loss, they are sold and the proceeds are applied to reduce the amount which the assurer must otherwise have paid.

It is in fact a contradiction in terms, to call the salvage, (that is, *what is saved*,) a part of the loss. Thus in the case last put of the dismasted ship, the old spars and rigging to the value of $500 were never lost, and are not paid for by the insurer. The real loss is $500; that being the sum necessary (with the $500 *saved* from the old materials) to make the ship as good as she was before the accident. But in thus repairing her, the assured does in fact make her $500 better than before. For this latter sum therefore he has no claim on the insurer, but must pay it himself. It still appears, therefore, in whatever light the subject is viewed, that in order to give the assured an indemnity and no more, we must first deduct from the cost of the repairs, the amount by which the value of the ship is increased, and then deduct from the balance the amount of the salvage. If this rule ever appears to operate unjustly, it is only because we adopt in one part of the statement the legal presumption, that the increased value is one third of the expense of the repairs, while in another part we consider it as either more or less than that proportion. Thus in the case of the cable above stated, when it is considered as one sixth worn in ascertaining the value of the salvage, it ought to be considered as one sixth worn in adjusting the amount originally payable by the assurer, and so, if it is one half worn in one part of the calculation, it ought to be computed at the same rate in every other part. In other words, as we are obliged by the established rule to consider the increased value as always amounting to one third of the expense of the repairs, we ought to adopt the same supposition throughout, and not to suppose a case where old materials, if all saved, would exceed, or fall short of, that sum. This legal presumption would be as near the truth in one case as the other; and would not be more unjust in its operation when there is a salvage to be disposed of, than when it is applied solely to the allowance of new for old, in paying for the repairs.

If the old materials, instead of being *sold*, are *used* in making the repairs, the assurers claim no allowance on that part of the repairs, because, so far as those materials are used, the ship is no stronger nor better than before. Take for example the case above stated of the dismasted ship, and suppose that the old spars and rigging, which are one third worn and decayed, are all worked up in the repairs, and that in adddition to this, the assured pays 1000 dollars for the repairs. Whether we estimate the increased value of the ship according to the fact, or according to the legal presumption, we shall allow nothing on account of these old materials; and the allowance of new for old, in either case, will be one third of the 1000 dollars paid for the repairs.

There is one other case which I will consider briefly, not as differing in principle from one that I have already mentioned, but because it has been urged as exhibiting in a strong light the supposed injustice and even absurdity of the rule which I am endeavoring to establish. It is the case of a new ship, which on going out of the harbor on her first voyage is driven ashore and caused to leak badly, and is obliged to return into port to repair. It is necessary to take off a part of her copper to find the leak, which is then discovered to have arisen from the starting of a butt. The butt is bolted anew and secured at an expense of ten dollars; but the copper which was taken off cannot be used again, and it is replaced with new copper; the whole expense of the repairs amounting to 600 dollars. The assurer according to the established rule pays only 400 dollars, and if he is entitled to the copper which was stripped off, he may even be a gainer; because the old copper has lost nothing of its weight, and is worth as much as it was before excepting only the expense and waste of melting and rolling it out anew.—Now the whole injustice and absurdity in this case arises, not from assurer's receiving the old copper, but from the assured's receiving only 400 dollars when he has really lost 600. His ship after the repairs is worth no more than she was before the disaster; but as the law presumes that she *is* worth more by 200 dollars, it deprives him of his indemnity to that amount. This loss of the assured is not enhanced, nor is the injustice aggravated, by the amount which the assurer may receive from the salvage. If the assurer should receive *nothing* from that source, still the assured will have lost 200 dollars; and if the assurer finally realizes 500 dollars from the salvage, still the loss of the assured remains the same. I repeat, therefore, that the injustice and absurdity, if there be any, arises not from the amount of the salvage, or the manner in which it is disposed of, but from the operation of the rule which allows in all cases one third, new for old, and by which in the case supposed, the assured receives two hundred dollars less than a full indemnity.

The last case is one that will not often occur; and when it does the assured, not being in any case compellable to call on the assurer, may pay all the expenses and retain the salvage to his

own use. If on stating his account of the transaction, he finds on the one side an expense and real loss of 600 dollars, and on the other a salvage of 450; but the law will not allow him to state his loss at more than 400, while the salvage still remains 450 dollars; he will see that although he has in fact lost 150 dollars, yet he can recover nothing of the assurer, and he will make no demand upon him.

There is one other objection that may be made to the rule which I am advocating, which it may be well to answer before concluding this opinion. It often depends on the discretion or will of the master, whether to sell the old materials, or to use them in the repair of the ship; and it may be said that if he sells them, he will, by the operation of this rule, give one third part of the proceeds to the assurer; whereas if he uses them in the repairs, the whole will go to the benefit of the assured, and the assurer will have no allowance on account of those materials. I answer that if the old materials are sold, suppose for 500 dollars and that sum, together with 1000 more, is expended in repairing the ship with new materials, the ship is better by the difference in value between the old and the new, which in the case above stated we have supposed to be one third; and therefore if the assured does not pay one third of the expense of the repairs, he gets more than an indemnity. On the other hand, if the old materials are all worked up in the repairs, and the whole additional expense is only 100 dollars, the ship, as far as the old materials are used, is no better than before, and her value is increased only by the difference between the new materials, *included in the* 1000 *dollars*, and the old for which these are substituted. In this case therefore, the allowance of the one third must be made only on the 1000 dollars, or else the assured will not get his full indemnity. The fallacy of the argument on which the objection is founded consists in considering the old materials, when thus used in repairs, *as worth precisely* 500 *dollars*, and yet as being no more in number and quantity than *new materials that would cost* 500 *dollars*; whereas if they are one third worn, and yet are equal in value to the new, they must contain fifty per cent more in quantity. Suppose, for example, that thirty hundred weight of old rigging, one third worn, is used in the repair; no allowance should be made for this, because it is no better than it was before. But if this old rigging had been sold, the proceeds of the sale would purchase only twenty hundred weight of new rigging; and if no more than this is used in the repairs, the ship is no better than before; because, though she has new rigging, which is fifty per cent better than the old, yet she has in the same proportion less in quantity. But if the master sells the thirty hundred weight of old rigging, and purchases *an equal quantity* of new, he must pay for it fifty per cent more than the old produces; and as the old is replaced by new, the assured must allow for the difference. The fallacy consists, as before observed, in supposing the two parcels of rigging when equal in quantity, to be also equal in value.

On the whole, therefore, if this were a new question which had never been judicially considered and decided, I should feel the fullest confidence in the opinion, that the allowance for the increased value of the ship after being repaired, should first be deducted from the whole expense of the repairs, and from the balance should be deducted the proceeds of the sale of the old materials and the residue would be the amount for which the assurer is liable.

2d. As to the second question, I think there is no doubt that 'the rules and customs of assurance in Boston,' thus referred to in the policy, do in effect constitute a part of the contract; and, when proved, will be considered as if they had been inserted in words at length in the policy. But these rules and customs are not referred to as prescribing the mode in which a partial loss shall be adjusted; but rather, as it appears to me, for the purpose of ascertaining whether any loss has happened for which the assurers are liable. The words are introduced in the clause which enumerates the perils insured against, in which after specifying 'the seas, fire, enemies,' &c, it is said, 'and all other losses and misfortunes, &c, to which assurers are liable by the rules and customs of assurance in Boston.' This clause may *enlarge the list of perils* to which the assurers are liable, and may include some which are not specifically mentioned in the policy; but it cannot, I apprehend, affect the mode of adjustment of those losses and perils that are included.

In the present case there is no question as to the nature of the loss, as it is supposed to be by the peril of the seas, which are expressly mentioned in the policy. The only question is, how the loss shall be adjusted; and for this, it appears to me that we are not referred to the rules and customs in Boston, but that we must resort to the general principles of the law, which govern in all other parts of the country.

CHA'S. JACKSON.

To Samuel A. Wells,
President of the Atlas Insurance Company.
*Boston, July* 7, 1829.

## JUDGE LAW'S OPINION.

Has the State of Georgia a right to extend its laws over the territory occupied by the Cherokee Indians, within its chartered limits, so as to control the conduct of *all* persons within that territory?

The question thus submitted for consideration is confined within very narrow limits.—The effect upon the Indians of birth and residence within the territorial limits of the State, in working the destruction of their separate independent existence as a tribe or nation, and subjecting them to the laws of the State; the compatibility of the existence of a separate and independent people within the territorial limits of another, with the idea of complete sovereignty in that other—these are questions about which there might be room for a difference of opinion, but which are not involved in that submitted. Neither does it require me to enter into the inquiry of the policy, justice or propriety of the extension of the State laws so as to embrace the Indians. But the abstract question of the right in the State so to legislate as to control the conduct of all persons within its territorial limits, appears to me, susceptible only of an affirmative answer, unless the State has parted with some portion of the essential attributes of its own sovereignty. The complete ultimate title to, and dominion of the territory in question, was vested in the Crown of Great Britain upon the principle, which regulated the nations of Europe, that discovery upon the American continent gave title. As between Great Britain and the natives, the relation permitted to exist was the dictate of the will of the former, upon the principle that the conqueror prescribes its own limits. By the treaty of peace between Great Britain and the United States, 'the powers of Government and the right of soil' were relinquished to the States. The powers of Government are co-extensive with the right of soil. The temporary suspension of the exercise of those powers does not destroy the right to their exercise.—The Government of the U. States have recognised the right of the States, under the treaty, by the acceptance, from the States, of cessions, of soil and jurisdiction. Whatever rights, therefore were continued to be exercised by the Indians, were permitted by the State within whose chartered limits they resided. Humanely regarding and respecting the right of occupancy in the Indians, the whites permitted them to retain the possession of their lands, but they, being incapable alike of amalgamation with the whites, or of accommodating themselves to any system of laws, which civilization could have prescribed for their Government even as a distinct tribe subject to the whites, after many sharp conflicts and struggles, retired at the approach of the whites to more distinct and remote portions of the territory.—There they have been permitted to live, exercising a kind of self-government, and if not heretofore subject to the existing laws of the State by virtue of their residence and birth for reasons which as I before said it is not required here to discuss, certainly always liable to be embraced by those laws by an express extension of them at the *will* of the State. This conclusion is the inevitable result of that unlimited sovereignty over her territory which the principles and facts we have been considering affirm in the State.

Has the State parted with any portion of that sovereignty, by which this question may be affected? I am not apprized of the surrender by the State of any of those rights essential to the maintenance of the result at which we have arrived. I know of no act on the part of the State of Georgia, by which she has parted with her right of jurisdiction and soil in the territory in question. On the contrary she has uniformly asserted them when that assertion seemed to have been rendered necessary by the acts of others.—The State of Georgia has a right to govern and control by her laws every human being within her limits.—*Georgia Constitutionalist.*

## OFFICE OF CORONER.

The office of Coroner depicts the benificent spirit of our ancient institutions. There is no similar power, of which history records. The Latins possessed their Consuls, Qæster, &c; but no authority similar to our Courts of Record—for the investigation of the causes of the death of persons. The Grecians enjoyed the Areopagus, to which Court, in cases of murder, where one killed another by accident, appeals lay for judgment—whose powers were both judicative and executive; such not being the twofold nature of the Coroner's Court. His power is merely judicative: he is locum tenens to the Sheriff; having alone authority to enter appeals and indictments; not being able to proceed, but deliver them for next gaol delivery.

The Coroner's is a very ancient office at common Law, and is called Coronator, because he has to do with the pleas of the Crown. Thus, in this light, the Lord Chief Justice is principal Coroner to the kingdom, and may exercise the jurisdiction of Coroner in any part of the realm. So, to the establishment of this power may we, perhaps, impute the effect—the few murdered, comparatively with what might be, in default of the existence of

such a Court. In Italy, Spain, and many other parts of the world, assassins make a trade of their profession; and on this account, that they can exercise their calling with impunity, since there is no Magistrate to whom appeal can be made. In some countries, also, there are places of refuge for assassins and murderers. Thus, among the ancient Jews, we read that, with the exception of murder—and, in this case, one witness was not sufficient—there were places of refuge set apart for their protection—as, see Numbers, chap. xxxv. Such impunity, however, exists not in England, nor will it ever happen, as long as the constitution of our common law connects the municipal relations of the State as they now appear. Thanks to the great wisdom of our immortal Alfred for the division of the country into its many local Courts, whereby, with the assistance of the sublime institution of the Trial by Jury, to no man right will be denied. It is true that, for a time, the trial by ordeal stained the meekness of our laws; and the judicium ferri, aquæ et ignis, which was called the vulgari purgatio, was a part of our common law, but it was not usually enforced; and the authority of the Coroner, in most cases, was confined to the gentle administration of distributive justice.

The Coroner should be a man of great experience and profound judgment, chosen by the freeholders: he should be a man, qui melius et sciat, et velit, et possit officio illi intendere. He, however, by the King's writ, de coronatore exonerando, can be deprived of his office, as on account of incompetency, old age or want of property. So, as belonging to a Court of Record, he has the power to summon evidence and witnesses, for the purpose of obtaining every information relative to cases brought before him, for eliciting the truth, that a verdict may be recorded for the satisfaction of the Jury: thus showing the exquisite feature of our law, by confining his prerogative of law to the judicature alone.

It is thus evident that a Coroner should have, not merely legal, but pathological knowledge, and be a man of undaunted integrity: independent of that, have the Jury important duties to discharge. They have a high office to fulfil, having to investigate every contingent relation with respect to the decease of a person. It is true that, in some few instances, their verdict is executive, as in cases of deodand; but, where a murder is committed, they have no jurisdiction over the life of the murderer. Hence the Coroner should have judgment to direct the Jury in circumstances where it is supposed they are incompetent to exercise opinion; as, from the nature of the occupation of Jurymen, it is not possible to suppose they would always have the faculty. Such has the wisdom of our ancestors prescribed.—*London Morning Herald.*

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The offices of Common Sergeant and Common Pleader to the City of London, vacant by the resignation of Sir Thomas Denman, and the decease of the late Mr Burnaby, will be filled up at a Court of Common Council, to be held on Thursday next.

Mr Hill, who is mentioned as having become a candidate for the office of Common Sergeant, in succession to Mr Denman, is a gentleman of high professional character, and, as he is strongly recommended by Mr Brougham, his success is considered certain. He possesses excellent talents, and is a decided Liberal.—*Manchester Guardian.*

## RECENT AMERICAN DECISIONS.

### ACTION.

1. An action will not lie against an officer of the army, on his promise to pay a reward offered for the apprehending a deserter, he acting in his official capacity, and as an agent of the government. *Belknap vs. Reinhart*, 2 Wend. 375.

2. Where a feme covert has a separate estate vested in a trustee, and services are rendered on the estate, and credit for such services is given to *her*, the *husband* is not liable to an action for such services. *Stammers vs. Macomb*, 2 Wend. 454.

3. On a promise to take the assignment of a judgment when obtained, and pay the amount thereof, an action will not lie until after a tender of such assignment. *Payne vs. Lansing*, 2 Wend. 525.

4. The rendition of the judgment alone in such case gives no cause of action; and where the defect appears in the declaration, it may be taken advantage of by general demurrer. *Ib.*

5. An action for a false return will not lie against a sheriff for returning an execution *nulla bona*, where the property of a firm is levied on by virtue of an execution against *one of its members*, and previous to a sale, an execution against *the firm* comes to the hands of the sheriff, under which the property levied on by virtue of the first execution is sold and exhausted. *Dunham vs. Murdock*, 2 Wend. 553.

6. A *parol* enlargement of the time set in a *sealed* instrument for the performance of covenants is good; but where there is such enlargement of a condition precedent, the party loses his remedy upon the covenant itself, and must seek it upon the agreement enlarging the time of performance. *Langworthy vs. Smith*, 2 Wend. 587.

7. *Debt* and not *assumpsit* is the proper form of action for the recovery of money from a *stake holder* of a bet on a trotting match. *McKeon vs. Caherty*, 3 Wend. 194.

8. The action may be maintained, although the plaintiff in fact acted as the agent of others in making the bet. *Ib.*

9. The proceeds of real estate placed by a father under the control of a son for the benefit and support of a daughter who is a *feme covert*, cannot be recovered in an action at law in the name of the husband and wife: the remedy is in equity. *Duval vs. Covenhoven*, 4 Wend. 561.

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### ACTION ON THE CASE.

1. An action on the case will lie for the assertion of a falsehood with a fraudulent intent as to a present or existing fact, where a direct, positive, and material injury results from such assertion. *Benton vs. Pratt*, 2 Wend. 385.

2. Where a contract would have been fulfilled but for the false and fraudulent representation of a third person, an action will lie against such person, although the contract could not have been enforced by action. *Ib.*

3. The owner of a vessel navigating a river, having it in his power to avoid collision with another vessel, and thus avoid an injury, refusing or neglecting to exercise the power he possesses, is guilty of negligence, and liable to respond in an action on the case, although the vessel damaged has the wind, if the owner of such latter vessel does all in his power to avoid collision. *Hawkins vs. Dutchess and Orange Steam Boat Co.* 2 Wend. 452.

4. A father, liable to a third person for the expenses of the lying-in of a daughter, who has been seduced within the age of 21, may maintain an action on the case for seduction, although the daughter is a servant *de facto* of another, and the father has permitted her to leave his house, and has relinquished all claim to her services, and has incurred no *actual* expense. *Clark vs. Fitch*, 2 Wend. 459.

5. A father may at pleasure revoke such license, recal his daughter and control her services; and having such right, the relation of master and servant exists. *Ib.*

6. Whether a suit, brought under such circumstances, is instituted by the direction of the plaintiff, cannot be inquired into on the trial of the cause. *Ib.*

7. Continued attentions to a female for several months, followed by an improper intercourse, is evidence sufficient to warrant the inference of seduction. *Ib.*

8. An action on the case for obstructing the execution of mesne process, cannot be maintained, unless the plaintiff aver and prove that he had a cause of action against the person whose arrest was prevented. *Campbell vs. Neely*, 2 Wend. 559.

9. The *directors* of a moneyed institution are responsible, in an action on the case, for improperly obtaining and disposing of the funds or property of the company. *Franklin Fire Ins. Co. vs. Jenkins*, 3 Wend. 130.

10. They are liable, however, only *individually* and severally, and not *jointly* as directors, unless the act complained of be done by *a majority* of the board of directors, when by the act of incorporation of the company, a majority only is competent to the transaction of the business of the company. *Ib.*

11. When a board of directors consists of *sixteen*, a joint action against *four* of the number for an act done *as directors*, cannot be maintained. *Ib.*

12. A general charge in a declaration, that the defendants, as directors of an insurance company, loaned the funds of the company upon inadequate security, knowing such security to be insufficient, without any specification of time, persons, or circumstances, is insufficient; and a demurrer for this cause will be sustained. *Ib.*

13. The declaration will also be adjudged bad if the grievances complained of are alleged to have been committed in part by the want of care and attention, and in part by the corrupt and wilful mismanagement of the defendants. *Ib.*

14. *It seems*, that in a declaration, charging directors with having squandered the funds of a moneyed institution, it should be averred of what the funds, credits, and effects of the company consisted. *Ib.*

15. Where, in consequence of the want of ordinary care and skill in laying the foundations of a house about to be erected, *damage* was sustained by the owner of an adjoining house and the parties thereupon entered into an agreement, by which it was stipulated that the work should proceed, that a partition wall should be built for the benefit of both parties, and that the *damages* and *compensation* should be passed upon by arbitrators; which submission was revoked previous to an award made, and an action for breach of covenant brought by the person who built the house to recover a *compensation* for a portion of the wall, in which action the defendant set off his *damages*, it was

*held*, that such damages were a legitimate subject of consideration in such action of *covenant*, under the agreement between the parties, and having been submitted to and passed upon by a jury, a suit could not subsequently be sustained for a recovery of the same damages. *Skelding vs. Whitney*, 3 Wend. 154.

16. *It seems*, that where a defence has been insisted on in a former action, submitted to and passed upon by a jury, and not objected to by the plaintiff in such action, although such defence be not the subject of set-off in such action, a party will be precluded from subsequently maintaining an action for the subject matter thus set off by way of defence. *Ib.*

17. The owner of lands adjacent to the shore of a navigable river, obtaining from the commissioners of the land office a grant of land under water, on which he erects a wharf after filling in the same, cannot sustain an *action on the case* against the agents of a company to whom *subsequently* the legislature give the privilege of erecting a mole or pier in the river for the purpose of constructing a basin for the safety and protection of boats, and who erect such mole or pier entirely encompassing the wharf on the side of the water, so as to leave no communication between it and the river but through a sloop lock at one extremity of the basin; although the privileges of such owner of the wharf be materially impaired by the construction of such works, the loss sustained by him is *damnum absque injuria*, for which no action lies. *Lansing vs. Smith*, 4 Wend. 9.

18. The grant by the *commissioners of the land office* conveys only the land described in it by metes and bounds, and being in derogation of the rights of the public, nothing is to be taken in favor of it by *implication;* on the contrary, if it be considered as giving the right to erect a wharf, a *reservation* to the legislature to regulate the use of it and of the waters adjacent will be *implied.* *Ib.*

19. The grant to the company to erect the pier, although subsequent to the former grant, is not a violation of the constitution of the United States providing that no state shall pass a law impairing the obligation of contracts, nor of the constitution of New York, declaring that private property shall not be taken for public use without just compensation; the former grant by the commissioners of the land office not precluding the legislature from making a great public improvement for the benefit of commerce. *Ib.*

20. Every individual who suffers actual damage, whether direct or consequential, from a *common nuisance*, may maintain an action for his own particular injury, although there may be many others equally damnified. *Ib.*

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AMENDMENT.

1. A certiorari may be amended, though a term intervenes between its teste and return. *Kissam vs. Morris*, 2 Wend. 259.

2. Under the rule allowing an amendment *as of course*, the plaintiff cannot add words, giving a new and distinct cause of action from that originally set forth. *Wiley vs. Moore*, 2 Wend. 259.

3. Where a verdict is found for an amount exceeding the damages claimed in the declaration, the plaintiff will not be permitted to amend his declaration by increasing the damages, unless he abandons his verdict, pays the defendant's costs of the trial and of resisting the motion, and consents to a new trial. *Dox vs. Dey*, 3 Wend. 251.

4. *Amendments* will not be granted to enable a party to set up the defence of *usury* or of the *statute of limitations*, if he has not availed himself of the opportunity to interpose such defence in the first instance. *It seems*, however, that where such defences are *defectively* set forth, an amendment will be allowed to give the party the benefit of the defence which he *intended* to present, but he will not be permitted to put in a *new* or *additional* plea or answer. *Beach vs. Fulton Bank, in error*, 3 Wend. 573.

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APPEAL FROM CHANCERY.

1. The Court of Chancery may direct upon what terms and conditions an appeal shall operate as a stay of proceedings, unless the Court of Errors, on a special application or by a general rule, restricts the power. *Irving vs. Dunscomb*, 2 Wend. 205.

2. An appeal will lie from an order of the Court of Chancery refusing to open the proofs in a cause for the purpose of *re-examining* a witness, who, since his examination, has disclosed facts material and pertinent to the issue depending in chancery, which he did not disclose when on examination; such order of the Court of Chancery affecting the merits of the cause. *Beach vs. Fulton Bank*, 2 Wend. 225.

3. It lies when the order appealed from materially affects the merits of the cause. Per Sutherland, J. Or is of such a character that the party may be aggrieved by it. Per Walworth Chancellor. *Ib.*

4. Although the order appealed from be made by the Court of Chancery in the exercise of its discretionary powers, or touching the mode of its proceedings, an appeal will be entertained, if not of an *equivocal* character. It does not, however follow, that no appeal will be dismissed which does in fact, or may by possibility affect the merits of the cause. Per Marcy, J. *Ib.*

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ARBITRATION.

1. In a submission to arbitration, where *three* arbitrators are named, with power to *two* to make an award, two have power to proceed and hear the parties, where the third arbitrator has been notified of his appointment, and refuses to attend. *Crofoot vs. Allen*, 2 Wend. 494.

2. A submission of a cause pending in court to arbitration, is a discontinuance of the suit, although the arbitrators have not taken upon themselves the burden of the submission, have not met to hear the parties, and have not made any award, or done any act under the submission. The court will not look beyond the submission. *Larkin vs. Robbins*, 2 Wend. 505.

3. A promise by a party in whose favor an award is made, to correct any mistakes which may have been made by the arbitrators, is void for want of consideration. At all events a defendant cannot avail himself of such defence in an action on the award. *Efner vs. Shaw*, 2 Wend. 567.

4. Proof that *arbitrators* before making an award, resigned their authority, and that such resignation was accepted by the parties, is admissible in bar of an action on an award. *Relyea vs. Ramsay*, 2 Wend. 602.

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ARREST.

1. An *arrest* of a felon may be justified by *any person* without *warrant*, whether there be time to obtain one or not, if a felony has in fact been committed by the person arrested. *Holly vs. Mix*, 3 Wend. 350.

2. If an innocent person is arrested upon suspicion by a private individual such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. *Ib.*

3. But if no felony be committed by any one, and a private individual arrest without warrant, such arrest is illegal; an *officer*, however, would be justified if he acted upon information from another which he had reason to rely on. *Ib.*

4. A constable may, *ex officio* and without warrant, arrest a breaker of the peace, and bring him before a justice. *It seems*, however, that this should be done within a reasonable time after the affray. *Taylor vs. Strong*, 3 Wend. 384.

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ASSAULT AND BATTERY.

1. The party *first attacked* in a personal rencontre between two individuals, is not entitled to maintain an action for an assault and battery, if he uses so much personal violence towards the other party, exceeding the bounds of self-defence, as could not be justified under a plea of *son assault demesne*, were he the party defendant in a suit. *Elliot vs. Brown*, 2 Wend. 497.

2. *Infants* are liable in the same manner as *adults* for trespass and assault. *Bullock vs. Babcock*, 3 Wend. 391.

3. Where the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. *Ib.*

4. *It seems*, that an injury might probably be considered an unavoidable accident in the case of infants, which would not be so considered in the case of adults. *Ib.*

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ASSUMPSIT.

1. An action for money had and received, will not lie by one party against another, to recover money received under a contract made in violation of the statute to prevent and punish champerty and maintenance. *Best vs. Strong*, 2 Wend. 319.

2. An action for *money paid, laid out, and expended*, will lie at the suit of an indorsee of a promissory note against an indorser for money paid on a judgment obtained against the former by the holder of the note, although such payment is but in part satisfaction of the debt; and such suit will lie for every payment made in *good faith*, and with the bona fide intent of reducing or extinguishing the debt. *Butler vs. Wright*, 2 Wend. 369.

3. In an action for use and occupation, where there has been a tenancy at a special *annual rent*, and there is a holding over, the tenant will be deemed to hold upon the terms under which he entered; but he is not precluded by an agreement to pay a fixed sum for a term *less* than a year, *Evertsen vs. Sawyer*, 2 Wend. 507.

4. A *promise to pay* will be implied from an agreement of parties *to abide by the decision* of individuals named between them to appraise the value of certain work and services done and performed by one party for the other. *Efner vs. Shaw* 1 Wend. 567.

5. Where there is an agreement to demise a house for five years, and leases to be executed under which the party enters, and subsequently

refuses to accept a lease, the owner may maintain assumpsit for the use and occupation. *Little vs. Martin*, 3 Wend. 219.

6. Taking the *key* of the house without a continued *actual* occupation, is enough to entitle the plaintiff to sustain the action. *Ib.*

7. The plaintiff is not bound to sue upon the agreement, and the statute of frauds cannot be objected to a recovery, as the suit is not on the contract. *Ib.*

8. Where A agreed to furnish a certain number of bales of cottton towards completing the cargo of a vessel bound to a foreign port, principally freighted by B, on B's paying him the full price of the cotton; the shipment, however, to be made one half on account of A and the remaining half on account of B, and on returns of sales coming to hand, A to receive his share of the profits, or to pay his share of the loss and the cotton was shipped by B to his consignees, abroad, *it was held*, that an action for *money paid* would not lie, A being liable only in an action on the special agreement for a loss, if any sustained, in the sale of the cotton, and not for the total amount of the advance on his account. *Pellier vs. Sewall*, 3 Wend. 269.

9. Such agreement did not create a *partnership;* the parties were tenants in common in the articles shipped. *Ib.*

10. Where a promissory note made to be discounted at a bank, for the accommodation and benefit of an individual, signed by him, and by three other persons as his sureties, is refused to be discounted by the bank, unless further names are procured, and another person is procured by the principal to put his name to the note, when it is discounted, and such person is subsequently compelled to pay a part of it, he cannot recover for *money paid* in a *joint* action against the principal and the three persons who originally signed as sureties, although he expressly signed the note *as surety;* he will be considered as a *co-surety*, unless a state of facts is shown from which it appears positively, or by legal intendment, that those who originally signed intended, as to the subsequent signer, to stand in the character of *principals. Warner vs. Price*, 3 Wend. 397.

11. The admission by one of the original sureties, that the plaintiff signed as *surety* for *all* the makers of the note, will not bind his co-sureties; no *partnership* being shown to exist between them. *Ib.*

12. An action of *assumpsit* may be maintained on a *promise* by a grantor, to refund the consideration money and interest of same of lands sold by him, notwithstanding a covenant of warranty, where the grantor, on being informed that actions of ejectment had been commenced against his grantees by a third person, admitted the title to be in such claimant, desired the persons in possession to surrender the possession to him, agreed to refund the consideration money paid to him, with the interest thereon, and instructed his agent to pay to his grantees the amount due each, as soon as in funds, on showing a compliance with the condition of the promise, viz. the surrender of the premises. *Miller vs. Watson*, 4 Wend. 167.

13. Such action may be maintained by a *grantee*, who had conveyed his interest in the land to third persons, with covenants of seizin and warranty, if it appears that such third persons have, in pursuance of the request of the original grantor, surrendered the possession of the land conveyed to them to the claimant, and that their claims upon their grantor have been satisfied by a re-payment of the moneys advanced to him. *Ib.*

14. In such case, however, the plaintiff must declare on the *special contract*, and is not entitled to recover under the common money counts or an *insimul computassent.* *Ib.*

15. After such admission of the title of the claimant, the grantor is estopped from showing title in himself. *Ib.*

16. Where a party contracted to do a job of work by a stipulated time, and in the contract was contained a provision that a portion of the work should not be done until directions were given by the other party, *it was held*, that the power to suspend the doing of the work did not continue so long as to prevent the completion of it within the time agreed on. *Dubois vs. The Delaware and Hudson Canal Company*, 4 Wend. 285.

17. Where one party was prevented from performance within the stipulated time by the omission of the other, and subsequently performed the work agreed upon, but at an enhanced expense, *it was held*, that he was not obliged to bring his action upon the contract, but might resort to the *quantum meruit* to obtain his indemnity. *Ib.*

18. There is not *it seems*, any precise rule which when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not; but if the act of one party be such as necessarily to prevent the other from performing on his part according to the terms of the agreement, the contract will be considered as rescinded, and the party may resort to his *quantum meruit.* *Ib.*

19. So a plaintiff may recover on the *quantum meruit* where the defendant has done no act to prevent the performance, and where the evidence is sufficient to warrant the plaintiff's action on the general count, supposing no special agreement had been laid in the declaration, but in such case, the terms of the special agreement regulate the compensation. *Ib.*

20. If a contract has been rescinded, the plaintiff may resort to his general counts; so if the contract has been completely executed he may recover in *indebitatus assumpsit* the stipulated price, unless the terms of the contract will be thereby infringed. *Ib.*

21. Where a work is done under a special contract at estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is to be the rule of payment as far as the special contract can be traced, and for the extra labor, the party is entitled to his *quantum meruit;* so also for any additional expense incurred in consequence of the party being obliged to do the work under disadvantageous circumstances, occasioned by the opposite party, he is entitled to an allowance. *Ib.*

22. A contract made by an agent in the name of his principal, he having authority to do the act, is not binding upon him individually. *Ib.*

23. *Assumpsit* against the principal, is the proper form of action, atthough the agent affixes a seal to his name, it being the seal of the agent and not of his principal. *Ib.*

24. Assumpsit for money had and received will lie by an indorser of a note against the holder, to *recover back* money paid under a judgment against such indorser, where the holder previous to the payment makes an arrangement with a *prior indorser*, by which he discharges him, or enters into a covenant *not to sue him. Brown vs. Williams*, 4 Wend. 319.

25. The rule which governs as to the effect of a discharge or the varying the contract of a *principal debtor* by a creditor, without the concurrence of the surety, applies to the discharge of a *prior indorser;* the subsequent indorsers are discharged in cases where the surety would be discharged. *Ib.*

26. A prior indorser, in reference to subsequent indorsers, stands in the place of a principal debtor; his discharge, or a covenant not to sue him, releases the subsequent indorsers. *Ib.*

27. Where a sheriff actually levies an execution on the property of a defendant *two months* before its return, and then *seven months* after the writ is returnable, returns that he has made the amount directed to be levied, such evidence is *prima facie* sufficient to establish the fact that he received the money antecedent to the commencement of a suit brought against him, nearly three months after the time when the writ was returnable. *Crane vs. Dygert*, 4 Wend. 675.

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### ATTORNEYS.

Attorneys and counsellors of the Supreme Court of New York are not privileged from arrest, although such arrest prevents the contemplated attendance upon court, if the arrest be made while they remain at home. *Corey vs. Russell*, 4 Wend. 204.

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### A PRACTICAL LESSON.

It is not uncommon especially during the winter season, for persons travelling upon the highway, either through sport or from malicious motives, to impede the progress of those behind them, by travelling at a slow gait, and so managing their own vehicle as to prevent others passing; and it seems that too many are not aware that such conduct is in direct violation of the laws of the state, and that an action can be sustained against all who may, in any degree, thus intentionally violate the rights of others. A prosecution occurred in this county a few days since, and although the offence was not perhaps of the most aggravated nature, yet a verdict of fifty dollars was promptly awarded to the plaintiff by the jury. It appeared that a number of persons had attended a singing school, about three miles from the village in which they resided; that the defendants (six in number) who were to occupy one sleigh, had determined, on account of hostile feelings, to perplex and delay the progress of the plaintiff on his return—that the former had proceeded at a slow pace, about three fourths of a mile, when they were overtaken by the latter—that every attempt of the plaintiff to pass the sleigh of the defendants was purposely frustrated, and the remaining distance was travelled at the rate of a slow walk. There were three gentlemen and two or three ladies in the sleigh of the plaintiff, and the weather being extremely cold their sufferings were severe. The plaintiff, instituted the suit, it appeared, more for the purpose of convincing the defendants that the laws afford a remedy in such cases, than for that of recovering damages; and when the verdict was made known, he, with more generosity than will at all times be met with, proposed to exact nothing further from the defendants than the payment of costs of prosecution.—*Ontario Rep.*

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William the Conqueror abolished capital punishment in England, but substituted the still more horrid one of mutilation of the limbs of criminals, that they might live, and be a terror to others.

THE JURISPRUDENT.

BOSTON, SATURDAY, FEBRUARY 26, 1831.

## RETAINERS.

When a barrister has drawn pleadings in a cause, or has advised upon it in some advanced stage of its progress—in short, when he has necessarily become acquainted with the case of one party, he ought, if not to consider himself absolutely retained in behalf of that party, at all events to give him a preference, or if we may use the expression, a right of refusal before he accepts a retainer from the adverse party. It is mere affectation to pretend that there would be any difficulty in carrying such a rule into practice. The business of no barrister, except the few great leaders, to whom the rule can scarcely be applicable, is so extensive as to make it doubtful to him whether the papers in the cause have been previously before him. And as it is a matter which, in our opinion, materially involves the character of the profession, and places those who have not sufficient self-reliance to break through an absurd usage, in a very painful situation, we may be pardoned for earnestly pressing the suggestion upon the consideration of our brethren.

A retainer ought not to be invalidated by any merely formal change, whether in the name or in the mode of proceeding, while the cause remains in substance the same. Neither, as it seems to us, is any inconvenience to be apprehended from this qualification of the existing rule; because there will always be enough of resemblance to identify the cause, and a simple inquiry from the attorney offering the second retainer, will immediately elicit the fact. As to the practice, if such a practice exist, of appearing first as the advocate of one party and then in a cause which is literally another and the same, suddenly shifting sides, and maintaining the exact contrary of all which has been urged before,—if any man can fail to perceive that such conduct is degrading, not only to himself individually, but to the whole body of which he is a member, we envy him not the state of his moral perceptions. And here let us not be met with objection, that there is any rule or etiquette of the bar in the way. No arbitrary regulation can be binding, when it becomes inconsistent with a man's own notions of right and honor; and we are quite sure that the rule in question was never intended to be carried to the extreme which we have been condemning. We call upon the profession to vindicate themselves from imputation but too readily, and, we are quite sure, groundlessly cast upon them, of a venal prostitution of their talents. If a precedent be wanted for departing, on occasion, from that etiquette, which in reality furnishes only a decent pretext for doing, what otherwise a man would feel ashamed of doing, we can furnish one perfectly satisfactory. A learned member of the profession, now at the head of it, was recently placed in the very dilemma which we are considering. A life had been insured in two public offices: actions being brought against each, the learned gentleman was retained for the plaintiff in one, for the defendant in the other; the circumstances of both being, of course, precisely the same. And how did he extricate himself from the difficulty? why—by cutting the knot to be sure,—by acting as all men of stronger mind do act, when required to decide upon such alternatives. He declared that he would not, for any such regulation as was urged upon him, consent to stultify himself: and having held the brief on the one side, he declined to appear as the advocate of the other.

Our objections to the fourth rule * are not, perhaps, of so serious a nature: but, for the reasons which have been already assigned, we should be glad that it were altered. The rule, in our opinion, ought to be, that the first retainer, whether special or general, should be binding and conclusive. The uncertainty which results from the present practice is a subject of much perplexity and annoyance to the clients; and as it seems difficult to find any assignable reason for it except the one which we have rejected as incredible, there can be no impediment in the way of the proposed alteration. To say the truth, we are anxious, not only that nothing should exist, in fact, derogatory to the dignity of the profession, but that all occasion for evil speaking should be removed. The honor of the Bar ought to be like that of Cæsar's wife, not only free from stain, but beyond the reach even of suspicion or reproach. These are searching and incredulous times. People are not content, now-a-days, to take a man's own account of himself as a sufficient voucher for his respectability. Reputation must be maintained, not by prescription, but by conduct which justifies it. It is not enough that we should style ourselves the *honorable* society of the Bar; we must show our title to the appellation by unimpeachable evidence of facts. Nor let it be thought a matter of small importance in what degree of public estimation the profession is held. On the contrary, it is of the last consequence that a general opinion should prevail of its uprightness and independence. The duties of the advocate form so essential a part of the dispensation of justice,—the very end and being of the social league,—that every taint which affects the practice of the Bar must necessarily in some degree vitiate the whole administration of the law, and can never therefore be of small importance, either to the members of that body or the community at large. Whether there be in reality any difference in the components of the body, between modern times and those which have preceded us, we know not. It is a common fashion, and almost as common an error, to suppose that every thing degenerates. Still, there are circumstances which induce us to think, that these are not exactly the times most favorable to the character of the Bar. In saying this let us not be misunderstood—that an immense majority are in no respect obnoxious to the reproach which not we, but the hardly judging world is disposed to cast upon the whole body, we not only most devoutly believe, but do most certainly know; but we also know that needy adventurers, not lacking in talent, but destitute, alas! of that far more important qualification, an accurate sense of honor and propriety, are to be found in the ranks of the profession. We cannot stay to analyse the cause, nor are we prepared with the remedy; but one step, at least towards our amelioration will have been made, if the leading members can be induced, not so much by anything here written, as by their own sense of fairness and propriety, to repeal or modify what is obnoxious in the regulation on which we have been commenting. In the meantime we call upon each person, individually, to show in his own practice that he will not suffer his notions of right to be controlled or superseded by any rule of merely professional etiquette.—*Law Mag.*

* 'A special retainer on behalf of A. against B. may be superseded by a general retainer on behalf of B. C. and D.'

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Alteration in the Terms.—The Act of Parliament for regulating the Terms will come into operation next month. In future, Hilary Term will commence on the 11th of January, and end on the 31st: Easter Term will commence on the 15th of April, and end May 9th; Trinity Term will commence on May 23d, and end June 13th; and Michaelmas Term will commence on the 2d November, and end the 25th.—*Morn. Her.*

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'Lord Brougham and Vaux, like a newly-married lady forgetful of her new name, often signs his letters in his old style—'Henry Brougham.' His Lordship has deserted the *wig*-party, and set the example of what Lord Eldon would call a dangerous and revolutionary innovation. He appeared on the woolsack, on Monday night, in a little cropped wig—a ludicrous contrast to the frosty honors that have, from time immemorial, adorned the heads of Chancellors on the Woolsack. His Lordship seems quite *distrait* in the ordinary business of putting questions, &c, and is totally *au desespoir* when a few saucy young Lords break through the rules of the House. But when Lord Brougham leaves the Woolsack, and addresses the House, the effect is electrical, and we advise certain persons to beware how they incur his withering sarcasms. We suspect some of the Lords felt as awkwardly situated under their present official head as *he* feels above *them*.—*Ib.*

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Samuel Nelson, judge of the 6th circuit, has been appointed by the Senate, on the nomination of the Governor, a judge of the Supreme Court of this State, to fill the vacancy occasioned by the resignation of judge Marcy.

John Tracy, of Oxford, Chenango county, has been appointed judge of the 6th circuit, in the place of Judge Nelson, appointed to the bench of the Supreme Court.—*Ontario Repository.*

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Mr Bousfield, the solicitor, has given the following notice of a motion to the Court of Common Council, of which he is a Member:—'That this Court do petition both Houses of Parliament, praying that the whole of the present 14 lists of Commissioners of Bankrupt may be abolished, and that, in lieu thereof, an efficient and regular Court be constituted to sit daily in matters of bankruptcy.'

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## NEW PUBLICATIONS.

Elements of Conveyancing, with cursory remarks upon the study of that science, including a list of Books for the use of students and practitioners, and also observations and directions relative to the practice of conveyancing, particularly with respect to the perusal of abstracts of titles, and preparing of deeds and assurances, of real and personal property, the 2nd edition, carefully revised and corrected, with great additions and improvements. By C. Barton, of the Inner Temple, Barrister at Law, 5 vols. 8 vo.

Advice on the Study and Practice of the Law; with directions for the choice of books, addressed to Attorneys' Clerks. By Wm Wright, 3d ed. enlarged, 1v. 12mo.

The Domestic Lawyer; or a practical exposition of the laws of England. By James Shaw, Esq. 1 v. 12mo.

Fennelly's Law and Practice of Elections in England, Scotland, and Ireland, 1 vol. 12 mo.

Hayes's Concise Conveyancer, with practical remarks, 1 vol. 12 mo.

The Bankrupt Act 6, Geo. IV. cap. 16, with notes by C. Sturgeon, 1 vol. 12 mo.

## GIRL'S OWN BOOK.

This day published by CARTER, HENDEE, & COCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

## LIBRARY OF EDUCATION.

This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

## WHITMAN'S LETTERS.

This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

## SIXTY MAPS

of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

## PARLEY'S ASIA.

This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

## THIS DAY PUBLISHED,

by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

## THIS DAY PUBLISHED,

by *GRAY & BOWEN*, The Christian Examiner General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semi-annual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

## JUST PUBLISHED,

by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

## GRAY AND BOWEN,

have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

## MALTE-BRUN SCHOOL GEOGRAPHY.

—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

## HINTON'S UNITED STATES.

GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel,

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15.
Feb. 19.

## MECHANICS' MAGAZINE.

—This day published by GRAY & BOWEN.

Nos. 13 and 14, North American Series.

These numbers contain articles on Motion of Fluids—Iron Brestramers—Caoutchouc—Liverpool and Manchester Railway—Weight and Pressure in Ships of War—Steam Canal Navigation—Improved Electrical Apparatus—Stephenson's Locomotive Engine—On Flying—Mariner's Life Grapple—Marine Steam Engine—Perpetual Motion, &c, &c; with very numerous engravings.
Subscriptions received as above. Feb. 19.

## HARMONY OF THE GOSPELS.

This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D.
Feb. 19.

## THIS DAY PUBLISHED,

by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

CONTENTS.

Art. 1. Mill's Phenomena of Mind. 2. Tytler's and Scott's Histories of Scotland. 3. Memoirs, Correspondence, and Papers of Thomas Jefferson. 4. Niebuhr's Geography of Herodotus. 5. Galt's Southennan. 6. Floods in Morayshire. 7. Troades of Euripides. 8. The Belgian Insurrection, and De Potter's Trial. 9. Alexander's Travels. 10. London Bridge. 11. Hydrophobia. 12. Mr Brougham and Local Judicatories. 13. Novels and Travels in Turkey. 14. The Three Days of Paris. 15. Brasse's Sophocles. 16. Geometry without Axioms. 17. Revolution of 1830. List of Books, Index, &c.
Jan. 22.

## AMERICAN ALMANAC,

Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

## WORKING MEN'S PARTY.

This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

## EVENTS IN PARIS,

during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

## WEBSTER'S WRITINGS.

This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.*
Jan. 8.

THE JURISPRUDENT

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, MARCH 5, 1831. NO. XXXII.

## CHANCELLOR KENT.

Mr Chancellor Kent was appointed a puisne judge of the Supreme Court of New York on the sixth of February, 1798, Chief Justice of the same court on the second of July, 1804, and upon the resignation of Mr Chancellor Lansing, succeeded to the distinguished station of Chancellor of New York, on the 25th of February, 1814. He has been long, therefore, before the public in a judicial character, which he has sustained with increasing reputation, a reputation as pure as it is bright; and he is, at the very moment we are writing, devoting himself to the labors of jurisprudence with a diligence and enthusiasm, which excite the admiration of the veteran counsellor at the bar even more than of the ambitious student just struggling for distinction. He has always been remarkable for an unwearied attention to business, a prompt and steady vigilance, and a sacred reverence for judicial authorities. For him the easy course of general reasoning, popular analogies, and fanciful theories, has no charms. He does not believe that judicial discretion is the arbitrium boni judicis, much less boni viri; or that he is at liberty to promulgate rules, either of law or equity, measured by his own abstract notions of what is fit or unreasonable. He contents himself with administering the common law as he finds it, without the rashness to presume himself wiser than the law or the vanity of distinguishing himself by innovations. His life has been devoted, sedulously and earnestly, to professional studies. He has fathomed the depths and searched the recesses of the ancient law, the black lettered relics of former times, so much disparaged, and yet of such inestimable value. He has traced back the magnificent streams of jurisprudence to their fountains, lying dark and obscure amidst the rubbish of monkish retreats, or stealing silently from the chivalric heights of feudal grandeur. His researches have been, amidst the dust and cobwebs of antiquated lore, pursued in the unfashionable pages of the Year Books, and Glanville, and Fleta, and Britton, and the almost classical Bracton. He has dared to examine the abridgments of Brook, and Fitzherbert, and Statham, (books, from which the modern student starts back with doubt and apprehension,) as the great reservoirs, whence have been drawn the best principles of modern times, and hence must be drawn the body and the soul of that learning which distinguishes the professor from the sciolist. He has not stopped short at a survey of the mere Gothic structures of the law; but has examined with eager and enlightened curiosity the beautiful systems with which the commercial law has been adorned in our day. He has mastered all their refinements, and has in no small degree contributed to their beauty and perfection. He has drawn deeply from the commercial law of foreign nations; the works of Straccha, and Roccus, and Valin, and Pothier, and Emerigon are familiar to his thoughts and his writings. He has there found the sources, from which our own jurisprudence is to be illustrated; and one is at a loss which most to admire, the incomparable discernment of the judge, or the attractive excellence of the materials. If his attainments had found their boundary here, they would have entitled him to great praise; but he has nobly extended his inquires beyond the common and commercial law, and explored the Roman jurisprudence through its texts and commentaries, with uncommon acuteness and accuracy. This has been done with no idle view, to gratify a mere speculative curiosity, or to gather up the fragments of antiquarian fame. Like all his other studies, this has been made subservient to the great purposes of his life, the promotion of justice, and the establishment of a solid jurisprudence founded in the most enlightened policy. In his decisions we can everywhere trace the happy use of that marvellous system of doctrines which Justinian collected with so much care, and which stands unrivalled in the world for its general equity, and nice adaptation to the necessities of mankind; a system, which was gradually matured by the labors of jurists and prætors during centuries, in which Rome was the mistress of the world, and which had the singular advantage of being the combined result of experience and general reasoning and judicial interpretation, aided very little by imperial rescripts, and rarely marred by imperial interference. Let those, who now doubt the importance of the study of the civil law by common lawyers, read diligently the opinions of Mr Chancellor Kent, and they will find all the objections raised by indolence and ignorance and prejudice practically refuted, and the civil law triumphantly sustained. They will perceive the vivid lights, which it casts on the path of juridical science, and they will be instructed and cheered in the pursuit, though they may not hope to move in the brilliant career of such a judge with equal footsteps.

It required such a man, with such a mind, at once liberal, comprehensive, exact, and methodical; always reverencing authorities and bound by decisions, true to the spirit, yet more true to the letter of the law, pursuing principles with a severe and scrupulous logic, yet blending with them the most persuasive equity; it required such a man, with such a mind, to unfold the doctrines of chancery in our country and to settle them upon immoveable foundations. Without doubt, his learned predecessors had done much to systematize and amend the practice of the court. But it cannot be disguised, that the general state of the profession was not favorable to a very exact and well regulated practice. There were, comparatively speaking, few lawyers in the country, who had devoted themselves to Courts of Equity. In general the ablest men found the courts of common law the most lucrative, as well as most attractive for the display of their talents. They contented themselves with occasional attendance at the chancery bar, and placed their solid fame in the popular forum, where the public felt a constant interest, and where the great business of the country was done. In many of the states, no Court of Chancery existed. In others, it was a mixed jurisdiction, exercised by courts of common law, and in those, where it was administered by a distinct judicature, there is great reason to fear that the practice was very poor, and the principles of decision built upon a notional equity, resting very much in discretion, and hardly limited by any fixed rules. In short, the doctrines of the courts depended much less upon the settled analogies of the system, than upon the character of the particular judge. If he possessed a large and liberal mind, he stretched them to a most unwarrantable extent; if a cautious and cold one, the system fainted and expired under his curatorship. This description was applicable, perhaps, without any material exceptions, to the equity jurisprudence of our country, and New York comes in probable for a full share of it. At least there are in the volumes of the Reports abundant proofs that neither the practice nor principles of the Chancery of that state had, previous to the time of Mr Chancellor Kent, assumed a steady and well defined shape. We see, for instance, that points of practice are often most elaborately reasoned out by this learned Chancellor in various opinions, as if the case stood de novo before him, and he was called upon for the first time to apply the English practice to our own. This could hardly have occurred, if there had been a constant, settled channel, in which it had previously flowed.—*N. A. Rev.* 181.

## MR BROUGHAM.

The January number of the New Monthly Magazine, commences a series of 'Sketches of the English Bar,' with a portrait of Mr Brougham—a man whom, (it is said) no title of yesterday can elevate, and who will be happy if the new position in which his title places him, and the new circumstances with which it causes him to be surrounded, do not so alter the man as to make Brougham the lord inferior to Brougham the commoner.

The writer gives an interesting view of the struggles and impetuous exertions of Mr Brougham in the earlier periods of his life, and in reply to the question whether pure philanthrophy or personal ambition had the greater share in urging him on to various and numerous toils, admits that Mr Brougham, like most other men, acted from mixed motives, and gives him 'credit for an honest anxiety to serve the people, combined with an ardent desire to elevate himself.' We copy the annexed paragraph descriptive of his personal appearance and manner, and shall introduce two other extracts of a different character in another paper.—*Courier.*

'If, gentlest and most indulgent reader, you had chanced any morning during term to have walked into the Court of King's Bench, you would probably have perceived near to one of the extremities of the King's counsel seat, a barrister with his brief before him at which he now and then cast a rapid glance, as if a thought had suddenly struck him respecting some point of which he wished to make himself sure; and then he would appear to relapse again into eager rather than profound reflection. There was no deep quietude in his repose—his position was changed frequently, and the nervous twitchings of his nose and upper lip seemed almost

to indicate the emotion caused by the forcible suppression of impetuous thought. His face was destitute of all pretension to beauty of feature or elegance of expression; the forehead rather broad, but not lofty; the nose long, and slightly curved upwards; the upper lip long, and the mouth close and firm: his complexion of a hardy paleness, and the visage strongly marked with lines of thought: the eyebrow dark and full, overshadowing an eye, which in repose seemed small and incapable of much expression, but in moments of excitement—and they were neither rare nor moderate—flashing forth with such fierce energy as I have not seen equalled in any other man. On the whole, his expression was that of a studious man, and a deep and vivid thinker; and this was Mr Brougham, as you would presently discover, when some stranger in the crowd, as occurred every moment, asked, 'Which is he?' I have never heard a speaker more likely to enchain the attention: there was a serious earnestness in his manner, without any of that heavy gravity which sometimes make seriousness tedious; his voice was clear, his enunciation distinct, beyond that of any other man in court, and a continued flow and impressiveness in his language gave an interest even to odinary detail, of which in the hands of others, they would have been utterly incapable. He was not loud, yet so clear, distinct, and forcible in his utterance that not a word was lost; even his under tones, his 'talking aside,' when he was addressing the judges or a jury, fell with palpable distinctness upon the ear: but the distinguishing characteristic of all he said was its earnest clearness; there was no unevenness, no hesitation, no hurry of words, no difficulty of expression. He seemed as if he spoke from an earnest conviction in his own mind that he was right; and even when he was quite wrong, as in points of law he very often was, he discoursed so much with the air of a man who was quite certain about the matter, that the unlearned in the law were astonished when they heard the Judges pronounce that Mr Brougham's legal positions were altogether untenable. It was, however, in the management of facts before an intelligent jury, that his abilities as an advocate shone conspicuously forth. His extensive knowledge of mankind, and of the affairs of life, furnished him with a continued store of observation and illustration, while his matchless facility and force of language made every circumstance which he touched upon tell with ten times its ordinary weight. His powers of eulogy, and his still greater powers of sarcasm, made his commentaries upon evidence singularly effective, and if he could have condescended to the *management* of juries his assistance would have been invaluable to suitors. But this management, this adapting of himself to the prejudice or ignorance of the people he had to deal with, and thus cajoling them out of a verdict, was an art which his impetuous and commanding temper could not submit to learn. His address to the jury was a lecture upon the case or the evidence: he spoke as one having authority, and whose business it was to teach his auditory, by the strongest appeals to their reason, the way in which they should view the case that was before them. His energy always rose with the importance of the circumtances upon which he commented, and gradually proceeded from the vigorous, yet subdued, earnestness with which he dwelt upon simple and ordinary facts, to the very highest strain of eloquent fervor, as his topics became more exciting and important. Then it was that he was accustomed to hurl forth his tremendons weapons of sarcasm and invective—and standing in the attitude of St Paul in the Cartoon, with his arms stretched forth, heaving forward, as it were upon the devoted object of his attack the vast volumes of his wrath, he proved himself by far the greatest forensic orator of his time; and in that particular department of oratory, the philippic, he has probably not been surpassed by any lawyer since Cicero. Many English lawyers have been noted for their powers of acrimonious abuse, among whom Sir Edward Coke holds a dishonorable pre-eminence; but in the lofty strain of vehement indignation, the subject of our sketch stands unrivalled. It is to be remarked, however, that in the perhaps less manly, but not less persuasive power of the orator, which addresses itself to the kind feelings and gentler sympathies of the human heart, Mr Brougham was found wanting. To paint the hideous wrong of tyranny and oppression—to exalt the glory of resisting them—to scourge meanness and cruelty—to overwhelm ignorance and presumption with sarcastic scorn, were tasks congenial to Mr Brougham's powers. The excellence of knowledge—the nobleness of freedom—the stern grandeur of fixed resolution, all these were things which he spoke of as a man who felt them; but the softness of pity—the subduing power of gentleness and goodness—the fervency of affection, and the tenderness of love, either found no sympathy with him, or were not thought fit to be made use of in the exercise of his art—

'Impiger, iracandus, inexorabile, acer,'

He seemed to desire to be borne along the torrent of his indignation, and never stopped for a moment to watch by the fountains of human tears.

## RECENT AMERICAN DECISIONS.

### BAIL.

1. A sheriff will be discharged from an attachment for not bringing in the body, where special bail has been put in, but the bail piece has been lost in its transmission to the clerk's office. *The People vs. Shoemaker*, 2 Wend. 253.

2. In a suit on recognisance of bail, where the defendant in the original action is in confinement as an imprisoned debtor in *another state*, the proceedings will be stayed, and time to surrender him after his liberation from confinement will be given. *The People vs. New York C. P.*, 2 Wend. 263.

### BAILMENT.

*Forwarding merchants*, with whom property is deposited, and who are instructed to forward the same, are discharged from their liability, on showing that they used ordinary diligence in sending on the property by responsible persons. *Brown vs. Denison*, 2 Wend. 593.

### BANKS AND BANKING.

1. In an action by the *receivers* of a bank, appointed under the act to prevent fraudulent bankruptcies, &c, to recover the amount of a note discounted at the bank, falling due *after the appointment* of the receivers, bank notes of the same bank of which the defendant became the holder, previous to his note falling due, cannot be set off against the demand of the plaintiffs, although, on the day his note falls due, the defendant makes a tender of the same in payment of his note. *Haxtun vs. Bishop*, 3 Wend. 13.

2. Receivers are trustees not for *the bank*, but for *the creditors* of the bank. Their appointment, and the possession of a note by them, is a transfer or assignment of the note for the benefit of all the creditors; consequently, bank notes holden by a debtor of the bank, whose note has not fallen due, cannot be set off against a note thus transferred before maturity. Even had the note of the debtor been due when transferred, and payment had not been made or tendered before the transfer, a set off would not have been allowed. *Ib.*

3. An assignment of its property by a bank, after it has stopped payment, to persons other than officers or stockholders, *in trust* to apply the proceeds to the payment of all the creditors of the bank, in equal proportions, is a valid instrument, and not void under the provisions of the act to prevent fraudulent bankruptcies; and bank notes of the same bank, purchased by the debtor after such assignment, cannot be set off in an action against him. *Ib.*

4. An action on a promissory note indorsed in blank, belonging to a bank, may be sued by *receivers* or *assignees*, in their proper names, as *indorsees*, without specifying their character as receivers or assignees. *Ib.*

5. In a *proceeding against a bank* by the attorney-general under the 'act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them,' if, in the bill filed by way of *information*, facts and circumstances are stated, verified by affidavit expressing *belief* in the truth of those facts, and they are of such a character as to raise a fair presumption that the bank proceeded against is insolvent, and are *not contradicted or explained* by the bank, on a motion for the appointment of a *receiver* after due notice, the fact of insolvency will be considered as proved within the meaning of the act. *Bank of Columbia vs. Attorney-General*, 3 Wend. 588.

6. The act prohibiting the carrying on of banking business by individuals and incorporated companies unless specially authorized by law, does not preclude individuals or corporations, if otherwise authorized, from lending their funds upon promissory notes by way of discount or otherwise: the evil intended to be guarded against is the keeping of an office of deposit for the purpose of carrying on banking business. *The People vs. Brewster*, 4 Wend. 498.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promise to accept a bill thereafter to be drawn, specifying the amount and time of payment, so as to leave no reasonable doubt as to the identity of the bill intended to be accepted, is, if shown to a third person, who on the faith of such promise, takes the bill for a valuable consideration, in point of law, *an acceptance*, binding the person who makes the promise. *Parker vs. Greele*, 2 Wend. 545.

2. A promise in these words, 'I have no objections to accepting for you at three and four months for $2500, on the terms you propose,' contained in a letter, is an *absolute* and not a conditional engagement; and such a promise authorizes a draft for the *whole sum* at *four* months, the longest period specified. *Ib.*

3. A demand of payment within three or four weeks after the transfer of a note, overdue when transferred, and notice of non-payment within two or three months after such demand, *it seems*, is sufficient to charge the indorser, where, from the

facts of the case, it is manifest that an immediate demand and notice was not contemplated. *Van Hoesen vs. Van Alstyne*, 3 Wend. 75.

4. The sufficiency of notice of non-payment to an indorser, when the facts are conceded, is a question of law to be decided by the court and not by the jury. *Ib.*

5. An action brought against the *maker* of a promissory note *on* the third day of grace is prematurely brought and advantage may be taken of the error on the trial by nonsuiting the plaintiff. *Osborn vs. Moncure*, 3 Wend. 170.

6. The maker has the whole of the third day of grace in which to make payment, though *it seems* that notice to the indorser on the third day of grace, after demand and default of payment by the maker, would be good. *Ib.*

7. A protest of a bill of exchange by a *huissier* (an officer of a tribunal of commerce in France, authorized by the commercial code of that country to make protests,) will not be received in evidence, without proof of the code. *Chanoine vs. Fowler*, 3 Wend. 173.

8. The commercial code of France being *written* law, cannot be proved by the production of a printed book admitted to be conformable to the *official edition* of the code, published by the government. *Ib.*

9. *It seems* that the same faith and credit would not be given to the protests of an officer unknown to the *law merchant*, that is given to the acts of a *notary public*, although the acts of such officer are in strict conformity to the laws of the country in which he resides, and such laws are duly proved; evidence beyond the production of the bill and protest would be required to show the authenticity of the act. *Ib.*

10. Notice of the non-acceptance of a bill of exchange cannot be given by a stranger; it must be by a party to it, or by one who, on the bill being returned to him, would have a right of action upon it. *Ib.*

11. Where information of the dishonor of a bill of exchange is sent to *an agent* who is not a party to the bill either actually or nominally, for the purpose of collection, with a request to give notice to the drawers, and he omits to give such notice until *the next day* after receiving such information, the drawers are discharged; being a mere agent, he should have given immediate notice. *Sewall vs. Russell*, 3 Wend. 276.

12. Where the existence and amount, and loss or destruction of promissory notes is shown, and it does not appear affirmatively that the notes were *negotiable*, the plaintiff is entitled to recover on the *lost* notes. *McNair vs. Gilbert*, 3 Wend. 344.

13. Notice to an *indorser* of the non-payment of a note sent to the *place* where he resided at the time of the discount of the note, is sufficient to charge him, although between that time and the maturity of the note he has changed his place of abode. *Bank of Utica vs. Phillips*, 3 Wend. 408.

14. Inquiry as to the residence of an indorser is not necessary, where the holder has reason to believe that he knows his place of abode. *Ib.*

15. *Indorsers* of a note made in the name of a *firm* by a member thereof, without the assent of his co-partner, and *passed by him* for his *individual* debt, are not liable for its payment. *Williams vs. Walbridge*, 3 Wend. 415.

16. The burden of proof lies with the holder to show that the several members of a firm assented to a note, in the name of a firm, where such note is taken for the private debt of one of the partners. *Ib.*

17. The defence that the note of a *firm* has been given by one partner for his individual debt, without the assent of his copartner, is admissible under the general issue. *Ib.*

18. The maker of such note is a competent witness to prove the defence. *Ib.*

19. The drawers of a note cannot object that it was negotiated contrary to its terms, where they themselves put it into circulation. *Wardell vs. Hughes*, 3 Wend. 418.

20. Where in a notice of non-payment *dated* on the day that a draft falls due, it is stated that the draft was *protested* on the evening *before*, for non-payment, and that the holders look to the indorser for payment, it is right and proper to submit the question to a jury, whether or not the defendant has been misled. A draft falling due on *Sunday* may be demanded on the preceding day. *Ontario Bank vs. Petrie*, 3 Wend. 456.

21. In an action against *the drawers* of a bill of exchange, dishonored by the *drawees*, but accepted by third persons *supra protest* for the honor of the drawers, payment must be demanded of the drawees, and notice of non-payment given. *Scofield vs. Bayard*, 3 Wend. 488.

22. Where a bill was payable in *London*, but by mistake was sent from Birmingham, where the holders resided, to *Liverpool*, to be presented for payment, and the mistake was discovered and attempted to be cured by sending the bill to London, where it did not arrive until two days after its maturity, but would have arrived in season but for the oversight or negligence of the clerks of the post office in Liverpool, *it was held* that such mistake or negligence was not a sufficient excuse for not presenting the bill on the day it fell due. *Ib.*

23. *It seems*, that where there is an *impossibility* to present the bill on the day it falls due, owing to unavoidable accidents, and the holder is not in fault for the delay, a subsequent presentment will be good. *Ib.*

24. Where an indorser resided in *one town*, within two and a half miles of a post office, and carried on business in *another town* where there also was a post office at the distance of four and a half miles from his residence, and he received letters and kept a postage account at the latter office, *it was held* that notice of protest of a note might be sent to either place. *Bank of Geneva vs. Howlett*, 4 Wend. 328.

25. It is not indispensable that notice should be sent to the office nearest to the residence of the party, nor even to the town in which he resides; it is sufficient if it be sent to the office to which he usually resorts for his letters. *Ib.*

26. A mistake in the name of the post office to which a notice of protest is directed, does not render the notice inoperative, where it appears that the post office is as well known by one name as the other; a notice directed to *Geddesburgh*, when it should have been *Geddes*, was accordingly holden good. *Ib.*

27. *Notice of protest*, if sent by mail, must be sent to the post office *nearest* to the defendant, if there be more than one post office in the town in which he resides; or to the post office most convenient to him, or where he resorts for his letters. *Cuhler vs. Nellis*, 4 Wend. 398.

28. The holder of negotiable paper seeking to charge indorsers, is bound to make inquiries as to the proper office to which notice must be sent. *Ib.*

29. A promissory note made by one of two partners, in the name of the *firm*, is admissible, *it seems*, in evidence in an action against both partners under a count on the note, although there be *no averment of partnership* in the declaration. *Mack vs. Spencer*, 4 Wend. 411.

30. At all events, it is proper evidence under the count for money lent. *Ib.*

31. The holder of a dishonored note is excused from giving notice of non-payment to the indorser on the *fourth of July*. *Cuyler vs. Stevens*, 4 Wend. 566.

32. Notice of non-payment need not be in writing; a *verbal* notice is sufficient. *Ib.*

33. A note payable to A or B cannot be declared on as a promissory note within the statute. *Walrad vs. Gould*, 4 Wend. 575.

34. If, however, it purports on its face to be *for value received*, the setting forth of the note, according to its terms, is a sufficient statement of consideration to entitle the plaintiff to recover as on a contract.

35. Such note may be given in evidence under the money counts.

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### BILL OF PARTICULARS.

1. Under a bill of particulars claiming to recover as for *money* paid, evidence that the plaintiff has paid a debt of the defendant, for which he was responsible, by the conveyance of *land* accepted in satisfaction of the debt, is admissible. *Bonney vs. Seely*, 2 Wend. 481.

2. Time in a bill of particulars is material and it was accordingly held that evidence of work done in 1820, was not admissible under a bill specifying items of work for which a recovery was claimed, to which was attached the date of 24th April, 1821. *Quin vs. Astor*, 2 Wend. 577.

3. Evidence of *money paid*, offered by a plaintiff, to rebut a claim set up by a defendant, is admissible, although no charge of money is contained in a bill of particulars delivered by the plaintiff. *Brown vs. Denison*, 2 Wend. 593.

4. A variance between a bill of particulars and the evidence produced, will not be regarded, unless the bill was calculated to mislead. *McNair vs. Gilbert*, 3 Wend. 343.

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### BOND.

1. A bond executed by *nine* persons as obligors upon certain terms and conditions, and subsequently delivered by *five* of the obligors, without the knowledge or consent of the remaining *four*, upon terms and conditions different from those originally stipulated, is not obligatory upon the latter. *Lovett vs. Adams*, 4 Wend. 380.

2. A bond given by a treasurer of a county that he 'shall well, truly, and faithfully execute and perform the duties of treasurer of said county according to law,' is good, although not in the form prescibed by statute. *Supervisors of Allegany vs. Van Campen*, 3 Wend. 48.

3. A *fraudulent representation* made by the obligee to the obligor of a bond, as an inducement to the latter becoming bound, is no defence *at law* to an action on the bond. *Stevens vs. Judson*, 4 Wend. 471.

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### BOND AND WARRANT.

A bond and warrant of attorney executed by a

defendant in close custody, is void. *Evans vs. Begleys*, 2 Wend. 243.

CHAMPERTY AND MAINTENANCE.

The statute of *champerty and maintenance* cannot be alleged in bar of a recovery on a bond, executed by a *step-son* of one lessor of the plaintiff in an action of ejectment to another, to indemnify him against the costs of such suit, where it appears that the obligee refused to permit his name to be used without such indemnity. *Campbell vs. Jones*, 4 Wend. 306.

CHANCERY.

1. An answer in chancery, responsive to and fully denying a material allegation in a bill, will prevail, unless it be disproved by more than one witness. *Stafford vs. Bryan*, 3 Wend. 532.

2. The *re-examination* of a witness in chancery rests in discretion, and though granted under peculiar circumstances, is against the ordinary practice of that court. *Beach vs. Fulton Bank*, 3 Wend. 573.

3. A general denial of *fraud* in an answer to a *bill of discovery* is not enough, where, in addition to a general charge of a fraudulent concealment of property by a defendant, there is a specific charge that such property is held by others in secret trust or by colorable title for the benefit of the defendant; the specific charge must be responded to, or the answer will be held insufficient. *Petit vs. Candler*, 3 Wend. 618.

4. A conveyance of an estate will not be decreed in chancery, where the proof of the equitable title *varies* from that set up in the bill; thus, where a state of facts was alleged in a bill creating a *resulting trust*, and the proof showed a *subsequent agreement* to convey, it was *held*, that the party was not entitled to relief. *Forsyth vs. Clark*, 3 Wend. 637.

5. The appropriation of the joint funds of a copartnership by one of the members of a firm, to the purchase of real estate conveyed to such partner in his own name, will not create a *resulting trust* in favor of his co-partner, unless the funds were so appropriated in pursuance of an agreement between the parties at the time of the purchase. *Ib.*

6. Where the contracting parties, after a contract for the purchase of an estate and the payment of the consideration money, but before the execution of a deed, conspire together to defraud the creditors of the vendee, *it seems* that a court of chancery, on a bill filed by a creditor, would deem the *equitable title* vested in the vendee, and would not permit the statute of frauds to be interposed as a bar to the setting up of such title. *Ib.*

7. Where the property of a defendant, sold under execution, brings a sum equal to, or greater than the amount of the judgment the plaintiff in such judgment can no longer be considered a judgment creditor of such defendant, entitled to the equitable interference of a court of chancery, to set aside a *fraudulent settlement* of accounts between the defendant and a third person. *Ib.*

8. To enable a court of chancery to set aside as fraudulent a settlement between a defendant in a judgment and a third person, and to order an account, &c, such settlement must be directly charged to have been fraudulent; and all the creditors in such case should be made parties, or an offer be made in the bill for them to come in. *Ib.*

9. An answer in chancery, although responsive to a bill, if impeached in material parts by the proofs in the cause, is, like all other evidence, entitled to only diminished credit. *Ib.*

COMMON CARRIERS.

1. The owners of a steam boat carrying not only passengers, but light freight and parcels for hire, are common carriers, and answerable for all goods shipped on board their vessel, unless lost by inevitable accident or the enemies of the country; and an action for the loss of a packet of *bank bills* delivered to the captain for carriage, will lie against them. *Allen vs. Sewall*, 2 Wend. 327.

2. An arrangement between the owners of steam boats and their captains, allowing the avails of carrying bank bills as a privilege to the latter, does not discharge the owners, unless the shipper contracts with the captain himself, knowing that he receives the goods on his own account, as part of his privilege, and not in his character of agent for the owners. *Ib.*

3. Instructions to the captain of a vessel employed in the carrying business, not to carry a specific article, i. e. money, does not excuse the owners, unless notice of such instructions is brought home to the shipper. *Ib.*

4. Bank bills are *goods* within the meaning of the statute incorporating a company, and declaring the members thereof individually liable, as carriers at common law, for the transportation of all *goods, wares*, and *merchandise* delivered to their agents. *Ib.*

5. Where a carrier is told that a packet containing money delivered to him is a very valuable one, though he is not informed that it contains money, there is no ground for an imputation of fraud or concealment. *Ib.*

6. There needs no particular agreement for hire, to render a common carrier liable, because, where there is none, the carrier may have a *quantum meruit* for it. *Ib.*

7. In an action against six, as proprietors of a steam boat, in which they were charged as *common carriers* for the loss of property put on board for transportation and the *gravamen* was stated to have arisen from a breach of duty, it was *held*, that a plea in abatement that there were fiftyfour other proprietors, who were *jointly* liable, was bad, and judgment of *respondeas ouster* was awarded. *Bank of Orange vs. Brown*, 3 Wend. 158.

8. An action solely *upon the custom*, is an action of *tort*, in which all or any number of the owners of a vessel, coach, or any kind of conveyance used by common carriers, may be sued, and on a verdict against all or a part only of those against whom the action is brought, judgment may be rendered. *Ib.*

9. The plaintiff has his choice of remedies, either to bring *assumpsit* or *case*; but when one or the other form of action is adopted, it will be governed by its own rules. If the plaintiff states the custom, and also relies on an undertaking, general or special, the action, though it may be said to be *ex delicto quasi ex contractu*, is in reality founded on the contract, and will be treated as such. *Ib.*

CONDITION.

Where there is a condition of *re-entry* reserved in a lease for non-payment of rent, the reversioner is not entitled to re-enter without showing a compliance with the requirements of the *common law*, such as a demand, &c, or that by *statute* he is entitled to re-enter, for the want of sufficient property on the premises countervailing the rent. *Jackson vs. Kipp*, 3 Wend. 230.

CONSIDERATION.

The partial failure of the consideration of a note may be given in evidence to reduce the amount of the plaintiff's recovery. *Spalding vs. Vandercook*, 2 Wend. 431.

CONSPIRACY.

1. The crime of *conspiracy* to effect an unlawful act is perfect when the agreement to do the act is concluded; no *overt act* is necessary to be shown. *The People vs. Mather*, 4 Wend. 229.

2. All who accede to a conspiracy after its formation, and while it is being executed, become conspirators. *Ib.*

3. When a new party, with a full knowledge of the facts, *concurs* in the plans of the conspirators as originally formed, and comes in and aids in the execution of them, he is from that moment a fellow conspirator; his concurrence, without particular proof of an agreement to concur, is conclusive against him. He commits the offence whenever he agrees to become a party to the transaction, or does any act in furtherance of the original design. *Ib.*

4. The fact of *conspiring* need not be proved; if parties concur in doing the act, although they were not previously acquainted with each other, it is a conspiracy. *Ib.*

5. If the agreement be entered into in any *one* county, and the conspirators go into *another* county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an expressed renewal of the agreement; such overt act of any one of the conspirators, in furtherance of the common design, is considered in law a renewal or rather continuance of the original agreement by all the conspirators. *Ib.*

6. The *venue* may be laid in the county where the agreement was entered into, or where an overt act was done by any of the conspirators in furtherance of their common design. *Ib.*

7. A *conspiracy* to commit a misdemeanor is not merged in the misdemeanor, the result of the conspiracy when committed; where the crime perpetrated is of a higher grade of offence than a misdemeanor, the misdemeanor is merged in the crime. *Ib.*

8. In an indictment for a conspiracy, it is not necessary to set forth the overt acts relied on as evidence of the defendant's guilt, where a legal offence is charged, *e. g.* a conspiracy to assault and false imprison a citizen. The unlawful agreement is sufficient to convict. It is usual but not necessary, after stating the conspiracy, to allege that in pursuance of it certain acts were done. *Ib.*

9. An indictment for conspiracy, charging the defendant to have conspired with divers person to the jurors unknown, is good, notwithstanding the co-conspirators are known to the jury, and their names might have been set forth. *Ib.*

CONSOLIDATION OF ACTIONS.

1. A consolidation rule will be granted where several actions are pending between the same parties brought at the same time, the causes of action in which may be comprised in the same declaration. *Brewster vs. Stewart*, 3 Wend. 441

2. A defence on the merits need not be set up to entitle a defendant to the benefit of the rule. *Ib.*

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CONSTRUCTION OF WRITTEN INSTRUMENTS.

1. Whether an instrument shall be considered *a lease*, or only, *an agreement for a lease*, depends on the intention of the parties to be collected from the whole instrument; the law will rather do violence to the words, than break through the intent of the parties, by construing it a lease, when the intent is manifestly otherwise. *Bulkley vs. Delacroix*, 2 Wend. 433.

2. An instrument respecting the letting of premises, though containing words of *present demise*, but in which was inserted an agreement by the owner to make alterations and improvements, and by the other party to take a lease when the premises should be so altered and improved, and the term was stipulated to commence from the day that the premises should be altered and improved in the manner agreed on, was accordingly held not to be a lease, but *an agreement for a lease*. *Ib.*

3. And where, under such an agreement, alterations and improvements were made, but of a different character from those stipulated, it was held that the party with whom the contract was made, was not entitled to demand the possession of the premises, though willing to waive the exact compliance with the contract. *Ib.*

4. If the reservation in a grant and the covenant of the grantee taken together leave no rational doubt of the intent of the parties, then such intent must govern in the construction of the grant; as where a grantor reserves the right of a stream of water running through lands conveyed, and the grantee covenants not to erect any water works on the stream, the water, as well as the land, is conveyed, *except* the right of using water power upon the premises, which is reserved to the grantor. Until the exercise of the right, however, the exception is inoperative, and the whole premises vest in the grantee, who may assert his right against any one but the grantor or his assignee. *Provost vs. Calder*, 2 Wend. 517.

5. Where two tracts of land were laid out in a parallelogram form, each being 8 miles long and 6 miles wide, containing together 67,438 acres, and distinguished as *townships* No. 3 and No. 4, and a deed was subsequently executed by the proprietor of those townships conveying two tracts of land described as townships No. 3 and No. 4, '*to be six miles square, and containing* 23,040 *acres each, and no more*, it was *held* that the deed should be so construed as to carry into effect the manifest intention of the parties, that the township should be resurveyed and a correction made of the boundaries so as to reduce each township to six miles square and to the contents specified in the deed. *Moore vs. Jackson*, 4 Wend. 58.

6. The grantees in such case, it was also *held*, had a right of election to locate their grant in any part of the two townships as surveyed at the date of the deed, the only restriction upon them being to locate in a square form. *Ib.*

7. Where demised premises were described in an indenture of lease by the *number of the lot*, and also by *metes and bounds*, and the metes and bounds applied to a different lot from that described by its number, and the tenant entered into possession of the lot as described by its number, and continued such possession for 36 years, it was *held* that the practical location was evidence of a *mistake* in the latter part of the description, and that the lease was good and operative. *Lush vs. Druse*, 4 Wend. 313.

8. And where in such lease the premises demised were described as extending from a given line so far as to include *one hundred* acres, and the lot taken possession of contained but *eighty* acres, it was *held* that the *quantity* being part of the description which might be rejected, the lessee took only what was contained in *the lot* described by the number, and whether it contained more or less than 100 acres, was not inquirable into in an action of covenant for the rent. *Ib.*

9. A bond by a physician that he would not locate himself *and* practise in his profession within his prescribed limits, and in case that he should so locate *or* practice, that he would pay the obligor a certain sum for each and every month that he should so *practise*, is forfeited if he practise within, although he *resides* without the prescribed limits; and his so doing may be well assigned as a breach of the bond. *Smith vs. Smith*, 4 Wend. 468.

10. Where a grant is made to individuals for the use of a *church* which at the time of the grant is not incorporated as such, the persons to whom the grant is made stand seized to the use; and when the church afterwards acquires a legal capacity to take and hold real estate, the statute executes the possession to the use and the estate vests. *Dutch Church of Schenectady vs. Veeder*, 4 Wend. 494.

11. To support a *release*, granted in 1716, of the rent and reversion of demised premises to individuals for the benefit and support of a church, a previous conveyance conferring a less estate will be presumed. *Ib.*

12. The support of the gospel is a sufficient consideration to render a release valid. *Ib.*

13. In a suit by a religious corporation founded on a conveyance, it is not necessary to aver a capacity in the corporation to take. *Ib.*

14. Although the quantity of interest, or the kind or nature of the estate intended to be granted is not specified in a conveyance, an estate for years will be deemed to be granted, if from the whole instrument taken together, it is manifest that such was the intent of the parties. *Barney vs. Keith*, 4 Wend. 502.

15. The legal effect of a covenant to *sell* certain lands, is, that the covenantor shall *by deed convey* to the covenantee; and, in averring performance, the covenantor is bound to set forth the nature of the conveyance executed by him. *Thomas vs. Van Ness*, 4 Wend. 549.

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CONTRACT.

1. Agreements are *independent*, where, on the one hand, an article of merchandise is sold and agreed to be delivered *on demand*, and, on the other, payment is *deferred* until five months after the date of the contract. An action in such case may be maintained for the non-delivery of the article, although not demanded until after the time stipulated for the payment of the money; and performance on the part of the plaintiff need not be averred. *Dox vs. Dey*, 4 Wend. 356.

2. The non-payment of the *whole* consideration is no excuse for the non-performance of a contract, where a *part* is received, unless it clearly appears that the payment of the whole consideration was a condition precedent. *Ib.*

3. Where a party received from another a number of hogs to fatten on shares, and when they were fattened gave notice to the owner and required him to attend to the division of the hogs within three or four days and take away his share and on the owner refusing to attend for that purpose, made a division himself, and turned the owner's share loose into the street, it was *held*, that the party was guilty of a violation of duty in turning the hogs into the street, and liable to damages. *Sheldon vs. Skinner*, 4 Wend. 525.

4. *It seems*, that it was the duty of the party receiving the hogs to have made a tender of the share belonging to the owner at the yard of the owner, being the place where he received them. *Ib.*

5. But if the party, under the circumstances of the case, after the division, was discharged from his liability under his *contract*, he was notwithstanding bound to take care of the property assigned to the owner, though the keeping of it in such case would have been at the risk and expense of the owner. *Ib.*

6. The property being turned into the street being *prima facie* evidence of its destruction, and the parties being considered as tenants in common, it was *held* the owner was entitled to maintain *trover* against his co-tenant. *Ib.*

7. Where drovers are sued for the price of cattle entrusted to them to be taken to market and sold, a jury are warranted in allowing the highest sum according to the evidence, the defendants neglecting to show the prices for which the cattle actually sold. *Clark vs. Miller*, 4 Wend. 628.

8. Where a director of a moneyed institution renders extra services for the company, and during a period of eight years that he continues a director after rendering such services, presents no account and makes no claim for compensation, and there is no express contract on the part of the company to pay for such services, a contract to pay will not be implied. *Utica Insurance Company vs. Bloodgood*, 4 Wend. 652.

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CORPORATION.

1. A grant of lands from the sovereign authority of the state to individuals, to be possessed and enjoyed by them in a corporate character, in itself confers a capacity to *take* and *hold* in a *corporate character*. *North Hempstead vs. Hempstead*, 2 Wend. 109.

2. *Towns*, under the laws of New York, are considered *corporations* for certain purposes, and the authority conferred on them to make regulations respecting their *common lands*, of itself, is sufficient to create a capacity in them to take and hold common lands. *Ib.*

3. A charter issued in 1644, by the *Dutch* governor of the then province of *New Netherlands*, to R. F. and five others, their heirs, executors, administrators, *successors*, or associates, or any they should join in association with them, conveying a territory comprehending the bounds of the original town of *Hempstead*, giving authority to erect a body politic, and to nominate magistrates, ratified and confirmed by the *English* government in 1685, by a grant to six individuals in behalf of themselves and their associates, the freeholders and inhabitants of the town of Hempstead, constituted the town of Hempstead a *corporation*, and the territory granted became the property of the freeholders and inhabitants in their *corporate capacity*, but did not belong to any or either of them in their *individual capacity*, nor were the corporators *tenants in common* of the property granted. *Ib.*

4. Where a *corporation*, whose jurisdiction extends over a tract of country comprising within its bounds lands and other property, held in its corporate character, is divided into two distinct and separate communities, each community is entitled to hold in severalty the public property which falls within its limits. *Ib.*

5. A corporation may be proved by an exemplification of the act of incorporation and acts of *user* under it. *Utica Insurance Company vs. Cadwell*, 3 Wend. 296.

## LIABILITY OF ONE CO-TENANT TO THE OTHER FOR REPAIRS.

The ancient writ of '*reparatione facienda*' would lie in many cases: and one of the cases was, where there were tenants in common, or joint-tenants, of a house, &c, which is fallen into decay, and one is willing to repair it, but the others are not: In this case the party to repair the same might have this writ against the others.* The words 'one is willing to repair and the other not,' have in a modern case very properly been considered to imply, that the defendant must have notice of the plaintiff's intention to repair; and that it must appear that he has refused, on request, to contribute his proportion.†

In the case just referred to it was also considered by the Court, that it was unnecessary to rely on the above expression implying notice, and that the consequences of a contrary opinion would be conclusive as to the obligation of giving the defendant notice. The Court said, 'If one tenant could, in the case supposed, maintain such an action, without any previous refusal by his co-tenant to contribute, the latter might for the same cause maintain the like action against him. In other words the defendant would have suffered the same injury as the plaintiff, and would have an equal right to recover damages. If the two tenants tacitly agree, or permit the house or its apurtenances to go into decay, neither can complain of the other until after a request and refusal join in making the repairs. From the form of the writ in the Register‡ it seems that the plaintiff, before bringing the action, had repaired the house, and was to recover the defendant's proportion of the expense of those repairs. The writ concludes—in *ipsius dispendium non modicum et gravamen.* It is clear that, until he has made the repairs, he cannot, in any form of action, recover anything more than for his loss, as of rent, &c, while the house remains in decay. For if he should recover the sum necessary to make the repairs, there would be no certainty that he would apply the money to that purpose.'

The above case was cited as good authority in *Mumford vs. Brown*, in New York;§ and the reason, the Court said, upon which the above positions as to the necessity of *notice* and *refusal* were founded, was that until notice and refusal, both parties are equally in fault, one having as much reason to complain as the other.

The *action on the case* has in modern times been substituted for the old writ of *reparatione facienda*;* thus one claiming a privilege in a well and pump situate in the land of another, (each being bound to contribute his proportional part of the repairs) may maintain the former action against him whose land the well is in, after a request and demand as above stated.†

In a case in the State of New York, one tenant attempted to compel his co-tenant to contribute for repairs by an action of *assumpsit*, for money paid and work done in repairing certain premises, of which the parties were tenants in common. On error to the Supreme Court,‡ the Court said, the plaintiff in error is not liable on the count for money paid, because it was without his assent, and because he had not been requested to make the repairs. But whether assumpsit would be the proper remedy, *even in that case*, is offered as a *quere* by the learned reporter.§

In *Loring vs. Bacon*,‖ it appeared that defendant owned the upper and the plaintiff the lower story of a house. The plaintiff repaired the roof, and after requesting the defendant to join in the repairs, then sued to recover the defendant's alleged proportion. The Court held that the plaintiff could not recover, for the very obvious reason, that the parties could not be deemed tenants in common, as they owned and occupied in severality. The principle was, however, recognised in this case, that tenants in common may be compelled to repair by the writ *de reparatione facienda.*

It has been doubted, in Massachusetts, whether the doctrine of contribution in such cases applies *to mills;* and it has been so far equitable modified by statute in that State, that if one part owner of a mill repairs against the consent of his partners, he must look to the profits for his indemnity.¶ Mr Kent says, 'The rule does not apply to *fences* enclosing wood or arable lands;'** but in *Mumford vs. Brown*, before cited, the Court seemed to admit, that one co-tenant of a lot of land might have been compelled to contribute for a new board fence which was a substantial benefit, provided he had been properly noticed and requested.—*Law Intel.*

* F. N. B. 127, 5 Jac. Law Dict. 482. And if a man have a house adjoining to my house, and he suffers his house to lie in decay, to the annoyance of my house, I may have a writ against him to repair his house. New Nat. Brev. 281.

† Doane v. Badger, 12 Mass. Rep. 65.

‡ Page 153.

§ 6 Cowen, 475.

* Doane v. Badger, supra. † Ibid.

† Mumford v. Brown, 6 Cowen, 475.

§ An action of *indebitatus assumpsit*, as well as *account*, will lie by one tenant in common against his co-tenant who has received more than his share of the profits of the property owned in common. Bridgham v. Eveleth, 9 Mass. Rep. 538. Jones v. Haraden, Ib. 540. Sargent v. Parsons, 12 Ibid. 149. But vid. Wheeler v. Raymond, 8 Cowen, 311, where the Court say—'The question then is, whether one tenant in common can maintain *assumpsit* against his co-tenant, for his proportion of the rents. That such an action could not be sustained, was the reason of providing by statute (1R. L. 90, s. 2.) for the action of account.' (Wheeler v. Horne, Willes 208.)

‖ 4 Mass. Rep. 575. If one suffer his separate property to go to decay to the injury of another, a writ may be obtained to compel him to repair it; and after an injury sustained, an action on the case lies. But this is different from the case before the Court.—*Ibid.*

¶ Carver v. Miller, 4 Ms. R. 559. 4 Kent's Com. 366.

** 4 Kent's Com. 366.

## ENGLISH CASES.

### COURT OF EXCHEQUER—NOV.

*Begbi vs. Levi.*

This was an action brought by the indorsee of a bill of exchange against the acceptor. It was tried by the Chief Baron in the Sittings after Easter Term, when a verdict was returned for the plaintiff. A rule to show cause why the verdict should not be set aside was obtained in the last Term, on the ground that the bill was dated on Sunday, and consequently should be presumed to be drawn and accepted on that day. Cause having been shown.

Mr Baron Garrow, in delivering judgment this day, observed that the objection to the legality of the bill in question was founded on Statute 29 Charles II., which enacted 'That no tradesman, artificer, or workman, should exercise any trade or work of ordinary calling (works of necessity excepted) on Sundays.' It had been contended, on behalf of the defendant, that by this Statute a contract entered into on Sunday was void; but there was no evidence to show that this bill had been accepted on a Sunday. It appeared on the face of it to have been drawn on a Sunday; but what proof is there that it was founded on a contract? It only requests of the defendant to pay the amount three months after date. It might be an application to his friendship to lend so much money. However, the defendant was not bound by it until he accepted it, on the day on which it was purported to be drawn. Indeed, the usual way was to leave a bill for a day with the person who was requested to accept it, and call for it the day after, so that the presumption is in favor of its not having been accepted the same day. However, even if it had been proved to have been accepted on Sunday, that circumstance would not invalidate it, for it had been decided in the case of Dorbs v. Williams, 3 Barnewell and Cresswell, in Drury v. Delafontaine, 1 Taunton, and in several other cases, that the sale of goods on Sunday, not in one's ordinary occupation, was not illegal. The Statute did not apply to all work done on Sundays; the object of it was to prohibit persons from following their ordinary occupations. It was decided, in the case of the King v. Whitmarsh, that a contract of hire, made with a servant on Sunday, was not void. Under all these circumstances, his Lordship thought that the acceptance of the bill came within 'works of necessity,' which were excepted by the Statute, and that the rule to enter a nonsuit should be discharged.

The rule was accordingly discharged.

### COURT OF KING'S BENCH—NOV.

*Phillips vs. Headland.*

This was an action on a policy of insurance, tried before Mr Justice Bayley at Lancaster, in which a verdict was returned for the plaintiff. The policy was effected on a ship bound from Liverpool to Sierra Leone, and valued at 4,000*l.* The Captain had on board a mate who had been once a voyage to Sierra Leone, and, relying upon his knowledge of the harbor, when he arrived at that place, which was about three hours after nightfall, instead of waiting until the morning for a pilot—there being established pilots at that port—he proceeded at once to enter. He went in with a fair wind and plenty of sea-room, but struck on a bank in the centre of the harbor, and was lost. Evidence was called to show that it would be more prudent to go in than remain outside, if the Captain knew the harbor, but that, otherwise, it was usual to anchor outside. Two witnesses were decidedly of opinion that a ship arriving after dark ought to anchor outside. The Learned Judge left it to the Jury to say first, whether it would be more prudent to go in at night than to remain until morning; and, secondly, whether they thought that the Captain had acted bona fide under the conscientious belief that he was doing that which under the circumstances, was the most advisable. The Jury, without answering either, gave a verdict for the plaintiff generally.

Mr Evans now contended that the verdict was neither in accordance with the Judge's charge nor the weight of evidence.

Mr Justice Bayley—I certainly thought I should have come to a different conclusion.

Mr Evans—I flatter myself that there are few people who would not be inclined to come to a different conclusion.

Mr Evans—Juries are seldom favorable to underwriters, and, in this instance, they without hesitation found for the plaintiff.

Lord Tenterden—Take a rule to show cause.

THE JURISPRUDENT.

BOSTON, SATURDAY, MARCH 5, 1831.

## MATHEWS ON PRESUMPTIVE EVIDENCE.

The object of the above work, as stated by the author, is to investigate and explain the doctrine of Presumption and Presumptive Evidence in their application to Titles, and to show how far defects in titles arising from the want of direct evidence may be supplied by established presumptions, or by those which are afforded by the particular circumstances of the case. The American Edition of the work is accompanied with notes and references to American cases by Benjamin Rand, Esq.

The author remarks that Presumptions are of two kinds:—presumptions of law and presumptions of fact. Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence, being found, from experience, to be generally accordant with truth, and remain of force until repelled by contrary evidence. Presumptions of fact are conclusions drawn from particular circumstances.

Presumptions of law rest on one or the other of the following grounds:—the laws of nature—the first principles of justice—the nature and general incidents of property—the innate principles of self-interest—the dictates of prudence or discretion—the policy of the law—and the motive or intention determining particular actions. Examples of the several kinds enumerated are adduced and the particular cases which they effect pointed out in Chap. 2.

1. *Semel furibundus semper furibundus præsumitur,* is a maxim or supposition of law, grounded on the essential nature of insanity, and the constant experience that by far the greater number thus afflicted never recover the right use of their mental faculties. (The burden of proof lies on him who alleges insanity. Jackson Ex. dem. Cadwell v. King, 4 Cow. 207. Stevens and wife v. Varcleve, 4 Wash. 262.)

2. The presumption that a child born in wedlock is legitimate, results from the principal of natural justice. The innocence of the parties is presumed till guilt is proved.—(Bowles v. Brigham, 2 Murf. 442.)

The legal presumption, in this case, is less strict now than formerly. The rule is the same—but a greater variety of circumstances are allowed by modern courts to be given in proof to rebut the presumption than were consistent with the rule laid down by Coke. No evidence was admissible to prove the issue a bastard, if the husband were within the jurisdiction of the King of England, except in the case of impossibility of procreation—as of the husband not having attained the age of puberty, &c. Now any cause which prevents the intercourse of the parties may be shown to meet this legal intendment.

Other presumptions of law founded on the principles of natural justice are such as the following—that in all cases of alleged wrong, whether the offence imputed consist in acts of fraudulent dealing or of open injury—in the breach of a moral precept or of a positive law—the party charged has the supposition of innocence in his favor. And this principle is permitted to have influence in a civil point of view. Dishonesty is not to be presumed—nor malice. Every act is to be taken to be done in good faith till the contrary appears.

A charge on an act of immorality or disobedience to the law must be supported by direct evidence. Circumstances showing a probability are, in such cases, not enough; the fact must be proved. This proof, however need not be express—but it may be derived from inferences, which are the necessary consequences from the acts done.

3. Presumptions from the nature and general incidents of property. They are two kinds. 1. That possession of property carries with it the right of beneficial enjoyment; and 2. that the ownership of real estate comprises a title to all usual appendant rights and privileges. As to personal property of a moveable nature, the general rule is, that possession constitutes the criterion of title.

5. Presumptions founded in the dictates of prudence and discretion. When regular means are once established for the attainment of particular purposes, those means, it is natural to expect, will be resorted to, when the purposes in question are to be effected—and so when acts which are commonly done only with a view to particular ends are performed—it is presumed that they proceeded from an intention to accomplish those ends. Thus the solemnities required by law to give validity to the ordinary instruments of assurance, as signing, sealing, delivery, &c, are, in the absence of proof of the omission, presumed, &c. Where a will consists of several sheets and the witnesses see only the last sheet signed, the law presumes all the sheets to have been in the room where the witnesses were assembled, till the contrary appears.

Interlineations of deeds which would vitiate them if made subsequently to the execution, will be presumed to have preceded the sealing and delivery. (Bishop v. Chambre, 1 Mood. and Walk. 116. Heffelfinger v. Shutz, 16 Sargeant and Rawl. 44. Erasures of the names of subscribing witnesses is presumed to have been done before execution. 5 Har. and Johns. 41. So with any other erasure. 1 Peters C. C. R. 364. But see Cumberland Bank v. Hall, 1 Hals. 215.)

6. Presumptions originating in the policy of the law. The instances to which the author refers under this head are—the presumption in favor of cross remainders where land is divided between two persons as tenants in common in tail—and the contrary when between more than two—and the presumption that money borrowed by a husband and wife, on security of the wife's estate, is appropriated exclusively by the husband. This last results from the nature of the marital right. As the money is under the husband's power, it is understood to be applied to his use. But this supposition may be controlled, and will yield to circumstances.

The following cases are collected by the American Editor on the subjects of the applications of payments and the presumptions arising therefrom. Baker v. Stackpole, 9 Cowen, 420. Niagara Bank v. Rosevelt, 9 Cowen, 409. Mayor of Alexandria v. Potter, 4 Cranch, 317. United States v. et al. 7 Cranch, 572. Field v. Holland et al, 6 Cranch, 8. Taylor v. Sandiford, 7 Wheat. 13. United States v. Kirkpatrick, 9 Wheat. 750. McGill v. Bank of U. S., 12 Wheat. 511. Remer v. Higginson et, 1 Mason, 323. Bank of North America v. Meredith, 2 Wash. C. C. R. 47. Man v. Marsh, 2 Caine R. 994. Roberts v. Gamic, 3 C. R. 14. Braxton v. Southerland, 1 Wash. 128. Bacon v. Brown, 1 Bibb, 334. Smith v. Seaver, 1 M'Cord, 368. Guinn v. Whitaker, 1 Har. and Johns. 354. Banett v. Lewis, 2 Pick. 123. Brewer v. Knapp, 1 Pick. 332. Boston Hat Factory v. Messenger, 2 Pick. 223. Hilton v. Burleigh, 2 N. H. R. 196.

In Chap. IV. the subject of Presumptions with respect to beneficial ownership is discussed. First where a purchase made by one person is completed in the name of another, and secondly, where an Estate paid for by two or more is conveyed to them as joint Tenants.

It is stated as the result of all the cases, that whether the Estate be, freehold, copyhold, or leasehold; and whether the conveyance be taken in the names of the Purchaser and others jointly, or in the name of others, without that of the purchaser—whether in one name or several—whether jointly or successive;—the trust or beneficial ownership appertains to the man who advances the purchase-money. A similar rule holds in regard to personal property. The doctrine on this subject is analogous to that of resulting uses at Common Law.

This doctrine or principle is, however, merely an intendment of law and is always controlled by the expressed meaning of the parties. This presumption may be met in various ways. It can never operate to subvert the policy of the law. Parol evidence is admissible to show a different intention between the parties. Although it is a general principle that parol evidence shall not be received to contradict a written instrument; yet, where the law raises a presumption which is against the apparent purpose of the written instrument, parol evidence is held admissible to repel that presumption. It is adduced not to contradict or vary, but to give effect to and sustain the apparent and literal import of the deed.

This presumption may be rebutted by circumstances, out of which a conflicting presumption of a higher nature arises. It is thus where such a relation exists between the person who advances the purchase money, and him in whose name the purchase is completed, as to impose a natural or moral obligation on the one to provide for the other. In such case the purchase is presumed to have been for the nominee's benefit, and to discharge such obligation. Such obligations exist between parents and children—husbands and wives, &c. Presumptions, arising from these sources may, however, be met by evidence of a contrary intention. It is said as between parent and child, parol evidence, that the child was to take merely as trustee, is not sufficient. There must be some written document signed by the party, or some other act equally conclusive; and these must be contemporaneous with, or prior to the completion of the purchase.

Possession by the Parent and receipt of rents has been held as evidence of intention to retain the equitable interest. But this rule does not hold where the purchase is in the name of an infant and the father keeps possession during the infancy, such possession being referrible to his right as guardian.

To be continued.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN'S, 141 Washington Street. Price 50 cents, bound. Jan. 1.

PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semiannual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglyphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

Nos. 13 and 14, North American Series.

These numbers contain articles on Motion of Fluids—Iron Brestramers—Caoutchouc—Liverpool and Manchester Railway—Weight and Pressure in Ships of War—Steam Canal Navigation—Improved Electrical Apparatus—Stephenson's Locomotive Engine—On Flying—Mariner's Life Grapple—Marine Steam Engine—Perpetual Motion, &c, &c; with very numerous engravings. Subscriptions received as above. Feb. 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

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AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

EVENTS IN PARIS, during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

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# THE JURISPRUDENT.

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## ON THE LIABILITY

### OF MONEY, BANK BILLS AND STOCK TO BE SEIZED AND SOLD UPON EXECUTION.

There is no question, that moveable and tangible personal property, such as corn, jewels, garments, household goods, &c, (if not expressly exempted by statute) may be seized and sold upon execution, by the Sheriff.* But the question whether money, bank bills and stock in incorporated companies may at common law be thus seized and sold, has been considerably discussed.

Lord Mansfield said that there were some old cases in which it had been held, that the Sheriff could not take *money* in execution, even though found in the defendant's *scrutoire;* and that a quaint reason was given for it, viz., that money *could not be sold.*† But it is evident, that he did not think this a sound reason, and the result of the motion in that case would seem pretty strongly to sanction the right of the officer to take money upon an execution. This has, however, been otherwise ruled in the King's Bench, in later cases, and carried so far, that the Court would not allow the Sheriff to apply surplus money raised on a sale of property under an execution to the satisfaction of another execution in his hands, against the same defendant, although no other property was to be found.‡ In the case however of *King vs. Webber,*§ it was ruled that a Sheriff *might* take ready money by a *levari facias;* and in this respect there was no difference between a *levari facias* and a *fieri facias;* and in *Dalton's Sheriff*, p. 145, it is laid down expressly, that money may be taken by virtue of a *fieri facias.* The Supreme Court of the *United States*, upon a careful examination of the authorities, have adopted the same doctrine; and they say, that they could perceive no reason why an execution should not be levied on money; that the one given in the books, that money could not be sold, was not a good one; that the reason of a sale is, that money only will satisfy an execution, and if anything else be taken it must be no good reason for refusing to take the very article, to produce which is the sole object of the execution.‖ The Supreme Court of *New York* have also expressly decided, that *money* or *bank bills* may be taken in execution; and have fully concurred in the doctrine advanced in the case last cited.* In another case, the court said, that on looking again at the cases, they could find nothing to induce them to doubt of the soundness of the above decision.†

When personal chattels are attached, another creditor who would make a second attachment, must do it by the same officer who made the first; because he has possession of the chattels, and the creditor therefore knows to whom to deliver his writ.‡ But where property is of so *intangible* a nature as *shares* in the *stock of a corporation*, there can be no change of possession. And as it is uncertain whether they are under attachment or not, the sale of them upon execution, is not justifiable at common law.§ Thus, in an action brought against a sheriff in the state of *New York*, it appeared that the sheriff had sold among other property one share in the *Bank of Columbia* and three shares in the *Hudson Library: Per* Kent C. J., 'The bank and library shares were levied on by mistake, for these were mere *choses in action*, and not the subject of a levy and sale by a *fi. fa.* any more than bonds and notes.'‖

But though a rule made by the sheriff, like the one in the above case, be irregular and unjustifiable, yet if certificates of the shares are given to the purchaser, the case is more analogous to the sale of common chattels. And, according to the construction of the Supreme Court of *Massachusetts*, the delivery of the certificate would be like the delivery of the chattel, and the transfer may be considered complete.¶

In *Connecticut*, it seems that shares in a *turnpike* company form an exception to the rule, that shares in the stock of corporations are not liable to a levy and sale by the sheriff; and this decision would equally apply to a *canal* company, it being founded upon the supposition, that the company have an incorporeal right or easement in the land upon which the road is constructed.** But in Massachusetts in the case of *Howe vs. Starkweather*,†† Parker, C. J., who gave the opinion of the court, expressly says,—'shares in a *turnpike*, or *other* incorporated company, are not chattels. They have more resemblance to choses in action, being merely evidence of property: the sale of them upon execution not being justifiable at common law.'

It has been held in Pensylvania, that a turnpike road cannot be levied on by an execution issued upon a judgment obtained even against *the company*. The plaintiff in error in this case, having obtained judgment against the president, managers, and company of the *New Alexandria* and *Pittsburg* turnpike road issued a *fieri facias*, and levied on 'all the right, title, interest, and claim of the defendants, of, in, and to ten miles of the said road,' &c.; and the question was whether property of this kind was subject to a levy by virtue of a *fieri facias*.* *Tilghman*, C. J. in delivering the opinion observed,—'It has been decided, that every kind of interest in land, legal or equitable, is subject to an execution in this state. But it does not appear, that the turnpike company had any estate of any kind, in the land over which this road runs. They were incorporated by the legislature for a special purpose, in which the public were much interested. They were permitted to enter on the land, and make a road, under certain regulations, and when the road was finished and approved by the governor, to take certain tolls. But there is nothing in the incorporating act, which authorizes the company to transfer their right to other persons; and such transfer would certainly be inconsistent with the whole design, and object of the law. It was presumed, that the right would remain in this corporation, and the act contains a complete system providing redress in cases of delinquency, and calculated to protect the public from the consequences of such delinquency. The inconvenience would be excessive, if the right of the company could be cut up into an indefinite number of small parts, and vested in individuals. The defendants had no tangible interest,—nothing which could be delivered by the sheriff to a purchaser under the execution. There was no rent, or profit, of any kind, issuing out of land,—nothing but a right to receive toll, for horses, carriages, &c, passing over the land, which would be more or less, according to the number of passengers, and that would much depend on the condition in which the road should be kept. Every kind of right, or license granted by the act of assembly, was confined to the company. They alone were confided in. They alone were looked to for a faithful performance of the important duties incumbent on them. But it may be said to be extremely hard that a corporation should be permitted to contract debts, and possess the means of paying them, and yet their creditors should have no power of coercion. And certainly such a state of things is both hard and unjust. But it does not follow that the proper remedy is by execution. Experience every day pointing out defects in our law, which can be remedied only by the legislative power. And the defect which now appears is well worthy of, and will no doubt receive the attention of our legislature. It may probably be thought adviseable to provide some mode of sequestration, by which the profits arising from roads, may be se-

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* Handy v. Dobbin, 12 Johns. Rep. 220. Holmes v. Nuncaster, *Ibid.* 395. Bogart v. Perry, in error, 17 Johns. Rep. 351.

† Armistead v. Philpot, Doug. Rep. 231.

‡ Fieldhouse v. Croft, 4 East, 510. Knight v. Criddle 9 East, 43.

§ 2 Shower, 166.

‖ Turner v. Fendall, 1 Cranch Rep. 117. But the court considered in this case, that the creditor had not such a legal property in the specific pieces of money levied for him and *in the hands of the Sheriff*, as to authorize that officer to take those pieces on execution, as the goods and chattels of such creditor. The money they held, became liable to such execution, the instant it was paid into the hands of the creditor; and it then became the duty of the sheriff to seize it. C. J. Marshall observed,—'It appears unreasonable that the law should direct a payment under such circumstances. If the money shall be seized the instant of its being received by the creditor, then it seems a vain and useless ceremony which might well be dispensed with.'

* Handy v. Dobbin, 12 Johns. 220.—Vid. also Williams v. Rodgers, 5 Johns. Rep. 167.

† Holmes v. Nuncaster, 12 Johns. Rep. 395.

‡ Denny v. Hamilton, 16 Mass. Rep. 402. Personal property is bound by the execution from the time it is delivered into the hands of the sheriff.—Cresson v. Stout, 17 Johns. Rep. 116. Farrington v. Sinclair, 15 Johns. Rep. Newell v. Sibley, 1 Southard's Rep. 381.

§ Howe v. Starkweather, 17 Mass. Rep. 240. Denny v. Hamilton, 16 Mass. Rep. 402. Wildman v. Wildman, 9 Ves. 97.

‖ Denton v. Livingston, 9 Johns. Rep. 96. and vid. Com. Dig. *Tit. Execution*, c. 4. In Louisiana, the creditors of a stockholder cannot sell his share in the property of a corporation.—Williamson v. Smoot, 7 Martin's Rep. 31.

¶ Howe v. Starkweather, 17 Mass. Rep. 240. But even in that case, unless by the return of the officer, it appears that the requisition of the statute respecting the levy upon, and sale of shares of debtors in incorporated companies has been complied with, the corporation may not be justified in giving certificates to the purchaser. *Ibid.*

** Swift's Digest, and 2 Conn. Rep. 567.

†† Howe v. Starkweather, 17 Mass. Rep. 243.

* Ammant v. President, &c, of New Alexandria and Pittsburg Turnpike Road, 13 S. & Rawle, 210.

cured to the creditors of the respective companies. But in providing this remedy, the public interest will not be neglected. Care will be taken, that so much of the tolls as is necessary, shall in the first place be applied to the repair of the road, and only the *net profits* subject to the payment of debts. A Court of Chancery would do something of this kind, but our courts possess no such power. All that we can do, is to levy on the property, and either sell it, or deliver it to the creditor, in case the rents and profits will pay the debt in seven years. But this kind of proceeding is altogether unsuitable, in a case like the present, and therefore, I am of opinion that the Court of Common Pleas was right in quashing the proceedings. If a turnpike company has a right to land, or other property, not on the road, there is no reason why it should not be subject to an execution. But, in the present instance, the levy, though made in part, on a lot of land contiguous to the road, had so blended the different subjects, that it was difficult to separate them, and therefore the court was justified in quashing the whole proceedings. I am of opinion, that the judgment should be affirmed.'

It being clear that shares in incorporated companies are not at *common law* liable to execution, they have been expressly made so in *Massachusetts*, and in some other states, by *statute*. The statute in these cases generally directs the mode of attachment on mesne process, the course to be pursued when they are attached, and when they are sold on execution. But under such provisions, where the charter or a general act of the legislature, requires that no stockholder who is indebted to a bank, shall make a transfer of his stock, until his debt is discharged, the judgment creditor cannot levy. Or, perhaps it might be more proper, to say, that if the judgment creditor does levy, the lien of the bank will be preserved; and this lien will extend to notes *drawn* before and *falling due* after the levy. So much respect is in fact paid to this lien given by statute, that a bank is not bound to appropriate part of the debtor's shares to pay their demand, and transfer the balance to the judgment creditor, even though the stock is sufficient to pay it and leave a balance.* In the case just referred to it was observed by the court—'It is long settled and not disputed that a lien is a good bar to an action of trover; the bank had a lien and were justified in refusing to permit a transfer of the stock until the lien was discharged.'

By the act of 1796, establishing the *Third Massachusetts Turnpike Corporation*, it was provided, that the shares therein 'may be attached, and may be sold on execution in the same manner as is or may by law be provided for the sale of personal property by execution'—*a copy of the execution and of the officer's return being left with the clerk of the corporation within ten days after the sale.* It was afterwards decided, that the general act of 1804, directing the mode of attaching and selling by execution shares of debtors in incorporated companies, repealed the provision for the same objects contained in the act of incorporation.†

There is great difficulty, it is said, in getting a transfer made to a creditor of a stockholder, at the Bank of *England;* for by law such transfer must be entered and the entry signed by the person making the transfer, or his authorised attorney. And in the act providing, that the court of chancery or exchequer may order a transfer by the secretary of the bank, there are only three cases mentioned, absence of trustee, bankruptcy, and lunacy.

It may gratify the curiosity of some of our readers to know the provisions and practice in relation to the seizure and sale of shares upon execution in the great national banks of *Scotland.*

It is declared in the charter of the Bank of *Scotland* that the shares may be transmitted by *adjudication*, or other legal conveyance, in favor of one person allenarly, who, in like manner, shall succeed to be a partner in his predecessor's place; so that the aforesaid sums of subscription may neither be taken out of the stock, nor parcelled among more persons by legal diligence in any sort, to the diminishing or disturbing of the stock of the said company and good order thereof.' It is also provided 'that on bankruptcy or forfeiture, the governor and directors may order the bankrupt or forfeited person's share to be sold by public roup, after such intimation, as are prescribed for the sale bankrupt lands. (1 *Bell's Com.* 66.) Doubts having been entertained respecting the proper diligence for attaching the stock, the Bank took this course to try it.—Fairholme, on his bankruptcy, was due 3000*l.* to the Royal Bank; and they adjudged his bank stock, with a view to sell it for the payment of this debt: But it was questioned whether this was a title to secure that purchasers would think eligible? The Bank, therefore, called on the cautioner for Fairholme to pay up the debt; and he suspended insisting on the benefit of the stock. The Bank stated, that they could make no transfer, but, 1. On a conveyance from the proprietor; or 2. In favor of an executor on production of his confirmed testament; and that no instance of a transfer on adjudication had occurred. The Court held the adjudication to be a good title, on which the Bank could transfer. The judgment, therefore ordered the cautioner to pay, upon the Bank conveying to him the bank shares which belonged to Fairholme, with such diligence as they have used for effecting the same, with warrandice from fact and deed; and found, that, in consequence thereof, the Bank was bound to receive the purchaser, or his assignee, in Fairholme's place, with regard to the said shares, in the same manner as they are in use to do in other sales or transactions of their stock. (14 Feb. 1770, *Bank of Scotland* contra *Fairholme*, Hamilt. 46; cited in Bell's Com. 66, in notis.)

The *Royal* Bank of Scotland was by a charter of erection, in pursuance of 5 Geo. 1. c. 20, established; the stock was declared moveable and descendible to executors, but, at the same time, not liable to arrestment or attachment. And by a by-law no proprietor can transfer but in the presence of a court of Directors, who may stop the transfer till he find the surety for what he owes the Bank. The creditors of the stockholder of this Bank may, by personal diligence, force a sale; even should the words of the charter passed in fulfilment of the statute prevent direct attachment. (*Ibid.*)—*Law Intel.*

## RECENT AMERICAN DECISIONS.

### COSTS.

1. *Executors* are entitled to costs when the recovery against them in the Supreme Court is less than $50. *Cuylers vs. Kniffin*, 2 Wend. 243.

2. In an action of assault and battery, where one of several defendants has a verdict, he is not entitled to have his costs set off against the recovery against the other defendants. *The People vs. Steuben*, C. P. 2 Wend. 247.

3. Where an affidavit in opposition to a motion is evidently spun out to increase the costs, the court will direct a deduction to be made in the taxation. *Legg vs. Kinney*, 2 Wend. 255.

4. An attorney's fee on trial or on argument may be charged, although the attorney does not in fact attend. *Wilson vs. White*, 2 Wend. 265.

5. Where a motion is suspended by consent, brief and fee are not taxable. *Ib.*

6. Where a declaration contained ten counts, two for malicious prosecution and eight in slander, and there was no proof in support of the two first counts, the court directed that in the taxation no allowance should be made for those counts, and that but four of the counts in slander should be taxed. So they directed that witnesses' fees should be taxed for but *ten* witnesse, where *forty* in fact attended, in support of the plaintiff's general character. *Irwin vs. Deyo*, 2 Wend. 285.

7. Where proceedings in a cause are set aside on payment of costs, the party is not bound to pay the costs, unless a taxed bill is presented. *Southerland vs. Sheffield*, 2 Wend. 293.

8. A plaintiff who sues the maker of a note and a guarantor of the same is entitled to full costs in each suit. *Meech vs. Churchill*, 2 Wend. 630.

9. Costs of motion will not be allowed, though the party prevails, where the affidavits on which the motion is founded are loaded with irrelevant matter. *Pitcher vs. Clark*, 2 Wend. 631.

10. Where the pleading is at common law, in actions other than replevin, and issues are found for both parties, the party prevailing upon the whole record recovers his costs, without any deduction for the issues found against him. So, in cases of double pleading under the statute, where the defendant has pleaded several pleas, some of which have been found for him, but the plaintiff prevails on the whole record, the plaintiff recovers his full costs, unless the judge certifies that there was probable cause for pleading those pleas; in which case, the plaintiff does not recover the costs of the issues found against him, nor does the defendant recover costs for those issues. *Wright vs. Williams*, 2 Wend. 632.

11. Where a plaintiff pays costs to a defendant for not proceeding to trial at a circuit court pursuant to notice, he cannot afterwards charge the defendant with the plaintiff's costs of that circuit, though he subsequently obtains a verdict. *Linacre vs. Lush*, 3 Wend. 305.

12. Where money is paid into court after issue joined, and the plaintiff proceeds in the suit, but fails to establish his demand beyond the amount paid in, the defendant is entitled to the costs of the defence incurred subsequent to the payment of the money into court, but not to the costs previously accrued. *Aikins vs. Colton*, 3 Wend. 326.

13. In an action of *false imprisonment* against four defendants, where one of them is, on the trial of the cause, acquitted by verdict, he is entitled to recover costs against the plaintiff, although he

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* Sewall v. Lancaster Bank, 17 S. & Rawle 285. It had been before settled in Pennsylvania, that the word 'Indebted' extended to notes given to the bank which had not fallen due. Rogers v. Huntingdon Bank, 2 S. and Rawle 77. Grunt v. Mechanic's Bank, 15 Ib. 140.

† Howe v. Starkweather, 17 Mass. Rep. 240. The same general act respecting the sale, &c, of shares in corporations provides also for the sale, &c, of an equity of redemption. And it has been held, that an officer who had sold an equity of redemption on execution was bound to pay over the surplus money arising from the sale, to another officer having an execution against the same debtor. Denny v. Hamilton, 16 Mass. Rep. 402.

joined in pleading with one of the other defendants against whom a verdict is rendered. *Griswold vs. Sedgwick*, 3 Wend. 326.

14. So judgment having been rendered on demurrer in favor of the defendant who was acquitted at the trial of another against whom a verdict was found on the plea of not guilty, the plea put in by them going to the whole declaration having been adjudged good, it was held that such two defendants were entitled to their full costs of the trial as well as of the demurrer; a single bill of costs, however, being allowed to both such defendants. *Ib.*

15. In an action of *slander or title* the plaintiff is entitled to full costs, though the recovery be less than $50. *Goodrich vs. Stewart*, 3 Wend. 439.

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COVENANT.

1. In an action of covenant for rent by the landord, the defendant cannot *set off* damages that ıe may be entitled to recover against the landlord ›n covenants contained in the same indenture ›n which the action is brought. *Tuttle vs. Tompkins*, 2 Wend. 407.

2. The execution of a lease, and the possession of the defendant, is evidence sufficient *prima facie* to charge a defendant in an action of covenant as *assignee* for the non-payment of rent; but the defendant is at liberty to prove that he is *not assignee*, as by showing that the estate created by the lease declared on ceased before his entry. *Williams vs. Woodard*, 2 Wend. 487.

3. In an action of covenant, seeking to charge the defendant as *assignee*, with the payment of rent, evidence of the death of the lessee, who had only a life estate, previous to the entry of the defendant, is admissible under a plea denying that the defendant held by assignment. *Ib.*

4. Where a covenant is contained in a lease, that on the payment of a specified sum of money, the lessor will convey an estate in fee simple to the lessee, and there is no obligation on the lessee to pay, payment of the money will not be presumed; it must be shown directly and affirmatively, and then the party must seek his remedy in chancery, not being entitled to set up such fact in bar of an action for rent. *Ib.*

5. A transfer of an estate, to which a privilege granted by lease is *appurtenant*, is sufficient evidence to charge a person acquiring the principal estate with rent as *assignee* of the interest conveyed by the lease. *Provost vs. Calder*, 2 Wend. 517.

6. In an action of covenant against the *assignee* of a term, though an eviction of three eighths of the estate has taken place, the defendant is not entitled to ask for an apportionment of rent, under a general plea denying his holding as assignee. *Lansing vs. Van Alstyne*, 2 Wend. 561.

7. To entitle a defendant in such case to ask for an apportionment on account of an eviction of part, he must plead the facts specially, and not in bar of the whole action. *Ib.*

8. On an issue tendered by a defendant denying his holding as assignee, the plaintiff holds the affirmative, and must prove the averment in his declaration that the premises came to the defendant by assignment. *Ib.*

9. Covenants are *independent* where there is a covenant to convey by a day certain on the one part, and such day precedes the time of payment, the consideration of the act to be performed stipulated in the covenant on the other side; and in such case in an action by the party covenanting, it is not necessary to aver performance on his part. *Goodwin vs. Holbrook*, 4 Wend. 377.

10. Where, in a contract for the payment of a sum of money in *salt*, the party contracting to make the payment agreed to pack the salt in barrels in the usual way of packing salt, and the contract specified that the barrels were to be furnished and delivered at the place of manufacture by the party to whom the payment was to be made: it was *held*, that to entitle a party to sustain his action for the non-delivery of the salt, he was bound to aver that he had *furnished* the barrels, or had *waived* the performance of that part of the contract by which the manufacturer was bound to pack the salt in barrels. *Ib.*

11. If an *estate for years* be granted by an indenture of lease, the words, 'grant and demise,' import covenants of warranty and for quiet enjoyment, and such covenants may be stated in the declaration, although not contained in the lease in express terms. *Barney vs. Keith*, 4 Wend. 502.

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DEBT.

Where, in an action of debt, two several sums are demanded as due and owing in two separate counts, *e. g.* $600 each, the declaration should in the commencement demand the aggregate amount, the first count should demand $600, parcel, &c, and the second count should be for $100, the residue, &c. *The People vs. Van Eps*, 4 Wend. 387.

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DECLARATION.

1. In an action for not conveying a lot of land, which the covenantor had agreed to convey, when and as soon as the covenantee paid a certain note, offer of payment and a demand of a deed must be averred. Ignorance of the covenantee of the residence of the covenantor, previous to a conveyance of the lot to another, is no excuse for not making such tender and demand. *Sage vs. Ranney*, 2 Wend. 542.

2. In declaring on a note as the indorsee of a *firm*, it is not necessary to set forth the names of the members of the firm. *Cochran vs. Scott*, 3 Wend. 229.

3. A declaration is bad for *misjoinder* of counts, where, in an action of assumpsit against an administrator, a count of *insimul computassent* with the defendant, as administrator, of and concerning moneys *from the defendant as administrator*, to the plaintiff, before that time due and owing, is joined to counts on promises made by the intestate. *Reynolds vs. Reynolds*, 3 Wend. 244.

4. Had the accounting been stated to have been with the defendant, as administrator of and concerning money due and owing to the plaintiff, *by the intestate in his life time*, there would have been no mis-joinder. *Ib.*

5. In declaring in *assumpsit* for the breach of a contract, it is not necessary to set forth the payment of a part of the consideration, admitted by the contract to have been received. *Dox vs. Dey*, 3 Wend. 356.

6. Nor where the contract is to deliver *on demand*, is it necessary to allege the precise day of the demand; the day not being *material*. *Ib.*

7. A contract in the alternative, to transport *fifteen or twenty* tons of marble from one place to another, must be stated, in the declaration according to the terms of it. If stated as an absolute contract for the transportation of *twenty* tons, and not fifteen *or* twenty tons, the variance will be fatal. *Stone vs. Knowlton*, 3 Wend. 374.

8. So, to allege a consideration for the promise in *addition* to the true considerations moving thereto, not supported by the proof, will be cause of nonsuit. *Ib.*

9. Where a party bound himself to pay a sum certain as the consideration of lands to be conveyed to him, by discharging two mortgages, incumbrances upon the land, and paying the balance to the vendor, it was *held*, that a breach was ill assigned which alleged generally the non-payment of the mortgages and of the balance to the vendor, without averring the mortgages to be due, or that the vendee had the right to pay them, or that the vendor had sustained injury by the non-payment, there being nothing on the face of the declaration by which it could be ascertained that there was a balance beyond the mortgages. *Thomas vs. Van Ness*, 4 Wend. 549.

10. It is not always sufficient to aver *performance* in the *words* of the contract; the *intent* of the contract must be shown to have been performed, and where the words do not clearly and unequivocally express, in terms, that which in judgment of law they import, their legal import constitutes the contract that must be averred to have been done. *Ib.*

11. Where it is necessary on the part of the plaintiff to aver performance, it must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled. *Ib.*

12. Where a breach gives no *data* to regulate the assessment of damages, it is not well assigned, though it negative the words of the condition of a bond. *The People vs. Russell*, 4 Wend. 570.

13. A defendant cannot, however, avail himself of such defective breach, under a demurrer *to his plea*, if there be another breach in the declaration well assigned. *Ib.*

14. Where, in a declaration against a sheriff for money collected on an execution, it is stated that the direction was to levy a certain sum, without specifying interest, and by the execution it appears that he was directed to levy the amount *with interest*, the variance is not material. *Crane vs. Dygert*, 4 Wend. 675.

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DEED.

1. Any person affected by a deed, may at any time question its validity, and show that it was not in fact duly executed or delivered, although it has been proved in the usual form by a subscribing witness, and recorded. *Jackson vs. Perkins*, 2 Wend. 308.

2. The delivery of a deed is usually proved by the fact of the grantee having the deed in his possession, or by other circumstances tending to the same conclusion. *Ib.*

3. Proof of the due execution of a deed, and of its having been recorded, is perhaps *prima facie* evidence of its delivery; but a grantee is not concluded by such proof, and is a competent witness to prove that the deed never was delivered to him. *Ib.*

4. A certificate of the proof of a deed that the witness '*testified that he saw the within grantor sign the same*,' without adding that the witness stated that he knew the person who executed the deed,

is not sufficient to entitle the deed to be read in evidence. *Jackson vs. Osborn*, 2 Wend. 555.

5. Where an erasure or interlineation appears in a material part of a deed, of which no notice is taken at the time of the execution, it is a suspicious circumstance which requires some explanation on the part of the party producing it, and it is the province of the jury to determine whether or not the explanation given is satisfactory. *Ib.*

6. Where a deed of a tract of land to three grantees recites a will devising the same land to one of the grantees during widowhood, and the remainder in fee to the others; declares its object to be to carry into effect the intention of the testator; and then grants the premises to the three persons in fee, '*Habendum* to them, their heirs and assigns, in the manner mentioned in the said will,' the *habendum* is not inconsistent with and will control the premises. *Bird vs. Ireland*, 3 Wend. 99.

7. Although the testator, at the time of the making of the will, had no legal estate in the premises, the grantees in the deed, and those claiming under them, are *estopped* from setting up any title inconsistent with that conveyed thereby. *Ib.*

8. Where a mother conveyed a house and lot to two sons in fee, and took back an instrument in writing of the same date, executed by one of the grantees under seal, declaring the intention of the parties to be, that the grantor should hold and enjoy the property, and receive the rents and profits thereof during her natural life, and covenanting to abide by such agreement, it was *held*, that the deed and the instrument were parts of the same contract, and that the grantor had an estate *for life* in the premises. *Watson vs. McKenny*, 3 Wend. 233.

9. The deed, being founded on a pecuniary consideration, might take effect *in futuro;* and the defeasance being a part of the deed, and not a distinct instrument, the deed was valid and effectual as a covenant to stand seised to uses. *Ib.*

10. The instrument also might operate by way of exception or reservation in favor of the grantor. *Ib.*

11. Where a party owns land adjoining one side of a stream, and also owns the bed of the stream, and conveys to another owning land adjoining the stream on the other side thereof, the land under water to the middle of the stream, *reserving* to himself the right to butt a dam on both sides or shores of the stream as he shall think necessary, the parties are entitled to an equal participation in the use of the water, notwithstanding the reservation. *Case vs. Haight*, 3 Wend. 632.

12. The *reservation* in such case has not the effect of an *exception*, it being indispensable to a good exception, that the thing excepted should be part of the *thing granted*, and not of any other thing; the reservation, however, is operative as an *implied covenant* or by way of *estoppel*, securing the right provided for in the reservation. *Ib.*

13. A title subsequently acquired by a person who has *quit-claimed* his interest in lands, in which, at the time of the quit-claim, he had no title, does not enure to the benefit of the grantee. *Jackson vs. Peek*, 4 Wend. 300.

14. A *bona fide* purchaser from a fraudulent grantee, or a grantee with notice, is, under certain circumstances, protected; but a purchaser under a power purchases at his peril: if there be no subsisting power or authority to sell, no title is acquired. *Jackson vs. Anderson*, 4 Wend. 474.

15. Whether a sheriff's deed of lands is void on account of adverse possession at the time of the sale? *Quære.* *Ib.*

16. The return to the grantor or destruction of a deed of lands will not revest the grantor with the title; a title to lands can be transferred only by deed. *Ib*

17. A variance in the description of premises sold, between the certificate of sale and the sheriff's deed, does not affect the title. *Jackson vs. Page*, 4 Wend. 585.

18. The omission to record a deed, does not prejudice the right of the grantee or those claiming under him as against a subsequent grantee with notice. *Ib.*

19. A deed from residuary legatees to an executor to whom an estate was devised, with power to sell, though regarded with jealousy in a court of equity, will be enforced at law. *Jackson vs. Potter*, 4 Wend. 172.

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### DEMAND.

1. In an action on a bank note payable on demand *generally*, and not at a particular place, a demand of payment is not necessary before the commencement of a suit. *Haxtun vs. Bishop*, 3 Wend. 13.

2. Nor is a demand necessary on a note payable on demand at a *particular place;* but if, in such case, the defendant shows that he was *ready* at the place to make payment, and brings the money into court, he discharges himself from interest and costs. *Ib.*

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### DEMURRER.

A demurrer to a declaration containing several counts will not be sustained if either count be good. *Cochran vs. Scott*, 3 Wend. 229.

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### DEVISE.

1. *It seems*, that under the New York statute of wills, a devise would be good, notwithstanding an actual disseizin; the power being given to dispose, by will, of any property, right, or interest, in real estate, whether the same is a vested freehold in possession of the testator, or a mere descended hereditament or interest therein, in respect to which the testator had only a right of entry, or a mere right of action. *Varick vs. Jackson*, 2 Wend. 166.

2. A mere adverse possession does not affect the validity of a devise. The common opinion has been, that such was the effect of a technical or *actual disseizin*, although the doctrine upon which that opinion was founded is now doubted in the English courts. *Varick vs. Jackson*, 2 Wend. 166.

3. The statute against champerty does not apply to devises, nor to judicial sales or assignments under the insolvent acts. *Ib.*

4. Where, in a grant of a tract of land, the grantor reserves to himself and his heirs the sole and exclusive right of a stream of water running through the same, and prohibits the grantee from erecting any hydraulic works on the stream, reserving the right to himself, and such grantor subsequently demises the privilege of erecting a dam and using the water to a lessee, reserving an annual rent, and afterwards makes his will and devises *all the privilege retained of the water of the stream*, such devise is good, and will pass the rent, the whole estate of the devisor in the premises being given by the will. *Provost vs. Calder*, 2 Wend. 517.

5. A *limitation over* contained in a devise in the following words, 'I give, devise, and bequeath unto my six sons, viz. F. &c, all my real and personal estate, share and share alike, whatsoever and wheresoever, to hold them, their heirs and assigns, and if any of the above six should happen to die without heirs, then his or their share shall fall to the survivors of the above named sons, share and share alike,' is good and effectual, by way of executory devise to vest in the surviving brothers the share of one of the devisees on his dying without issue. *Jackson vs. Christman*, 4 Wend. 277.

6. Where real estate is *devised* to executors, with power to sell the same and distribute the proceeds, if the executors die without conveying, the estate descends to the heirs at law, and a conveyance from them is good to pass the estate. *Jackson vs. Potter*, 4 Wend. 672.

7. If a conveyance from the executors is not shown, the presumption, is that they never did convey. *Ib.*

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### DISCONTINUANCE.

Where the defendants were *minors* and obtained merchandise on credit, and when sued, interposed the plea of *infancy*, the plaintiffs were permitted to discontinue without costs. *Van Buren vs. Fort*, 4 Wend. 209.

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### DISSEIZIN.

1. There can be no disseizin in fact, except by the wrongful entry of a person claiming the freehold, and an *actual* ouster or expulsion of the true owner, or by some act tantamount thereto; such as a common law conveyance, with livery of seizin, by a person actually seized of an estate of freehold in the premises, or some one, lawfully in possession, representing the freeholder, or by a common recovery, in which there is a judgment for the freehold, and an actual delivery of seizin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record. *Varick vs. Jackson*, 2 Wend. 166.

2. The holding over of a tenant for life, after the determination of his estate, though he claims the fee, is not a disseizin of the rightful owner. *Ib.*

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### DOWER.

1. A writ of dower *unde nihil habet* lies only against the tenant of the freehold. *Hurd vs. Grant*, 3 Wend. 340.

2. Where the demandant failed in showing that the defendant was *such* tenant, and where it proved on the part of the defendant that *another* was tenant of the freehold, the court refused to set aside a non-suit. *Ib.*

3. Admeasurers of dower, in ascertaining the part to be assigned to the widow, are not authorized to make any deduction in consequence of any conveyance of land made by the husband to the wife during marriage. *Hyde vs. Hyde*, 4 Wend. 630.

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### EJECTMENT.

1. A defendant in an action of ejectment is entitled to avail himself of an outstanding title, against the lessors of the plaintiff, although he is

in possession without color or claim of title; his possession is good against all the world except the legal owner, and by showing the title in another, he destroys the plaintiff's right to recover. By Oliver, *senator*. *Schauber vs. Jackson*, 2 Wend. 14.

2. A defendant cannot controvert a plaintiff's title by showing a title in some third person, where he entered by the permission of the plaintiff, or as an intruder upon the possession of the plaintiff, without such permission, and without claim of title, or where the plaintiff claims under a judgment and execution against the defendant. In these cases he is estopped from setting up an outstanding title. By Stebbins, *senator*. *Ib.*

3. Where a person intrudes, without claim of right, upon the *actual* possession of another, there is reason in compelling him to restore the possession before he be permitted to show title in a third person. But the reason does not apply in a case of that constructive possession which the law implies as following title; and a defendant entering, declaring that he takes the lands as a mere possessor, acknowledging his ignorance of the owner, and expressing a desire to discover him, for the purpose of purchasing, is not precluded from showing the title out of the lessors of the plaintiff, notwithstanding he may be unable to trace it to himself. By Stebbins, *senator*. *Ib.*

4. Where a grantee, under a conveyance from a tenant by the courtesy of a house and lot, goes into possession of the lot and of an alley adjoining the same, which had been used for thirty years by the owners of the lot as appurtenant thereto, continues in possession of himself nine years and then acquires title to the alley from a third person, he cannot set up such title as *adverse* in an action of ejectment brought by the heir to recover the premises as the inheritance of his mother, the action being brought within twenty years after the termination of the life estate. *Jackson vs. Mancius*, 2 Wend. 357.

5. A release by one of two lessors of the plaintiff is no bar to a recovery in an action of ejectment, such release affecting only the quantum of interest. A release by a sole lessor is a bar here, though held otherwise in England. *Jackson vs. McClaskey*, 2 Wend. 541.

6. In ejectment, where the grantor of a small lot of land remained in the possession of the premises conveyed for twentyseven years, and no entry or act of ownership on the part of the grantee was shown, it was *held* that such possession was not adverse; that nothing but a clear unequivocal and notorious disclaimer of the title of the grantee could render the possession, however long continued, adverse. It was further *held* that the defendant was not entitled to notice to quit; that the relation of landlord and tenant did not subsist between the grantor and those claiming under the grantee, the more especially as the nature and situation of the property repelled the presumption of a hiring of the premises by the grantor. *Jackson vs. Burton*, 2 Wend. 341.

7. A conveyance in fee having been shown from the original proprietor of a tract of land, the grantees will be presumed to have entered into possession; and whoever is in possession will be presumed to hold for them, and in subordination to their title, until the contrary appears. So ruled, in a case where the claim to recover was made under a conveyance executed fiftyfive years before suit brought. *Doe vs. Butler*, 3 Wend. 149.

8. A demise in a declaration of ejectment laid from a man who was dead at the commencement of the suit, may be objected to at the trial, and is cause of non-suit. A lessor must be capable of making a demise, not only at the time alleged in the declaration, but also when the suit is commenced. *Ib.*

9. Where a *joint* demise is laid in the names of several lessors, it must be proved as laid; and unless it be shown that the lessors had such an interest as would enable them to join in a demise, the plaintiff will be nonsuited. *Ib.*

10. Where a person entered into the possession of land belonging to his father-in-law, who promised to give the land to him and his wife, and subsequently by will devised the same to the wife, it was *held*, in an action of ejectment brought by the heirs of the wife, that a possession of thirtysix years' continuance under a conveyance from the husband was not adverse, that a conveyance to the husband from the ancestor could not be presumed. *Jackson vs. French*, 3 Wend. 337.

11. Where a jury would not be warranted by the evidence in an action under the statute for waste, to find a verdict for the plaintiff, a judge is not authorised, in an action of ejectment founded on an alleged forfeiture for waste, to instruct a jury that the acts complained of simply because done without the permission of the landlord, work a forfeiture of the tenant's right: he should submit the question to the jury to determine whether the acts done were in fact prejudicial to the plaintiff's interest. *Jackson vs. Tibbits*, 3 Wend. 341.

12. *It seems*, that if waste be committed in a dwelling house, part of the property demised, only such parts of the dwelling house are forfeited as the waste is committed in. *Ib.*

13. A rule to appear and plead in ejectment will be ordered where the service of the declaration is on the wife of the defendant on the premises. *Jackson vs. Salisbury*, 3 Wend. 430.

14. A tenant for one year holding over, is a tenant from year to year, and entitled to notice to quit before an ejectment can be brought against him. *Jackson vs. Salmon*, 4 Wend. 327.

15. A person coming in under such tenant, stands in the same relation to the landlord, and is also entitled to notice to quit. *Ib.*

16. An equitable lien or mortgage cannot be set up at law as a legal estate to defeat a recovery in an action of ejectment. *Jackson vs. Parkhurst*, 4 Wend. 369.

17. *Notice to quit* is not necessary *from* a purchaser at a sale, by virtue of a surrogate's order for the payment of debts, *to* a person in possession under a conveyance from the *heirs* of the testator or intestate. *Jackson vs. Robinson*, 4 Wend. 436.

18. An offer to purchase land by a party having the title, does not impair or affect his right; such offer, however, by a party, bars the defence of adverse possession. *Jackson vs. Britton*, 4 Wend. 507.

19. *Aliens* authorized by statute to *hold* lands, but inhibited from leasing or demising the same, are not precluded from making a demise for the purpose of bringing an ejectment. *Ib.*

20. A plaintiff in ejectment is entitled to recover upon the *parol acknowledgment* of the tenant that the plaintiff is the owner of the premises; the tenant having no title himself. *Jackson vs. Denison*, 4 Wend. 558.

ERROR.

1. Where a judgment is pronounced in the Supreme Court on pleadings brought up from an inferior court, and the party against whom the judgment is, asks and obtains leave to amend his pleadings, which he accordingly does, and issue is joined, and a trial had on such amended pleadings, the party amending is estopped from afterwards alleging error in the judgment pronounced on the original pleadings. *Campbell vs. Stakes*, 2 Wend. 137.

2. Error cannot be alleged in the Court for the Correction of Errors, for that in a cause where there were two issues joined, the jury had passed upon only one of them, if it appears that the question has not been brought before the Supreme Court, on a motion in arrest of judgment, or otherwise. *Ib.*

3. The Court for the Correction of Errors is strictly an appellate court for the re-examination and correction of erroneous decisions *actually* made by other tribunals, upon questions *distinctly presented* to the court below, and none other will be considered. *Ib.*

4. There are also cases which have been passed upon by the court below, which will *not* be revived by the Court of Errors but in the exercise of a discretion; as where the court of Errors is asked to reverse or modify the decision upon some new point not raised in the court below. It would seem that a decree of the chancellor will not be reversed for the purpose of giving the appellant a remedy which he did not ask for in the Court of Chancery; but a judgment of a court of law will not be sustained merely because the plaintiff in error has neglected to urge every valid objection which might have been insisted on by way of argument in the court below. *Ib.*

5. Where, in a record of a judgment of the Supreme Court of New York, reversing a judgment of the Common Pleas, restitution was awarded upon a *bare suggestion* that the prevailing party in the court below had obtained satisfaction of the judgment pronounced in his favor, whereby the losing party had lost a certain sum, the Court of Errors refused to consider the point, as the question had not been submitted to or passed upon by the Supreme Court. *Safford vs. Stevens*, 2 Wend. 158.

6. The practice of applying to the Supreme Court on affidavit for leave to make a suggestion on the record in such case, to lay the foundation of a judgment for restitution, approved. *Ib.*

7. It is error in a court of common pleas to refuse to decide questions of law pertinent to a case on trial, upon which a decision is asked by one of the parties. *Van Hoesen vs. Van Alstyne*, 3 Wend. 75.

8. Where a court of common pleas refuses to exercise a discretion vested in them by law, under the impression that they possess not the power which they are called upon to exercise, and in consequence a judgment is erroneously obtained, such judgment will be reversed for error. *Beach vs. Chamberlain*, 3 Wend. 366.

9. Where a party to a writ of error dies after joinder in error, a judgment in error will be directed to be entered *nunc pro tunc* as of a time previous to the death. *Bemus vs. Beekman*, 3 Wend. 667.

10. On reversal in the Court for the Correction of Errors of a judgment of the Supreme Court of New York, rendered on a judgment removed into

that Court from the common pleas, such judgment is given as ought to have been given in the Supreme Court. *Close vs. Stuart*, 4 Wend. 95.

11. An *appeal* from an order of the chancellor refusing a *re-hearing of a motion* for instructions to a master as to the examination of a witness, will not be entertained. *Williamson, Appellant*, 4 Wend. 170.

12. An *appeal* does not lie from an order of the chancellor directing the sale of property, the subject of contest between the parties litigant, and ordering the money to be brought into court to abide the final order to be made upon the rights of the parties; such order relating only to the preservation of the property, and not affecting the merits of the cause. *Chapman, Appellant*, 4 Wend. 173.

13. Where there was a *defective verdict* in a case; where the damages found by the jury *exceeded the damages* claimed in the declaration: where the judgment was entered for *only the damages* and costs in an action of *debt*; and where the judgment was *general* instead of *special*, exempting the body of the defendant from imprisonment after a confession of a plea of an insolvent discharge, *the Court for the Correction of Errors* dismissed a writ of error with costs, on the ground that the party might have obtained relief in the court below had he there sought it. *Houghton vs. Starr*, 4 Wend. 175.

14. It was shown in this case, after the entry of the judgment, and before the suing out of the writ of error, that the defendant below applied to the Supreme Court to *set aside* the proceedings of the plaintiff for *irregularity*; but it was not shown that he had asked for a correction of the specific errors relied on for a reversal of the judgment. *Ib.*

15. A cause will not be heard on writ of error, unless the bill of exceptions, if there be one, is entered *on the record*. *Anon.* 4 Wend. 193.

16. A writ of error *coram vobis* will be quashed, where the names of the parties in the judgment sought to be reversed are not truly stated. *Brown vs. Davenport*, 4 Wend. 205.

17. Where there is error in a record of an inferior court, which the party obtains leave to cure by an order or rule of such court, but neglects to *amend* his record conformably to such rule, the judgment will be *reversed*, notwithstanding the rule. *Waldron vs. Green*, 4 Wend. 409.

18. A judgment will not be reversed for a *technical* error in entering it. *Wilson vs. Gale*, 4 Wend. 623.

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ESCAPE.

1. A *bond for the limits*, given by a defendant who had been charged in execution, and to whom the plaintiff had previously given permission to go at large, beyond the jail liberties, does not *revive* the judgment, so that an action can be maintained against the sheriff for an escape. *Poucher vs. Holley*, 3 Wend. 184.

2. Although it was not the intention of the plaintiff to discharge the debt, a voluntary discharge by a creditor of his debtor from the limits, discharges the judgment and the debt. *Ib.*

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EVIDENCE.

1. In an action by the assignee of an insolvent debtor, in which the plaintiff declares *as assignee* for a cause of action existing prior to the assignment, the plaintiff must prove, on the trial, the character in which he sues, although no other plea than the general issue is interposed. *Best vs. Strong*. 2 Wend. 319.

2. The *memoranda* of a deceased *notary* of the demand and notice of non-payment of a promissory note, are *prima facie* evidence of the fact. *Butler vs. Wright*, 2 Wend. 369.

3. Where the payment of money is a condition precedent to the performance of a covenant to convey land a *waiver* of the condition cannot be given in evidence in support of a declaration for breach of the covenant averring performance. *Baldwin vs. Munn*, 2 Wend. 399.

4. The *written* laws of foreign states must be proved by an *exemplification*, and cannot be proved by the printed statute books of such state. *Packard vs. Hill*, 2 Wend. 411.

5. Where an indorsement in part satisfaction of a judgment is made on an execution, being the proceeds of property sold, which sale is subsequently set aside, the plaintiff in the execution may show the facts of the case, *notwithstanding the return of the officer*, and the indorsement will be held a nullity. *Dubois vs. Dubois*, 2 Wend. 416.

6. Evidence of usury is admissible under the general issue in assumpsit. *Fulton Bank vs. Stafford*, 2 Wend. 483.

7. After a lapse of *ten years*, a written memorandum, made at the time of transaction, respecting notice of protest of a note, may be read in evidence, as a link in the chain of testimony. *Hart vs. Wilson*, 2 Wend. 513.

8. Evidence varying the terms of a written submission, is inadmissible. So also evidence of *mistakes* in an award by arbitrators, cannot be shown in a court of law. *Efner vs. Shaw*, 2 Wend. 567.

9. An intrument *under seal*, to which is affixed the name of a subscribing witness, can be proved only by such witness, unless it appear that his attendance cannot be procured. *Henry vs. Bishop*, 2 Wend. 575.

10. A person present at the execution of the instrument, who not then, but subsequently affixes his name as a witness, is not a subscribing witness within the reason of the rule and his testimony cannot be received, it appearing there were witnesses who did subscribe their names at the time of the execution. *Ib.*

11. An award of the *Onondaga commissioners*, respecting lands situate in that county at the time of the award, may be *exemplified* by the clerk of that county, although subsequently included in the county of Cayuga. *Jackson vs. Tibbits*, 2 Wend. 592.

12. A record, verdict, or judgment, is not *conclusive* when offered as *evidence* to prove an issue of fact, and not brought forward by plea as an *estoppel*. The jury in such case may find against the facts so proved, if the other evidence in the case will warrant their so doing. *Jackson vs. Wood*, 3 Wend. 27.

13. To make a record evidence to conclude any matter, it should appear from the record itself that that matter was in issue; and evidence cannot be admitted that under such a record any particular matter came in question. *Ib.*

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The following specimen of cross-examination, by a celebrated Old Bailey lawyer, may amuse our readers. The case was one of no particular interest:—*Jour. of Law.*

Mr C. PHILLIPS—You say, Mr Clifford, that you are a conveyancer and surveyor?—Yes, I do, Sir.

Pray, now, Mr Conveyancer and Surveyor, will you, upon your oath, tell me the number of jails you have been in during the course of your life?—(Hesitating)—I don't wish to answer that question.

Come, Sir, it is a very plain question, answer it.—(Hesitating)—No, I shall not; I didn't come here to talk about myself—(a laugh.)

Well, perhaps you'll tell us how long you spent over the way; I mean in Newgate?—I am not bound to answer that question.

Mr C. PHILLIPS—Oh! but I say you are; for it is the only means the jury can have of knowing whether you are a person worthy of credit on your oath.

Mr Baron GARROW observed that it had, unhappily sometimes occurred that persons found themselves the inmates of a prison rather in consequence of the crimes of others than any fault of their own. This might be the case with the witness, and, if so, he need not object to answer the question put to him.

Clifford—I don't wish to answer questions like this, my Lord.

Mr Baron GARROW—You are not obliged to do so, if you do not choose.

Mr C. PHILLIPS—My Lord, I will shape my question in a different manner. Now, Mr Conveyancer, on your oath, were you ever in Newgate for debt?

Clifford—Am I to answer, my Lord?

Mr Baron GARROW—Certainly; the question is a proper one.

Clifford—I never was in Newgate for debt.

Mr C. PHILLIPS—Now, having said you were not there for debt, I would ask you if you were ever there at all?—I will not answer you unless pressed to do so by the learned Judge.

Mr Baron GARROW observed that a person might have been tried for a crime, and acquitted in consequence of his innocence being manifest to the jury. That would, however, be a case of misfortune and not of guilt, and he therefore could see no reason why a person so circumstanced should object for a moment to acknowledge the fact.

Clifford—My Lord, I submit that by law I am not bound to answer the question.

Mr Baron GARROW—No one can be asked to criminate himself, but you might tell whether you had ever been in Newgate without disclosing the cause that led you there.

Clifford—I would rather not answer at all, my Lord.

Mr Baron GARROW—Your hesitation will produce a more unfavorable impression than your admission, if the fact be as is suspected, possibly could.

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BARTLETTIANA.—Joe Bartlett, as he was familiarly called in the eastern part of New England, was a great wag in his day, and as well known in that quarter for his wit and humor as his facetious predecessor Joe Miller. When practising the law in the State of New Hampshire, Joe had a large dog, that constantly attended him in Court, to the no small annoyance of his brother lawyers. His canine student, one day interrupting the Court by his yelping, the Judge addressed Bartlett somewhat sarcastically, as follows.

'Well, Mr Bartlett, do you mean to bring that dog up to the *bar*?'

'No may it please your honor,' said Bartlett, with a profound bow, 'I intend him for the *bench*.'

THE JURISPRUDENT.

BOSTON, SATURDAY, MARCH 12, 1831.

## MATHEWS ON PRESUMPTIVE EVIDENCE.

Continued from page 255.

If the child be an infant, and the Parent continue his possession after the minority ceases; or if the child be an adult when the purchase is made, and the Father takes possession and acts as owner from the first, the legal presumption as to the Equitable interest may be varied. In some cases, such possession after minority has terminated, has been held to be evidence of a trust. In others, the contrary doctrine is maintained.

In the case of Murlus v. Franklin, (1 Swans. 17,) it is laid down generally by Lord Eldon, that possession, taken by a Father at the time of the purchase in his son's name, showed the Father's intention to purchase for his own use. This doctrine, however, Mr Mathews thinks questionable, and that the reasons assigned for it are not conclusive.

Presumptions in favor of an advancement where the purchase is made in the name of the child and parent are not now considered so strong as formerly. In 2 Atk. 477—480, Lord Hardwick said such purchases did not answer the purpose of advancements, ever in the case of an infant. Although the reasons assigned for such decision is not considered satisfactory, it is admitted that the conveniency is strongly in favor of holding purchases in the name of adult children to be trusts. The tendency of the contrary doctrine being to discourage parents from entrusting their sons.

The same rules on the subject of advancements apply generally to purchases in the name of a wife. When such purchases are determined to be advancements, the father or husband can make no disposition of the property to the destruction or in derogation of the child's or wife's right. He cannot devise, mortgage or sell. The better opinion seems to be that purchases in the names of a wife or child may be avoided by creditors. And this principle applies as well to trusts raised by presumption as by express declaration.

On the same principle, where partnership property has been applied by one of the partners to purchase an estate, the estate is considered as partnership property and will be liable to the joint debts.

But where such purchase is made when the father or husband is not in debt, the title of the child or wife will prevail.

Chap. V. is upon presumption of performance and presumed satisfaction of family provisions—in cases of Personal and Real Property.

Chap. VI. treats of the presumed satisfaction of Debts by Legacies or Portions.

The general rule is stated to be that a legacy to a creditor in amount equal to, or greater than, the debt, and equally beneficial in other respects, shall, if no contrary intention appear, be presumed to be given in satisfaction of the debt.

This doctrine has been questioned. And Courts are now much inclined to make exceptions in its application. Any difference in value or kind, or other circumstance which makes the legacy less beneficial than the demand, is held sufficient to take the case out of the rule. So if a different purpose can be collected from the will or the circumstances of the testator. The rule does not apply in cases where the debt arises upon negotiable paper of the Testator, as it cannot be known to whom the debt may be owing at his death.

Where the Legacy is less than the debt, this principle cannot apply, even pro tanto. (Owings v. Owings, 4 Har. & Gill. 491.) Nor in case of a balance on an unsettled account, due the legatee. No intention of the kind can be presumed on the part of the testator in such cases. And it is the the same in the case of debts created after the execution of the Will.

Parol evidence may be admitted to show the Testator's intention and support or contradict this legal implication.

Chapter VII. relates to the subject of presumed satisfaction of portions by legacies or second portions.

Courts are not inclined to favor double portions. The law does not presume that the Father intended to give more to one child than to the others. Thus when a parent after making a settlement, securing portions to his children, gives by will other sums, such legacies are considered, without opposing circumstances, as going in satisfaction in whole or in part. It is the same in case of second settlements similar to the first. And legacies or advancements thus made, go in part as well as whole satisfaction.

As a general rule, slight variations between the original portions and subsequent provisions furnish no decisive inference against a presumed satisfaction.

Where an intention appears that the provision shall be accumulative, such presumption does not exist. Nor does it where the second provision is made on a different consideration. Extrinsic evidence is here as in other cases admitted to rebut the presumptive satisfaction. Parol declarations by the parent may be given in proof.

Chap. VIII. *Presumed Ademption of Legacies, &c.*

Where a gift is made by a parent to a child by a legacy, it is taken as the amount of the provision intended to be made for the child. (Walton v. Walton, 7 Johns. ch. 258—Cogdalls Exr. v. his widow, 3 Dessaus, 368.)

When a parent or one in loco parentis, having made a pecuniary provision for a child by will, advances portions in marriage, or sums of money for preferment in business, such sums or portions, if equal or greater than the gift by will, are presumed to be an ademption of the legacy. This doctrine was opposed in 1 Bro. C. C. 426, 7—1 Ves. Jr, 109.

The circumstances of the Testator ratifying and confirming his will by a codicil, does not preclude such presumption of satisfaction. Such words amount simply to a new publication. Dissimilarity between the subjects of the legacy and advancement will prevent the application of the rule.

Where a consideration distinct from the duty of the parent forms the inducement to advancing a portion, such as the child's relinquishing an independent claim on the Father, it will not prejudice his claim to a previous legacy. Nor is it by a gift of money for a particular object—as to buy furniture, &c.

A *general* legacy, additional to another given in the same will *expressly* as a portion, will not be revoked by a future provision on marriage.

This prima facie ademption may be rebutted by the apparent intention of the Testator as drawn from a subsequent codicil.

Extrinsic evidence is admitted to repel this legal presumption, such as written documents, letters, memoranda in Books of account, or other private papers—or parol declarations. Such evidence may be introduced also to fortify the legal presumption.

Chap. IX. *Presumption in cases of double Legacies.*

There are two classes of cases of this kind. 1. Where both legacies are given by the same instrument. 2. Where they are given in different instruments. Whether in the same or different instruments a specific article, as a particular piece of furniture, the gift is of necessity construed single.

When double legacies or annuities of the same amount are given in the same will, the legatee is entitled to but one legacy or annuity.

But if the legacy be of an unequal amount though given in the same instrument, the presumption is in favor of their being accumulative.

Where the two legacies are not contained in the same instrument, but one is given by will, the other by codicil or by distinct codicils, the legatee is prima facie entitled to both, and it is of no importance whether the amount be the same or not. But where a meaning different is ascertained this presumption must yield to it. So if any additional or different motive exists as an inducement to the last legacy.

Where a testator bequeaths to a legatee a certain legaey and after makes a codicil, and recites the fact of his having before given such legacy, gives another of larger amount, in terms, which indicate an intention only to add so much to the former bequest as that is exceeded by the latter, the legatee is not entitled to both. A bequest to two Trustees for the benefit of an Infant will not be considered additional to an equivalent bequest to one trustee only for the same purpose; it not being regarded as probable that the party could intend to create two distinct trusts, under such circumstances.

Parol declarations of testator's intention to give only one legacy where the legal presumption opposes such construction, are not to be admitted. But when the legal inference is in favor of their being accumulative, declarations showing an intention to make double provision will be allowed.

A change of the circumstances of the Testator is admissible to show the intention as to the bequest. ( A general bequest of a sum of money to a creditor equal to or exceeding the debt due, though it stand in an unliquidated account is a satisfaction, if it appear either from the will, or by evidence *aliunde*, to be so intended. Parol evidence to show the intent was held not to be objectionable, as going to vary or contradict the will; but to be consistent with it. Williams v. Crary, 8 Cowen 246.

To be continued.

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Lord Pitmilly, of the Court of Sessions, in Scotland, has retired from the bench; we have not yet heard to whom his Justiciary gown is to be given. The resignation or decease of another Judge will reduce the Court of Session to the number of Judges which the late Judicature Act has fixed it shall in future consist of.—*Caledonian Mercury.*

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CONUNDRUM.—A member of the bar, the other day, handed us the following Conundrum, which we publish for the amusement of the fraternity. Why is a man *possessed* of an estate of inheritance, like a rogue just nabbed by a constable? Because he is *actually seized, (seised.)*

GIRL'S OWN BOOK.
This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

LIBRARY OF EDUCATION.
This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

WHITMAN'S LETTERS.
This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Jan. 1.

SIXTY MAPS of the various countries of the Globe, from the Epitome of Universal Geography. For sale at GRAY & BOWEN's, 141 Washington Street. Price 50 cents, bound. Jan. 1.

PARLEY'S ASIA.
This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—
Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED,
by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLII. for December, 1830.

CONTENTS.

Art. I. Classes of American Society.—1. A Lecture on the Working Men's Party, first delivered Oct. 6, before the Charlestown Lyceum, and published at their request. By Edw. Everett. 2. Mr Tuckerman's Second Semiannual Report of the Fourth Year of his Services as a Minister at Large in Boston.

II. The Jews.—The History of the Jews, from the Earliest Period to the Present time. By Rev. H. H. Milman.

III. Wheaton's Travels.—A Journal of a Residence during several months in London; including Excursions through various Parts of England; and a short Tour in France and Scotland, in the Years 1823 and 1824. By Nathaniel S. Wheaton, A. M.

IV. English Unitarian Methodists. An Account of the Rise and Progress of the Unitarian Doctrine, in the Societies at Rochdale, Newchurch in Rosendale, and other Places, formerly in Connexion with the late Rev. Joseph Cooke. In Ten Letters to a Friend. By John Ashworth.

V. Life of Mohammed.—The Life of Mohammed; Founder of the Religion of Islam, and of the Empire of the Saracens. By the Rev. George Bush, A. M.

VI. Anderson's Tour in Greece.—Observations upon the Peloponnesus and Greek Islands, made in 1829. By Rufus Anderson, one of the Secretaries of the American Board of Commissioners for Foreign Missions. Jan. 22.

JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXX. for January, 1831.

CONTENTS.

Art. I. Statuary—Del' arte di vedere nelle belle arte del desegno, secondo i Principii di Sulzer e di Mengs.

II. Bank of the United States—Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States.

III. Anatomy—Address to the Community on the Necessity of legalizing the Study of Anatomy. By order of the Massachusetts Medical Society.

IV. Clarence—A Tale of our own Times. By the Author of Redwood.

V. Hieroglyphics—Essay on the Hieroglyphic System of M. Champollion, Jr, and on the advantages which it offers to Sacred Criticism. By J. G. H. Greppo, Vicar General of Belley. Translated from the French, by Isaac Stuart, with Notes and Illustrations.

VI. American System—1. Report from the Committee on Commerce to whom was referred so much of the President's Message, as relates to the Commerce of the United States with Foreign Nations, &c. 2. A Review of Mr Cambreleng's Report from the Committee of Commerce. By Mephistopheles. 3. Exposition and Protest reported by the Special Committee of the House of Representatives on the Tariff. 4. Mr McDuffie's Speech in the House of Representatives on the Bill reported by the Committee on Manufactures for the more faithful Collection of the Revenue.

VII. Grahame's History of the United States—The History of the Rise and Progress of the United States of N. America till the British Revolution in 1688. By James Grahame, Esq.

VIII. Memoirs of Madame De Genlis—Memoires Inedits de Madame la Comtesse de Genlis sur le dixhuitieme siecle et a Revolution Francoise, depuis 1756, jusqu' a nos jours.

IX. Phillips' Manual of Political Economy, with particular reference to the Institutions, Resources and Condition of the United States. By Willard Phillips.

X. History of the Jews—History of the Jews from the Earliest Period to the Present Time. By Rev. H. H. Milman. Jan. 22.

GRAY AND BOWEN,
have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

MALTE-BRUN SCHOOL GEOGRAPHY.—This day published by CARTER, HENDEE, & BABCOCK, The Malte-Brun School Geography, illustrated by numerous original engravings, and an Atlas of 19 Maps, Charts, and Tables. By S. Griswold Goodrich. Jan. 1.

HINTON'S UNITED STATES.
GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.
Nos. 13 and 14, North American Series.

These numbers contain articles on Motion of Fluids—Iron Brestramers—Caoutchouc—Liverpool and Manchester Railway—Weight and Pressure in Ships of War—Steam Canal Navigation—Improved Electrical Apparatus—Stephenson's Locomotive Engine—On Flying—Mariner's Life Grapple—Marine Steam Engine—Perpetual Motion, &c, &c; with very numerous engravings.
Subscriptions received as above. Feb. 19.

HARMONY OF THE GOSPELS.
This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVI.

CONTENTS.

Art. 1. Mill's Phenomena of Mind. 2. Tytler's and Scott's Histories of Scotland. 3. Memoirs, Correspondence, and Papers of Thomas Jefferson. 4. Niebuhr's Geography of Herodotus. 5. Galt's Southennan. 6. Floods in Morayshire. 7. Troades of Euripides. 8. The Belgian Insurrection, and De Potter's Trial. 9. Alexander's Travels. 10. London Bridge. 11. Hydrophobia. 12. Mr Brougham and Local Judicatories. 13. Novels and Travels in Turkey. 14. The Three Days of Paris. 15. Brasse's Sophocles. 16. Geometry without Axioms. 17. Revolution of 1830. List of Books, Index, &c. Jan. 22.

AMERICAN ALMANAC,
Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY.
This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett.

EVENTS IN PARIS,
during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS.
This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

THE JURISPRUDENT
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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, MARCH 19, 1831. NO. XXXIV.

## LORD MANSFIELD.

The name of Murray, which must be familiar to every one in the least acquainted with the history of Scotland, is generally admitted to be among the most ancient of that country. Tradition derives it from the Moravii, a warlike people of Germany, of whom a colony is said to have settled at a very early period in that part of the kingdom since known by the appellation of Murrayshire. But without going so far back for its origin, or resting its antiquity on equivocal testimony, it can be proved by authentic records, that Friskinus de Moravia, who is usually looked upon as the immediate founder of the family of Murray, was a wealthy and powerful noble of Scotland, so far back as the beginning of the twelfth century. By a royal charter, dated 1284, Sir William de Moravia, or Murray, one of the lineal representatives of Friskinus, was confirmed in the possession of the estates of Tullibardine, which he had obtained in consequence of a marriage with the daughter of Malise, seneschal of Strathern. In the reign of James VI. Sir John Murray, twelfth baron of Tullibardine, was raised to the peerage by letters patent dated April 25, 1604; and in little more than two years afterwards (July 10, 1606), was created Earl of Tullibardine. This title is now annexed to the dukedom of Athol. The peerage of Scotland also counts among its titles those of Dunmore, Stormont, and Elibank, all belonging to the name of Murray, and all deriving their origin from the same source.

Sir Andrew Murray of Argonsk, who was a younger son of Sir William Murray, eighth baron of Tullibardine, may be considered the founder of the Stormont branch of the family. By his second wife, Lady Janet Graham, daughter of the Earl of Montrose, he had three sons, of whom the second, David, during the reign of James VI. was successively appointed to the offices of master of the horse, captain of the guard, and comptroller of the royal revenue. Being in attendance on the king at the time when his life was threatened with imminent danger by Earl Gowrie's conspiracy, he had an opportunity of doing good service to his majesty, by contributing to provide for the safety of his person, and particularly by quelling the insurrection that broke out in the town of Perth, soon after the intelligence of Gowrie's death became public. The activity and zeal displayed by him on this occasion procured him a considerable share of the earl's possessions, which became forfeit to the crown in consequence of his treason. The king conferred on him the barony of Ruthven, and the abbacy of Scone, which last having a short time before been erected into a temporal lordship for the family of Gowrie, empowered the new possessor to assume the title of Lord Scone. The ancient abbey and the adjoining royal palace of Scone, from time immemorial the crowning place of the kings of Scotland, have been so entirely destroyed by the religious fanatics of the reformation, that the exact site on which they stood is now uncertain; though it is generally supposed that the present castle is built nearly on the same spot, a beautiful and romantic situation on the banks of the Tay, about a mile and a half to the north of Perth. This edifice was begun by Earl Gowrie and finished by his successor, Sir David Murray, whose memory is perpetuated there by a fine marble monument erected over his tomb in the adjoining church, representing him as large as life, in a kneeling posture, and in complete armor. By letters patent, dated August 16, 1621, he was created Viscount Stormont. The lineal succession to this title has since met with no interruption. The fifth viscount married the only daughter of David Scot of Scotstarvet, who was the heir male of the family of Buccleugh, and by her he had fourteen children. Of these the fourth, William, has given more lasting celebrity to the name of Murray than had been conferred on it by the valor and the wisdom of the many illustrious warriors and statesmen whose deeds had previously rendered it so honorably conspicuous in the annals of their country. His life will form the subject of the following pages.

The Honorable William Murray, at present better known by the title of Lord Mansfield, was born on the second of March, 1704, in the palace or castle of Scone. A mistake in the entry of his name in the books of Christ Church College, Oxford, for some time gave credit to the supposition that the town of Bath could claim the honor of giving him birth. But this can be contradicted on his own authority. The circumstance was one day mentioned to him by Sir William Blackstone; and he then accounted for the error by presuming either that the document transcribed into the college books must have been so illegibly written as to cause the word Perth to be mistaken for Bath, or that the broad Scotch pronunciation of the bearer, if he was referred to for an explanation of it, might have given rise to a similar confusion of the two names.

The country of his birth had no share in the cultivation of his genius; as he was removed to England when not more than three years of age, and there received the whole of his education. Some portion of his early youth was passed at the grammar school of Litchfield; and it is a remarkable fact, that at a later period, when he filled the station of chief justice of England, there were no less than seven judges on the bench, besides himself, who had been partly educated at the same seminary: namely, lord chancellor Nothington; Sir Thomas Clarke, master of the rolls; Willes, chief justice of the common pleas; chief baron Parker; Sir John Wilmot, then a puisne judge of the king's bench, and afterwards chief justice of the common pleas; Judge Noel; and Sir Richard Lloyd, a baron of the exchequer. The celebrity of the school was afterwards still further increased by the fame of Johnson and Garrick, who were both brought up there. Young Murray did not remain sufficiently long at Litchfield to obtain in it more than the rudiments of classical learning, being admitted a king's scholar at Westminster at the age of fourteen. Fortunately the school had never been in a more flourishing condition than at the period when he entered it. The number of the boys amounted to five hundred; and besides the advantage of having for their daily instructors two such eminent scholars as Doctors Friend and Nickoll, they were examined at elections by Bishop Atterbury, who attended in his capacity of dean of Westminster, Bishop Smalridge, as dean of Christ Church, and Bentley, as master of Trinity College, Cambridge. 'As iron sharpeneth iron,' says a distinguished schoolfellow of Murray, 'so these three, by their wit and learning and liberal conversation, whetted and sharpened one another.' The learned rivalry of such men could hardly fail to excite a corresponding emulation among the young scholars who were in the habit of witnessing it; and in the constant competition of talent to which this excitement must have given an additional stimulus, none shone more conspicuous than Murray. It is particularly recorded of him that his superiority was more manifest in the declamations, than in any of the other exercises prescribed by the regulations of the school; a fact not to be overlooked in the history of one who afterwards, as an orator, equalled if not excelled such competitors as it falls to the lot of few nations or ages to possess. His proficiency in classical attainments was almost equally great; insomuch that at the election in May, 1723, when he had been five years a member of the school, he stood first on the list of candidates for Oxford, where he accordingly entered as king's scholar in the following June.

During his residence at Christ Church, Murray did not disappoint the expectations which had been formed at Westminster with respect to his success in the university. Here he was of course less controlled than he had been at school in the direction of his studies; and the bent of his taste as well as of his ambition led him to devote a considerable portion of his time to that of oratory. As he spared no pains to attain excellence in his favorite pursuit, he not only took care to exercise himself frequently in composition (the surest method of forming a ready speaker,) but he was not deterred by the apparent drudgery of the task, from following a plan recommended by all the most eminent professors of the art, and one which gives those who adopt it the double advantage of familiarizing themselves at the same time with the practice of composition and the language of classical literature; namely, that of translating the masterpieces of ancient oratory, and then retranslating the version into the original tongue. He has often been heard to declare that while at Christ Church he put this method in practice with most of the orations of Cicero. These circumstances are important in a double point of view; both inasmuch as they are a proof of the assiduity and industry of the individual, and as they tend (so far at least as one very eminent instance can do so) to discredit the very common, but not the less very fallacious doctrine, according to which eloquence is considered as a natural gift, incapable of being cultivated or improved to any considerable extent by study and practice. This is a notion particularly likely to find favor with such as do not distinguish mere fluency of speech, or the capability of stringing words together with rapidity and facility (than which there scarcely exists a more mean and unenviable faculty, nor one more

frequently allied with very small talent,) from real eloquence, the noblest effort of human intellect.

That Murray, even at this early period, had reflected much and deeply on the principles of the art in which he was thus earnestly endeavoring to perfect himself, is sufficiently proved by the fragment of a Latin discourse written by him while at the university. It is a critical examination of the speech of Demosthenes for the crown; and is very evidently the work of one accustomed to calculate by what means a particular effect is most likely to be produced on the passions or the understandings of a mixed assembly of people. The artful mode in which the orator contrives in the outset to secure the favorable attention of his auditory, calls forth the admiration of the young critic; and he beautifully compares the insinuating eloquence of Demosthenes, insensibly assuaging the passions aroused by his rival's peroration, to a silent shower of dew gently falling on a parched herbage. 'Quis flexanimam Demosthenis potentiam digne explicaverit, quæ submisso placidoque principio in animos ominium, velut in accensos agros taciturno roris imbre leniter influentes, incendium quod reliquerit Æschines extinguit, populique furorem placat?' The rising energy of the speaker, and the effect produced by it on his hearers, is commented on with great judgment as well as beauty of language. But what he especially applauds, is the dexterity of Demosthenes in keeping himself as it were concealed, and exciting the feelings it is his object to awaken, without appearing to make any effort for that purpose. It is particular worthy of notice that the eloquence of Murray himself was afterwards chiefly remarkable for that consummate perfection of art which conceals all appearance of art, and excites no suspicion of design. He tells us of Demosthenes, 'Omnem artificii suspicionem tollit, et in narrationibus non advocati studium sed testis fidem, in argumentis non rei excusationem sed judicis auctoritatem habet.' This eulogium is equally applicable to himself, and is indeed in substance nothing but what has been said of him by a great master, that his statement of a case was alone worth an argument.

Though oratory was undoubtedly the favorite study of Murray, he was by no means inattentive to the other branches of learning cultivated in the university. The discourse just mentioned would be an ample proof, were there no others, of his classical scholarship, and especially of his complete mastery over the language in which it is written. He also distinguished himself, though in a less degree, by his attempts at poetry; and it is probably in allusion to his success in these two pursuits, as well as in the study of classical literature, that the portrait of him painted for Christ Church, by Martin, (1776) represents him with a volume of Cicero in his hand, and a bust of Homer placed on the table before him. A copy of Latin verses has been preserved, written by him after he had taken his bachelor's degree. They certainly do not exhibit any extraordinary degree of poetical merit; but they are at least equal to the common average of academic exercises, and show their author to have been familiar with the practice of Latin versification. The subject is the death of George the First; and the prize which had been proposed for the best composition on that occasion was awarded to Murray. Pitt, then a gentleman commoner of Trinity, was one of the disappointed competitors; and this was in all probability the first instance of the rivalry between these two celebrated men, who were afterwards for many years the leaders of two contending parties in a much more brilliant and more arduous species of strife.

In April, 1724, Murray had become a member of Lincoln's Inn, and in Michaelmas term, 1730, having previously graduated as Master of Arts (24th of June, 1730) and passed a short time on the continent, he was called to the bar. In what manner he had qualified himself for the duties of the profession he was now about to enter upon, we have but very imperfect means even of conjecturing. This is the more to be regretted, as a full account of his initiation into the science of which he afterwards became so able an expounder, would derive a peculiar interest from the circumstance of his having, unlike the majority, depended almost entirely on his own resources for instruction; since it is known that, although he no doubt readily availed himself of the occasional advice and assistance of such of his seniors as chance gave him access to, he never professedly became the pupil of any particular practitioner. During his noviciate, he was in the habit of attending a debating society, the discussions of which were exclusively confined to legal subjects; and his arguments were prepared with so much care as to be frequently serviceable to him in after-life, not only when at the bar, but when he presided in the court of king's bench. This is almost all that can be stated with positive certainty of his early studies. However, in the absence of information as to the course of reading he himself adopted which might possibly be thought to want in authority quite as much weight as it would have in point of example, we are fortunately supplied by his own hand with advice as to some part of the course his maturer experience recommended for others to follow. It is by no means improbable, that the very plan by which he himself had been guided in his reading was in substance and in all essential particulars, the same he afterwards proposed as the most eligible. If so, it comes to us doubly recommended.

The first preparation suggested for the study of the law is a general course of historical reading; and two letters of Murray's on the subject of foreign, and particularly French history, written at the request of the Duke of Portland, afford very good evidence that he himself abided so far by the directions he afterwards laid down. This necessary information being obtained, the legal student is recommended to gain a general insight into the science of ethics, which, as Murray justly observes, is the foundation of all law. From ethics the next step is to the law of nations, which he correctly describes as being partly founded on the law of nature, and partly positive. When this foundation is laid, it will be time, he says, to look into systems of positive law; and he mentions it as a thing of course that the Roman laws will be the first to claim attention. It will afterwards be necessary to obtain a general idea of the feudal system, for which purpose Craig *de Feudis* is proposed as 'an admirable book for matter and method.' 'Dip occasionally,' he concludes, 'into the *Corpus Juris Feudalis*, while you are reading Gianonne's history of Naples, one of the ablest and most instructive books that ever was written. These writers are not sufficient to give you a thorough knowledge of the subjects they treat of; but they will give you general notions, general leading principles, and lay the best foundation that can be laid for the study of any municipal law, such as the law of England, Scotland, France, &c.'

Some objections may perhaps be made to the details with which the outline of this comprehensive plan of study has been filled up. The list of authors recommended might no doubt be both amended and enlarged with advantage. As for instance, in the case of ethics, for which the only works mentioned are Xenophon's *Memorabilia*, Cicero *De Officiis*, and Wollaston's Religion of Nature, with Aristotle's Treatise, for occasional reference; and still further in that of civil law, which comprises merely Gravina and the Institutes of Justinian, with the short commentary of Vinnius; the Digest to be consulted only from time to time. But the substance of the plan itself appears to us unexceptionable. It may probably be urged that such a course of purely preparatory study would demand a space of time which might be more advantageously devoted to a direct and immediate pursuit of the object in view, namely a knowledge of the English law. But this objection is upon the whole more spacious than solid; and is indeed founded on a principle which we conceive to be altogether erroneous. The task which the student has to accomplish is admitted on all hands to be an arduous one; the goal is distant, and it is therefore commonly presumed that he who soonest starts forward on the road has a much better prospect of reaching it than those who delay their departure in making preparations for the journey. This notion does not prevail nor is it ever acted upon in the real business of life. If a real voyage be contemplated, instead of the figurative one to which we have just compared the study of the law, no one thinks of grudging either the time or the trouble bestowed in making provision to encounter the length and the difficulties of it; because common foresight and every-day experience abundantly prove that it is only by taking such necessary precautions, it can be performed with safety or expedition. The length of time, and the degree of care given to the task of making preparation are apportioned to the length and the difficulties of the proposed expedition. We see no valid reason why the mind should not in like manner be forearmed against the difficulties of a toilsome and arduous course of study; nor why the time and the trouble bestowed in so preparing it should be considered mis-spent. Indeed we are acquainted with no more striking exemplification of the very just though apparently paradoxical adages, that the most direct way may turn out to be the longest in the end, and most haste prove worst speed, than the precipitation with which it is too common to plunge at once, and without previous preparation, into the intricacies of the study of the law.

The advantage to be derived from imbuing the mind with a sufficient store of principles, before we proceed to load the memory with the rules which have been deduced from them, has never to our knowledge been denied in theory, however little it may be attended to in practice. There is, however, one peculiar benefit attendant on this method, which we believe has not sufficiently often been adverted to; though for confirmation of it we may confidently appeal to all who have called the faculties of their minds into active exercise, with reference to any subject whatever. This is the extreme facility with which any particular rule, which has been obtained as the conclusion and result of a train of reasoning, is preserved in the recollection, or, if forgotten for a moment, is recalled at pleasure; and on the other hand, the extreme difficulty of retaining in the memory a mass of isolated and unconnected facts, which we

have originally taken for granted, and which having as it were no hold upon the brain, we have no means of recovering when they have once escaped. Nor in enumerating the advantages of a plan of study like that recommended by Murray, should the facilities it affords in acquiring as well as retaining knowledge be left out of the calculation. The different gradations from one subject to another, are placed, so to speak, in a descending direction. The student gains a lofty eminence in the first instance, and his whole after progress is made with the ease of a traveller journeying down hill. If the study of the law were always entered upon in this manner, we should not so commonly hear of its revolting abstruseness, nor should we be able to quote so many examples as are now to be found, of men neither deficient in talent nor in perseverance, who have pursued it with reluctance, or quitted it in disgust.

Perhaps no one who ever abandoned the profession of the law has had stronger temptations to assign as his motive, than those which assailed Murray. Accomplished, devoted to literature, and, so far as academical distinction can confer celebrity, not without some portion of literary fame, it must have required a severe exertion of self-command to refrain from following the example of the numerous aspirants to renown, who have been seduced from the bar by the prospect of acquiring more speedy honors and emolument in the world of letters. The character of literary men as a class, and their station in society, had never been higher than at that very period. The time was still fresh in the memory of his contemporaries, when Addison and Prior had found their literary celebrity a passport to offices of state. Pope had raised himself to independence, and indeed to affluence, solely by the exertion of his talents. The eagerness with which his acquaintance was courted, and the deference shown to him in the highest classes of society, were owing entirely to his success as an author. These, and many other instances of a similar kind, were no doubt, a strong inducement to those who felt the consciousness of genius, to venture in the same track. The manners of that time, too, made the eminent authors particularly easy of access; and every one might be a witness to the respect invariably paid to them in the public places of resort, where they were wont to congregate. Those places of resort were moreover almost all in the quarter of the town occupied by the members of the legal profession, who then lived in the very heart and focus of the literary world. The neighborhood of the inns of court was the chosen head quarters of men of letters, and also, indeed, of men of fashion, who were almost universally anxious to cultivate their society. Steele dates all the papers of his Tatler, that have reference to literary discussion, from either Wills' coffee-house or the Grecian; the former being frequented by such as interested themselves chiefly in poetry and the lighter departments of the belles lettres, the latter, by those whose conversation turned principally on subjects of classic learning. Wills' (as well as Button's, which in Murray's time was still more frequented) was in Russell-street, Covent-garden, within a few minutes' walk of Lincoln's-inn; the Grecian was and still remains at the very gate of the Temple. Our readers will probably not require to be reminded, that Dick's and Serle's, and several other coffee-houses of the same character, formed a cluster about the inns of court; nor that the well-known shop of Bernard Lintott the bookseller, which was the constant morning lounge of literary men, was situated between the Temple-gates, in Fleet-street. We are not certain whether old Jacob Tonson, Dryden's publisher, still remained at the Judge's Head in Chancery-lane, or whether he had then vacated this shop in favor of the Shakspeare's Head, over against Catherine-street in the Strand. At all events, the head-quarters of literature may be said to have had Temple-bar for their nucleus. In Lincoln's-inn Fields, too, stood the theatre; and a theatre was then a place of amusement of a far higher character than it has been of late years. In short, a lawyer of that day was surrounded by such temptations as have induced many, whose tastes and habits gave them any inclination towards literary pursuits, to forsake their profession altogether, and many more to follow it so languidly, as to find themselves eventually shut out from all prospects of its highest dignities and rewards.

That Murray withstood these allurements as well as those of the fashionable society, to which his birth gave him access, or at least made them subservient to his more serious pursuits, is a convincing proof that he possessed the energy and determination of character, without which nothing great can be achieved. That he was ambitious is of itself small praise; for to conceive lofty projects and indulge in brilliant anticipations of fame, is the constant occupation of many an idler, who wants the resolution to make any effectual attempt towards realizing his visions of future greatness: but that he had perseverance steadily to pursue the object of his ambition shows, not only his strength of mind, but his consciousness of ability to attain the eminence he aspired to reach; than which (whatever particular instances may be adduced as exceptions to the rule) it may safely be affirmed there is, in general, no more certain indication of genius.

However, after giving to Murray the credit which is justly his due for remaining constant to his profession, in the midst of these inducements to desert it, we must not omit to remark, that he was not subjected to that sort of trial, which of all others has had the greatest influence in cooling the ardor of aspirants to legal honors, and in many instances has caused them prematurely to abandon a profession, that might eventually have raised them to wealth and eminence, as great as their most sanguine hopes could have anticipated. He had not to contend with neglect, nor to struggle against the mortification and the discouragement of unmerited obscurity. In respect, indeed, of an early opportunity of displaying his acquirements, he may be said to have been unusually fortunate. Within a year and a half after his call to the bar, we find him engaged with the solicitor-general, Talbot, in an appeal case of importance before the House of Lords; and only few days afterwards he appeared in the same place, as counsel for the Marquis of Annandale. In the year following he was retained in three appeals; and his success in this, the most lucrative department of a barrister's practice, was so great, that in the years 1739 and 1740, he was counsel in no less than thifty; a much larger number than are usually set down for hearing in the course of two consecutive sessions of parliament. Previous to this (in 1737) he had received from the corporation of Edinburgh the freedom of the city in a gold box, for the zeal and ability he had displayed as their advocate, before both houses of parliament. The occasion of his being engaged on their behalf was the proposal of a bill for disqualifying the provost and fining the corporation, on account of their remissness in quelling the Porteous riots; their inactivity being imputed to motives of disaffection to the reigning monarch. Perhaps the connexion of a part of Murray's family with the jacobite party might be one reason why he was singled out for their defender.

It is to be presumed, that he was indebted for his first introduction to the bar of the House of Lords to the influence of his family connexions. These were probably of less service to him in the Court of Chancery, where he was a constant attendant; but the reputation for abilities, both as an orator and a lawyer, which he shortly acquired, in consequence of the talent displayed by his arguments in cases of appeal, could not fail to procure him clients elsewhere. It is not always that the names of counsel engaged are given at all in Atkyn's Reports, and when this does happen, the seniors only on whom the arguing of the cases devolved are mentioned; besides which, as the work is very properly confined to causes of importance, it contains no allusion to such business as may be supposed to have brought a rising young barrister most frequently before the court. We have, therefore, no clue towards forming anything like a correct estimate of the amount of Murray's practice during this period; but there is every reason to believe that it went on progressively increasing in Westminster-hall with as much rapidity as in the House of Lords. It has been said, indeed, that he remained, for a long time after his call to the bar, entirely unnoticed; and that he never knew the difference between having no practice at all and one that produced him three thousand a year. That this account is incorrect may easily be proved, by a reference to the Lords' journals: and another story on which it is partly founded seems to lay very little better claim to credibility. According to this tale, in the well known case of Cibber v. Sloper, tried (5th December, 1738) before Sir W. Lee, chief justice of the King's Bench, the senior counsel employed on behalf of the defendant being suddenly seized with a fit in court, the conduct of the defence devolved entirely upon Murray, who was retained as junior on the same side; and the court consenting to adjourn for an hour, in order to give him time for preparation, at the expiration of that time he delivered a speech, which had such an effect on the jury, as speedily to bring the young, and till that time unknown orator, an enormous influx of clients. Now it is to be remarked, in the first place, that two accounts of the trial, published at the time, make no mention of any incident of this kind; though it would have been one not likely to be omitted in books made up for the sole purpose of gratifying the curiostity of the public, and containing the most minute detail of everything connected with the proceedings. Even had Sergeant Eyre, the leader, been disabled from proceeding with the defence, there were three other counsel on the same side, independent of Murray, and two of them, Noel and Lloyd, were his seniors; so that it is not probable the duty would have devolved on him. But the fact is, that the sergeant's speech is reported at considerable length, and bears not the slightest mark of his having been stopped short, or even interrupted for a moment by an attack of illness, or any other cause. Murray, it is true, was afterwards heard by the court, but this privilege was probably conceded to him, from a consciousness of his ability as a speaker, which had long been no secret, either to his own profession or the public.

To be concluded.

## RECENT AMERICAN DECISIONS.

### EVIDENCE.

14. An estoppel cannot be created by parol evidence helping out a record; to constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the record alone. *Jackson vs. Wood*, 3 Wend. 27.

15. The lessors of the plaintiff, in an action of ejectment, are not barred from their action, by the production of a record of a verdict and judgment in a suit against the lessors and others as heirs and devisees, in which they pleaded *riens per descent*, and on the trial of which issue the question was whether the premises claimed in the action of ejectment and *other lands* held by the lessors and their co-defendants in that suit came to such defendants by descent or devise, and were assets in their hands to pay the debts of their ancestor, although the jury on the issue of *riens per descent* found against the defendants, it not appearing from the record that the fact in issue in the action of ejectment was in issue and decided in the former suit. *Ib.*

16. If a verdict in a former suit will stand, on the assumption that the issue therein was found in favor of the title set up in the second suit, such verdict and the judgment thereon are not *conclusive*. *Ib.*

17. Nor does it help a defendant in an action of ejectment, that the title set up by the lessor was *in dispute* in the former action, if such title came in question only *collaterally*, and if it does not appear that the verdict is necessarily based upon the finding that the lessor had no title. That the jury found against the lessor must appear affirmatively, and not rest in *inference*. *Ib.*

18. *Proof of hand-writing* of the indorser of a note, going no farther than that the witness believed it to be the hand-writing of the indorser, founded upon the facts of having seen him write his name two months before the trial, and also having seen him write five years before the trial, stating at the same time that he would not have been able to have testified to the hand-writing from the fact alone of having seen him write five years ago, and expressing doubts as to a part of the signature, would scarcely be sufficient to uphold a verdict, if the question as to its sufficiency had been properly submitted to a jury. *Utica Ins. Co. vs. Badger*, 3 Wend. 102.

19. Where a judge upon such evidence, in an action by the indorsees of a promissory note, charged the jury that the plaintiffs were entitled to a verdict, instead of leaving it to them, under proper instructions, to say whether the indorsement was or was not the hand-writing of the party, a new trial was granted. *Ib.*

20. A witness, on his examination, may recur to a written memorandum, to refresh his memory as to facts to which he is called to testify. *Holladay vs. Marsh*, 3 Wend. 142.

21. Where deeds of lands embrace premises lying in two counties, and are recorded in only one of them, and it is proved that the originals are lost, *exemplifications* of the records of the deeds, are competent evidence to prove the contents of such deeds, in an action of ejectment for the recovery of the premises conveyed, situate in the county where the deeds are not recorded. *Jackson vs. Rice*, 3 Wend. 180.

22. The bare fact of two persons holding different parcels of what was once an undivided tract of land, deriving title from the same source constitutes no *privity of estate*, so that the testimony of a deceased witness on the trial of an action of ejectment against *one*, for the premises in his possession can be given in evidence in an action of ejectment against the *other* for the premises possessed by him, although both actions be by the same claimant. *Jackson vs. Crissey*. 3 Wend. 251.

23. A discharge under the act abolishing imprisonment for debt in certain cases, may be given in evidence under the plea of a general issue; and a variance between the discharge pleaded and that produced on the trial, will not prevent the party from offering the discharge in evidence. *Bradley vs. Field*, 3 Wend. 272.

24. Reasonable notice must be given to produce books or papers before the time when the case *may* be tried. What shall be deemed reasonable notice depends upon the circumstances of the case. Whether secondary evidence shall be admitted depends upon the discretion of the judge. *Utica Ins. Co. vs. Cadwell*, 3 Wend. 296.

25. The *privilege* of not disclosing a communication made by a client to counsel, is confined to *counsel* and to an *interpreter*, though *it seems* the rule might perhaps be extended to the *clerks* of counsel. *Jackson vs. French*, 3 Wend. 337.

26. But a person in no way connected with the counsel, present at a communication made to him by a client, is bound to testify. *Ib.*

27. A promissory note for the payment of money, *void* in law, so that a suit cannot be maintained upon it, may be used nevertheless as evidence of an acknowledgment of indebtedness to take a cause out of the statute of limitations. *Utica Ins Co. vs. Kip*, 3 Wend. 369.

28. The defendant has a right to avail himself of the testimony of special bail, by substituting and justifying new bail. *Leggett vs. Boyd*, 3 Wend. 376.

29. A will upwards of 40 years' standing after the death of the testator, it being clearly proved that the land devised by it had, ever since the death of the testator, been held under and according to its provisions, was admitted in evidence as an *ancient* deed, without proof of its execution, although one of the subscribing witnesses was shown to be alive and within the jurisdiction of the court, and notwithstanding that the *attestation* did not state that the witnesses subscribed their names in the presence of the testator. *Jackson vs. Christman*, 4 Wend. 277.

30. The omission to state the fact that the witnesses subscribed their names in the presence of the testator does not conclude the jury from finding that the will was so subscribed, if warranted by the circumstances to find in favor of its due execution. *Ib.*

31. Where a bond signed by several obligors came collaterally in question, and the name of one of the obligors and one of the witnesses was the same, and the judge at the trial admitted the bond to be read in evidence, upon proof of the hand writing of the other witness who was shown to be dead, without requiring the absence of the other witness to be accounted for, it was *held* that the judge erred; that in the absence of proof, he was not authorized to say from the identity of the name that the obligor and witness were the same person; and *it seems* that though the fact had appeared he would have been a competent witness in the cause, it being between other persons. *Ib.*

32. The admissions of a party under a misapprehension of his legal rights and liabilities, do not affect his interests. *Morse vs. Hitchcock*, 4 Wend. 292.

33. Although seizin be alleged in a declaration of covenant on a lease for rent, the plaintiff is not bound to prove it; nor to show the defendant in possession, where it is in evidence that he claimed to be the assignee of the lease and actually paid rent. *Lush vs. Druse*, 4 Wend. 313.

34. Proof of the hand-writing of subscribing witnesses to a sealed instrument who are shown to be dead or beyond the jurisdiction of the court, is good evidence of the execution of the instrument without proof of the signatures of the parties. *Ib.*

35. The declaration of the *plaintiffs* in an execution attempted to be shown dormant, are not admissible in evidence in an action against the *sheriff* for a false return of a second execution, where it is not shown that they had indemnified the sheriff. *Benjamin vs. Smith*, 4 Wend. 332.

36. *Parol* evidence is not admissible to show the land *intended* to be granted by a deed, where the premises are described as *being all the land purchased by the grantor of A B*, and where, without such description, the deed is incapable of location; the deed to the grantor in such case must be produced. *Jackson vs. Parkhurst*, 4 Wend. 369.

37. The admissions or declarations of an *agent*, relative to the settlement of an account, made *seventeen months* after the pretended settlement, when there is no proof of a settlement in fact, are not admissible in evidence against his *principal*. *Thallhimer vs. Brinckerhoff*, 4 Wend. 394.

38. The acts and declarations of the agent *at the time* of the transaction are binding upon the principal, but what he says at another and subsequent period, are not evidence against the principal: his declarations are received not as admissions, but as a part of the *res gesta*. *Ib.*

39. An *exemplification* of letters of administration from the surrogate's office is good evidence, without accounting for the non-production of the original letters. *Jackson vs. Robinson*, 4 Wend. 436.

40. The declarations or admissions of a party showing title out of himself or in the lessor of the plaintiff, in an action of ejectment, are inadmissible in evidence to divest him of his legal estate, where there is no proof of a tenancy by the party in support of which the declarations can be applied, or where there is no title shown in the party in whose favor the admissions are made, independent of such declarations. *Jackson vs. Anderson*, 4 Wend. 474.

41. Where premises demised by a lease were described by *distances* from a given corner, and were bounded on one side by a lot described as of a particular number, and a diagram of the demised premises described an obtuse angle, leaving a gore between the angle and the lot specified as a boundary, it was held that *parol evidence* was admissible to show the intent of the parties to cover as well the gore as the premises included within the distances, although there were not natural or artificial objects to control or regulate the courses and distances. *Jackson vs. Britton*, 4 Wend. 507

42. One of two attorneys executing a deed

may prove the execution of it by himself, but not by his co-attorney where there is a subscribing witness to the deed. *Ib.*

43. *Recitals*, in a power of attorney executed thirtysix years before the trial of the heirship of the constituents in such power, together with slight parol proof of such heirship, is *prima facie* sufficient to entitle a party claiming under a conveyance by virtue of such power, to recover in an action of ejectment. *Jackson vs. Russell*, 4 Wend. 543.

44. The testimony of a witness proving that on search made in a surrogate's office for a will, which according to the laws relating to ancient wills, ought there to have been deposited, that such will could not be found, is equivalent to the testimony of the surrogate himself, although the witness is not a clerk in the office, the search being made under the direction of the surrogate. The certificate of the surrogate is not the only competent evidence in such cases. *Ib.*

45. After such preliminary proof, an exemplification of the will from the surrogate's office is competent evidence. *Ib.*

46. A warrant, under which a false imprisonment takes place, produced on the trial by a plaintiff, is evidence of the facts contained in it until gainsayed by proof on his part. *Scott vs. White*, 4 Wend. 255.

47. The declarations of a third person, referred to by a party, are not evidence against such party, unless strictly within the subject matter in relation to which the reference is made. *Duval vs. Covenhoven*, 4 Wend. 561.

48. A promissory note, *void* on the ground of being discounted by an incorporated company not authorized to carry on banking business, is nevertheless competent evidence, *it seems*, in support of the money counts. *The Utica Insurance Company vs. Bloodgood*, 4 Wend. 652.

49. A stipulation not to plead the statute of limitations in a prosecution for any balance that may be due on a *note* particularly described, may be used in support of the money counts, though the note be adjudged illegal and void. *Ib.*

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EXECUTION.

1. To constitute a *levy* under an execution, the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them. The goods should be brought within his view, and subjected to his control; and *it seems* that an inventory should be taken of them. He should assert his title to them by virtue of the execution, and his acts should be public, open, and unequivocal, and nothing should be done by him to cast concealment over the transaction. *It seems*, that the acts of the sheriff, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser but for the protection of the execution. *Beekman vs. Lansing*, 3 Wend. 446.

2. In an action of *debt* on a bond conditioned for the payment of an *annuity*, after judgment, it is not necessary to have a *scire facias* to warrant an execution for subsequent arrears. An execution may be sued out without a *scire facias*, but it *seems*, it would be well to specify in the direction, particularly, the arrears claimed. *Wood vs. Wood.* 3 Wend. 454.

EXECUTORS AND ADMINISTRATORS.

1. It is the duty of trustees and guardians to keep the money belonging to the trust estate properly invested. *Depeyster vs. Clarkson*, 2 Wend. 77.

2. If they neglect to make investments, they are chargeable with the interest of the unemployed funds, commencing six months after the receipt of the moneys. *Ib.*

3. A trustee is not permitted to put the income of an estate into his own pocket, to be accounted for at the termination of the trust, and in the meantime appropriate the capitals to the payment of the annual expenses of the trust. The *interest* or *income* should first be applied and exhausted in the support of the *cestuis que trust*, if infants and to answer the other exigencies of the trust before the principal is encroached upon. *Ib.*

4. Where annual disbursements are required, and they are equal to the whole income of an estate, and the trustee is charged with interest on the income used by him and not invested, he will have to pay the interest as it falls due; but if the disbursements or investments that he makes are less than the income, then he will not be required to pay the interest which he may owe as it falls due, but it will be carried into the disbursement fund, which bears no interest. This rule, therefore, does not allow compound interest. *Ib.*

5. Where, for a period of 20 years, a large balance, amounting on an average to a sum exceeding $5000, was annually left in the hands of executors and guardians, who after the first seven years made no investments whatever of the moneys remaining on hand, but the same were used by one of the executors as his own, against whom a bill to account was filed, the following directions were given to the master in stating the account, and the decree of the chancellor containing such directions, on appeal to the Court of Errors, was *affirmed*, viz. The master ' is directed so to state the account as that the defendant shall be charged with interest on the annual balances and on two certain bonds, one given by the defendant, and the other by one S. H. (for which the defendant had become responsible,) and also on all moneys received by him during each year, from the end of six months after the day of the receipt thereof to the end of the year, deducting therefrom, except as hereinafter mentioned, the interest on all payments, of what nature or kind soever, from the respective dates thereof to the end of the year; and that the interest which shall appear at the end of every year during the period of such account, to be due from the defendant, be applied towards satisfying, in the first instance, as far as the same shall extend, and before resorting to the principal, any payments, including expenditures and investments thereafter made by the defendant, to or on account of the complainants, or their estate, but so, nevertheless, as not in any case, to compute interest on interest; and to that end, the master is hereby directed to carry into said account the interest annually accruing on the said two bonds, on the first day of January in each year, until the principal was paid. And the said master is further directed, during the first year of the said account, commencing on the first day of January, 1803, to compute interest on the respective receipts and payments by the defendant during the year, to the end thereof, and strike the balance of such interest, and carry the same into the column of simple interest, to be added to or deducted from the interest to be computed on the yearly balance of the principal moneys, as the case may be; and such amount of interest at the end of the year 1803, shall be deemed the fund out of which payments are made during the ensuing year or years, until the same is exhausted, and so from year to year until the termination of the account, except that no interest after the year 1803 is to be credited on payments made by the defendant, until such fund of interest as aforesaid shall first have been exhausted; but as to any excess of payments, interest is to be computed thereon: and in case it shall so happen, that at the expiration of any year, the balance of interest shall be found in favor of the defendant, then the same shall be applied towards diminishing the principal moneys then due to the complainants, or the said estate. *Ib.*

6. Moneys arising from the sale of real property in *another state*, on an order of a Court of Probate there, are not assets in the hands of the executor in the state of New York, and cannot be so averred in a replication to a plea of *plene administravit*. *Peck vs. Mead*, 2 Wend. 470.

7. In an action against an administrator, a creditor is not concluded by the inventory, but may show the goods and chattels inventoried to be of a *greater value* than the amount specified in the same. Nor would the administrator *it seems*, be concluded by the inventory. *Willoughby vs. McCluer*, 2 Wend. 608.

8. After an *administratrix* has pleaded the *general issue*, and a plea of *plene administravit præter* a certain sum, and the plaintiff in the action has replied, admitting the truth of the second plea praying judgment, &c, a plea *puis darrein continuance*, setting forth a judgment confessed by the administratix in a suit commenced since the action in which the plea is interposed was at issue and noticed for trial, will be received and considered good. *Lawrence vs. Bush.* 3 Wend. 305.

9. An *administrator* cannot retain money remaining in his hands unadministered, to apply on a contract for the sale of land to the intestate, where the contract has been annulled and cancelled by the vendors. He cannot thus benefit the *heir's* seeking an enforcement of the contract, at the expense of the *creditors* of the intestate. *Harmon vs. Durham*, 3 Wend. 367.

10. An *executor*, by virtue of his office, becomes a *trustee* for the devisees and creditors of the testator, when it is ascertained that the personal property of the estate is insufficient to pay the debts of the testator; and in such case he will not be permitted to sell the real estate of the testator under a judgment held by himself and to become the purchaser. *Rogers and Rogers*, 3 Wend. 503.

11. The *lapse* of 14 years between the granting of administration and an application to a surrogate for the sale of real estate, is a sufficient cause without explanation for the rejection of the application; still if the surrogate errs in entertaining the petition, his error can be corrected only on appeal. *Jackson vs. Robinson*, 4 Wend. 436.

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ACTION.

Case for deceit in selling a vessel as a British vessel, she being in fact not British, or entitled to a British national character. It was *held* that the Plaintiff was entitled to damages to the extent of

the difference of value of the vessel as sold, and her value, if her character had been known, and also to such damages as the value of repairs made in her on the faith of the representation of her British character, which had not been remunerated by her earnings or in any other way.—*Sherwood vs. Sutton.* 5 Mason's R. 1.

BILL OF EXCHANGE AND PROMISSORY NOTES.

A bill drawn upon a partnership, but not accepted until after a dissolution of the partnership publicly announced binds only the partners, who accept it, and not the other partners, who have not consented thereto.—*Tombeckbee Bank vs. Darnell, Ib.* 56.

An agent, to whom a negotiable note has been indorsed by his principal for the benefit if the latter, and who has no interest in the note, cannot sue as indorsee upon the note. No person can sue as indorsee, unless he be the owner of the note, or has some legal or equitable interest therein.—*Thacher vs. Winslow, Ib.* 58.

Assuming that a foreign Bill of Exchange, payable at *sight* ought to be presented, within a reasonable time, that time must be judged of with reference to the usage among merchants, as to delays in the negotiation and transmission of such bills.—*Wallace vs. Agry, Ib.* 118.

Where a partnership is carried on by a firm in the name of one partner only, and he indorses notes in his own name, the firm is not bound thereby, unless the notes were received or discounted as notes binding the firm, upon the representation of the partner giving the same to that effect, and were made for the common benefit and business of the firm.—*United States Bank vs. Binney Ib.* 176.

Where a note is made payable at a particular place and the indorser resides there; if the holder remits it to his agent at such place for payment and it is dishonored; the agent is not bound to give notice of the dishonor to the indorser; but his duty is to give notice to his principal, who may then give notice to the indorser, and if given in due time after the principal has received the notice, the indorser is bound.—*U. S. Bank vs Goddard, Ib.* 366.

If due notice is given by a holder to his immediate indorser of the dishonor of a note, and the latter gives due notice to a prior indorser, the holder may secure against the latter, although he has never given him any notice, for due notice given by any party on the bill, is notice to charge in favor of all subsequent parties.—*Ibid.*

COMMERCE.

An open boat is not a *ship* or vessel within the purview of the statutes of 1820, ch. 122—and 1823, ch. 150—which prohibit commercial intercourse from the British Colonies.

It seems that notwithstanding these statutes open British boats may visit the United States, if not destined for trade.

British ship or vessel excluded from our ports by those statutes are such as are owned by *British* subjects, having a *British* domicil and sailing under the *British* flag, and not ships or vessels owned by *British* subjects, domiciled in the *United States.*—*United States vs. an open Boat*, 120.

Under the Act of 15th March, 1820, ch. 122, prohibiting commercial intercourse from the *British* Colonies in *British* ships, *British* owned vessels are included in the prohibition, although not registered or navigated according to the British navigation and Registry acts.

But open boats without decks, are not included in the prohibition.

The forfeiture under the act, attaches to the *cargo* on board at the time the vessel enters or attempts to enter our ports, and not to any cargo subsequently taken on board, though on board at the time of the seizure.—*Ibid*, 232.

THE JURISPRUDENT.

BOSTON, SATURDAY, MARCH 19, 1831.

## MATHEWS ON PRESUMPTIVE EVIDENCE.

Continued from page 263.

Chap. X. *Of the Exclusion of Executors from the Residuary Estate.*

The appointment of an Executor amounts, in law, to a gift to the person of the undisposed surplus of the Testator's personal Estate, after payment of his debts. In equity this rule is modified and it is made a question of intention. The Executor holds unless there is a strong presumption of intention, to the contrary.

The first class of cases of such presumption against the Executor is when expressions are used in making the appointment, or directions relating to it are given, which go to show that the Executor was named only with a view to discharge the duties of the office, as where he is designated as trustee, or 'Executor in trust.' So where the Estate is given to the Executor *as such*, for *specified* purposes. It is thus where the testator makes use of expressions which indicate an intention to impose on office merely for the performance of certain necessary duties—as, *that his will may be well executed he nominates and appoints*, &c. So when words of request are used to the Executor to accept the office—or that he would take the *trouble* &c; anything, indeed, which goes to show that a burden and not a benefit was intended.

The case is still stronger where a legacy is given for his *care* and *trouble*. A provision for the Executor's indemnity against losses, expenses of journeys—of remitting legacies, &c—are evidence of intent to impose a charge merely.

Where the appoint is confined to certain districts or the performance of certain particular duties—the same presumptions exist.

Another circumstance from which such presumptions arise, is the fact of the Executors being nominated on account of their occupation, or the station which they hold in society; as where 'partnership was appointed to the trust';—the 'American ambassador, or such persons as should hold that office at the time of the testator's death.'

Another class of cases of such presumptions is where the testator has manifested an intention to give the Estate wholly away to others. As where the residuary Estate is given to one who dies before the Testator, although the object of the Testator cannot be carried into effect, the circumstance shews that he did not intend to give it to the Executor. So where the legacies are given to any object which being against public policy, or for some other good reason, the law will not enforce.

And it is the same where the Executor declares his purpose to dispose of the residue by a subsequent instrument; or prepares or begins a codicil for that purpose.

And it has been held that the same principle prevails where a gift of the residue is partially erased or become illegible, or partially cancelled by the Legatee's name being struck out by pencil or otherwise. A will directing the personal Estate to go according to law gives no interest to the Executor.

Another class of cases is where there is an appointment of one Executor and an express legacy given to him.

The presumption of law is that it was meant that he should take what was expressly given and no more. Another ground is that the legacy amounts to a gift by way of compensation for the services.

And it is laid down generally that whenever there is not an obvious incongruity between the gift of a particular legacy and an intention to bestow the whole residue, the Executor may insist on his legal title.

Parol declarations are also here admitted to repel these legal presumptions by which the Executor is excluded from a beneficial interest in the residuary Estate. It is confined however to cases strictly of presumptions. And it may also be adduced to fortify the presumption.

But such evidence is not admissible to show the testator's intention to impose a bare office of trust. (*Mann vs. Executors of Mann*, 1. *John. ch.* 231. *Beckenbridge vs. Duncan*, 2 *Marsh.* 51. *Shelton vs. Shelton*, 1 *Wash.* 53 *Rino's Ex'rs vs. Davis, H. and M.* 4. 283)

PRESUMPTIONS OF FACTS.

Chap XI. *On the Presumptions of Instruments of assurance.*

To give effect to quiet and long possessions and to affirm titles which rest chiefly upon this circumstance, Courts presume the existence of necessary instruments to clothe the possessor with the title. Such presumption is made, in some cases, without any specific evidence of the existence of such title: and, in others, upon evidence of their having once existed, although they are not to be found.

There are many cases to which the statute of limitation does not apply: and to extend the beneficial operation of this Statute, Courts of law and equity have established certain rules founded on analogies to its principles, to meet such omitted cases. Thus a peaceable enjoyment of real Estate for 20 years is prima facie Evidence of ownership. (A general usage, like that of depositing lumber on the banks of a river, not accompanied by a claim of title or an intention of occupying the land to the exclusion of the owner's right cannot furnish any legal presumption of a grant. Bethune vs. Turner, 1. Greenl. R. 109.

A Possession for 20 years of one of two tenants in common, accompanied by an exclusive appropriation of the rents and profits affords presumption of conveyance.

(*Homes vs. Howard*, 2 *Har. and M'H.* 60. *Lloyd vs. Gordon, Ib.*254—260. *Allen vs. Hall*, 1 *M'Cord* 131. *Coleman vs. Hutchinson*, 3 *Bibb*, 209. *Johnson vs. Howard*, 1 *Har. and M.* 210. *Thomas vs. Mather*, 4 *Bibb*, 412. *Jackson vs. Whitbeck*, 6 *Cowen*, 632. *McClung vs. Ross*, 5 *Wheat*, 116—124. *Clap vs. Bromagham*, 9 *Cowen*, 530. *Jackson vs. Tibbets*, 9 *Cowen*, 241.

This possession must have been however an adverse possession.

Records which are essential to the stability of such titles may be presumed in some cases.

T he actual ouster of one tenant in common, in order to form this ground of title, will be presumed as readily as a rightful conveyance.

*( Ricard vs. Williams*, 7 *Wheat.* 59. *Johnsons vs. Howard*, 1. *Har. and McHenry*, 281. *Lloyd vs. Gordon*, 2 *Har. and Mc'H.* 254. *Bromeghan et al vs. Clap*, 5 *Cowen*, 295. 3. *Ib.* 530. *Jackson vs. Johnson*, 5 *Ib.* 74. *Hermes vs. Howard*, 2 *H. and M.* 60. *Jackson vs. Tibbets*, 9 *Cowen*, 241. *Allen vs. Hall*, 1 *M'Cord*, 131. *Coleman vs. Hutchinson*, 3 *Bibb*, 209. *Thomas vs. McPier*, 4 *Bibb*, 412. *Jackson vs. Whitbeck*, 8 *Cow.* 632. *McClung vs. Ross*, 5 *Wheat.* 116—124. *Frederick vs. Grays*, 10 *Serg. and Rawle*, 182.*)*

There are other cases where auxiliary evidence is introduced to strengthen the inference arising from time. In these cases such evidence and the lapse of time mutually assist each other.

The lapse of time furnishes a ground for admitting the secondary evidence; it being a rule that without good cause for supposing the existence of instruments alleged to be lost, collateral proof of their contents shall not be received. Upon this principle, an ancient copy of a deed or will; an old attested copy; the rough draft of a release; an old abstract which appears to have been used by professional persons; a recital of the supposed deed, in an old writing, as being then extant; or a memorandum or a recital of it in a Court of Justice as having been produced in a former action; will be admitted as proof of the prior existence and the contents of the instruments, when the subsequent enjoyment has been consistent with it.

In the absence of such proof parol evidence is admissible, especially where there is evidence of a wilful destruction of the instrument by the adverse party.

The Bill or Books of account of a deceased soliciter containing charges for preparing such an instrument, &c, may be relied upon.

The fact of a robbery or fire having taken place where the original document was probably kept, or other accidents which might have destroyed it, may be introduced.

But proof must, in all these cases, be first given that search and inquiry have been made, without effect, to find the Instrument and that it cannot be found. Otherwise there would be no end to the introduction of forgeries.

Chap. XII. *Presumed Coveyances of outstanding legal Estates.*

Chap. XIII. *Presumed Surrender of Terms.*

Chap. XIV. *Presumptions of acts and solemnities in Support of Assurances and Rights.*

Deeds of 30 years standing are admitted in evidence without proof of their execution. So of a will, although the Testator has not been dead 30 years, and some of the subscribing witnesses are still living. In the case of the deed, possession must have accompanied it.

Where a precedent or subsequent condition is necessary to vest or prevent the devesting an interest, long undisputed possession is prima facie evidence of the act having been performed. Where a proviso goes to defeat the mortgagee's estate and to revest the property in the mortgagor, if the debt has been satisfied, but it cannot be ascertained precisely when, whether before or after the day appointed in the proviso, the law will presume it to have been done at the specified time.

Chap. XV. *Presumptive Evidence in matters of Pedigree &c.*

The object of this chapter is to particularize the species of proof which are regarded as effectual with regard to marriages, heirship, deaths, &c.

Recitals in ancient deeds, if consistent with the apparent state of a title, are one species of presumptive evidence of the facts which they relate. Such recitals have been held to be good presumptive evidence of pedigree, where no adverse title by inheritance has been set up under the same ancestor even though the land conveyed by the deeds is itself the subject of controversy. (Little vs. Palister, 3 Greenleaf 200. See Jackson vs. Cooley, 8 John. R. 128. Stokes vs. Dawes, 4 Mason 268.) Memoranda in ancient Family Bibles—old Pedigrees, and similar family Records are good evidence. An old cancelled will was, in one case, used to prove the fact of seniority between two of the Testator's sons. Inscriptions upon tomb stones and engravings on rings are also admitted as evidence. Memoranda of a deceased medical attendant on his charge Book, for attendance on a woman, and also of the payment of the charge, has been used as presumptive evidence as to the day of a birth. Declarations by deceased relatives, as to particular events in their families, or its members—or its state and circumstances may, if better evidence cannot be procured, be resorted to. So of a man who has married into a family. But it is otherwise of servants and acquaintance or neighbors.

Such declarations must be above all suspension as to interest. They can have but little or no weight, if made after disputes have arisen in families, on the subject to which they relate.

As to marriage evidence of cohabitation; acknowledgment of the marriage by the Parties; reception of them as man and wife by their friends and relations, and common reputation, is admissible. (1 *Har. and Mc'H. Cheseldine vs. Brewer*, 152. *Allen vs. Hall*, 2 *Nott, and Mc'Cord*, 114. *Hammich vs. Brownson*, 5 *Day* 290. *Purcell vs. Purcell*, 4 *Hen. and M.* 507. *Newbury Port vs. Boothbay*, 9 *Mass.* 414. *Selts vs. Foster*, 1 *Taylor* 121. *Whitehead vs. Clinch.* 2 *Hay.* 3. *Fenton vs. Reid*, 4 *John.* 52. *Jackson vs. Claw*, 18 *Johns*, 346. *Forney vs. Hallacher*, 8 *Serg. and Rawle*, 159.)

So evidence of their having eloped for the purpose of getting married and returning as married; of their children being registered as the offspring of the father and mother. Such presumptive evidence may be regarded as conclusive after the death of the parties.

It is supposed that a purchaser would not be bound to accept a title whose validity depended on such presumptive evidence of a marriage

There are but few cases in the Books on the subjects of presumptions in relation to the death of persons long unheard from. After 20 years absence, without being heard of such presumption was in one case admitted. (7 Ves. 590) in another case 14 years was held sufficient to authorize the Executor to collect the deceased effects, (6 Ves. 605) another case is found (5 Ves. 468) where such presumption was admitted after sixteen years.

In this case a purchase would not be bound to take a title which depended on such evidence.

Chap XVI. *Of Presumed Grants of Portions of Titles, of Advowsons, Faculties, Rents, Commons, Markets, Tolls, Lights, Ways, and Water Courses.*

Chap. XVII. *Of Presumed dedication of Rights of Road to the Public.*

It is not yet entirely settled whether time is necessary to create the presumption of the dedication of a Road to the public. (Where the owner of land had, on making a new road over his property, giv his consent thereto on condition of its not being used by coal carts, held that there might be a partial dedication of a highway to the public; but, if by law, there could not be a restriction to a public way the grant would amount only to a license, revocable, and that, after notice, aperson using it with coal carts would be a trespasser. *Marquis of Stafford vs. Boyney* 7 *B. & C.* 257. *Galatin vs. Gardner*, 7 *Johns. R.* 106.

In every instance where the question has come up before the Court distinctly, time has been considered an important feature in the case.

It may be, says the author, considered as settled, that whenever a public right of way in a road or street is claimed on the ground of a presumptive dedication, it is essential, in order to establish such presumption that the owner of the soil has for some considerable period submitted to the general usage. What this length of time must be, is not yet ascertained. In some cases 6 and in others 8 years have been held sufficient. Two or three years have been held not enough. Unmolested enjoyment for 20 years, with the knowledge of the owner, is held to be conclusive of dedication.

This presumption may be rebutted by showing that the public user began during the existence of a lease, &c, or the legal inability of the proprietor of the soil.

The putting up of a gate, bar or chain, or any other like significant act, manifesting intention to confine the use of the road to particular individuals, will negative the public right, and the gate, &c, need not be constantly shut. It is enough if it be done occasionally

Chap. XVIII. *Presumptive Bar to Equities of Redemption.*

It is now held that 20 years possession by a mortgagee without account or acknowledgment of an existing right to redeem forms a presumptive Bar to the Equity of the Mortgager. There must be 20 years possession after the forfeiture at law.

The commencing of a suit simply, within the 20 years, will not preserve the Equity. Parol acknowledgment by a mortgagee, within 20 years, has been held sufficient to preserve the Equity. These admissions must, however, be full, express and unequivocal.

Chap. XIX. *Presumed satisfaction of mortgage debts,—Judgments, Warrants to confess Judgments, Decrees, Statutes, Recognizances and Bonds.*

Chap XX. *Presumed satisfaction of annuities—Portions, Legacies, Liens for purchase money, and other demands not within the Statute of Limitations.*

Chap. XXI. *Presumed dereliction of the right to have fraudulent Purchases, Purchases by Trustees—and Purchases of Reversions, set aside in Equity.*

Chap. XXII. *Presumed waiver of rights of appropriation, of resumption, or forfeiture, presumption and Election; of rights under Executory Trusts, Devises in Equity, agreements to purchase, and covenants for renewal; of the responsibility of Executors, administrators and Trustees;—of the liability of purchasers to see the application of the purchase money, and of other miscellaneous Rights and Equities.*

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰων. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. I. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Second edition. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

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Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett. Second Edition.

EVENTS IN PARIS, during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

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The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I.—Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

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VOL. I. BOSTON, SATURDAY, MARCH 26, 1831. NO. XXXV.

## LORD MANSFIELD.

Continued.

In short, there seems every reason to believe that the whole history of Sergeant Eyre's sudden malady, and Murray's almost equally sudden emersion from obscurity into celebrity, owes its origin to that same appetite for the extraordinary, by which so many facts of much greater importance are almost daily confused and distorted. There is no reason, however, to doubt that Murray's reputation was diffused much more widely than it had been before, in consequence of the part he bore in this trial. Any cause in which the son of Colley Cibber might be concerned, was not likely to fail in catching the attention of the public. His wife, too, (the sister of Thomas Arne the composer) who was the cause of the action, had long been a favorite actress, and the whole town had been occupied, some time before, with the notable dispute between her and Mrs Clive, as to whom should perform the part of Polly Peachum in the Beggar's Opera;* so that all the history of her intrigues was sure to prove an attractive subject, in an age when a depraved taste for such scandalous and indecent details as were gone into at the trial, was, to say the least, quite as prevalent as in our own time. Indeed, no better proof can be given of the general curiosity excited by this case, and of the extent to which the account of the trial, and of the events that led to it, was circulated, than the fact of one pamphlet on the subject having reached a sixth edition. In a legal point of view the case still possesses some interest, inasmuch as it affords an instance of a practice now deservedly exploded in actions for criminal conversation: the jury having been directed to find for the plaintiff, notwithstanding the most direct and unequivocal evidence of collusion on his part. The amount of the verdict was ten pounds.

In support of the account which represents Murray as having been entirely unknown and unemployed till the trial of Cibber v. Sloper, a letter of Pope's is adduced, supposed to have been written in answer to one wherein the young lawyer had good-humoredly complained of his want of business on circuit. There is not, however the slightest evidence to show that the letter in question was addressed to Murray; and indeed if Warburton's arrangement of his friend's papers be correct (which there is surely no reason to doubt) it is quite clear this must have been written to a totally different person, since it is classed among others dated 1718, a time when Murray was not fourteen years of age. Besides, nothing can be more improbable than that one fragment, and one only of their correspondence should have been inserted in the collection of the Poet's works.

The poems of Pope contain several testimonies of his attachment to Murray. In the fourth book of the Dunciad, which was added to the original work in 1742, he very happily introduces an allusion to his friend's celebrity, at the same time that he vents a bitter and well-merited satire upon the exclusive attention paid in our public schools to mere verbal learning, and especially to Latin versification. A pedant makes his complaint before the throne of dulness, that Westminster-hall and the House of Commons should cause all this species of lore so speedily to be forgotten, even by those who were once the greatest proficients in it.

'We ply the memory, we load the brain,
Bind rebel wit, and double chain on chain:
Confine the thought to exercise the breath,
And keep them in the pale of words till death.
Whate'er the talents, or howe'er designed,
We hang one jingling padlock on the mind:
A poet the first day he dips his quill;
And what the last?—a very poet still.
Pity! the charm works only in our wall,
Lost, too soon lost, in yonder house or hall.
There truant Wyndham every muse gave o'er,
There Talbot sank, and was a wit no more!
How sweet an Ovid, Murray, was our boast!
How many Martials were in Pulteney lost!'

Of his imitations of Horace, the sixth epistle published in 1737, is addressed to Murray, and contains, among other passages relating to him, the following lines:—

'Graced as thou art with all the power of words,
So known, so honored in the House of Lords.*
Conspicuous scene! Another yet is nigh,
More silent far, where kings and poets lie;
Where Murray (long enough his country's pride)
Shall be no more than Tully or than Hyde!

Several anecdotes are recorded of the intimacy of these two illustrious friends, from which it appears that their feelings towards each other were almost as those of a father and son. For instance, an acquaintance of Murray's happening one day to enter his chambers abruptly, perceived him practising the gestures of an orator before a glass while the poet sat at his side, to give his opinion of their effect. Another story gives a still better example of the familiarity of their intercourse. It is well known that Pope entertained some jealousy of the reputation Dr Friend had acquired for his Latin epitaphs; which feeling, indeed, at one time vented itself in the epigram:—

'Friend, for your epitaphs I'm grieved,
Where still so much is said;
One half will never be believed,
The other never read.'

He was occasionally seized with a desire of emulating, as well as ridiculing the doctor. Towards the decline of his life, he was often in the habit of spending his winter evenings in the library of Murray's house, in Lincoln's Inn-fields; and when the professional duties of the latter obliged him to leave his guest alone, he would employ himself in penning compositions of the same kind. These Murray, on his return never failed to throw into the fire, saying, that the finest of English poets, and the one who had most embellished his own language, ought to write in no other.

No intimacy could surely be closer, than one which authorised such friendly liberties as this. To the latest period of Pope's life the same cordial intercourse met with no interruption. A few days before his death he was carried from Twickenham, at his own desire, to dine with Murray, in London. This was the last social interview between them. The only other guests invited were Bolingbroke and Warburton. By Pope's will, Murray was appointed one of his executors, and a trifling bequest (a marble bust of Homer, by Bernini, and another of Sir Isaac Newton, by Guelfi,) was left to him, as a memento of his friendship. Murray was also in possession of a portrait of Betterton the actor, drawn by Pope himself, who occasionally amused himself with attempts at painting.

Before Murray had acquired that high character at the bar which secured him the possession of a large income, he was a suitor for the hand of Lady Elizabeth Finch, one of the daughters of the Earl of Winchelsea and Nottingham. The want of adequate fortune was, however, at that time, considered by the lady's family an impediment to their union; and he had some reason to fear that a more wealthy rival might supplant him. This is pointedly alluded to by Pope, in some lines of the epistle quoted above.

'From morn to night, at senate, rolls, and hall,
Plead much, read more, dine late, or not at all.
But wherefore all his labor, all this strife?
For fame, for riches, for a noble wife?
Shall one whose native learning, birth conspired
To form, not to admire, but be admired,
Sigh, while his Chloe, blind to wit and worth,
Weds the rich dulness of some son of earth?'

In the Ode to Venus, also, which was published the same year (1737), the same topic is touched upon.

'Mother too fierce of dear desires,
Turn, turn, to willing hearts your wanton fires;
To number five direct your doves,
Then spread round Murray all your blooming loves:
Noble and young, who strikes the heart
With every sprightly, every decent part;
Equal the injured to defend,
To charm the mistress, or to fix the friend;
He, with a hundred arts refined,
Shall stretch thy conquests over half the kind;
To him each rival shall submit,
Make but his riches equal to his wit.'

* This is alluded to in Fielding's play, 'The Historical Register for 1736,' where Theophilus Cibber, under the name of Pistol, and his father by that of Ground-Ivy, are held up to the ridicule of the audience.

'Thus to the public deign we to appeal;
Behold how humbly the great Pistol kneels.
Say then, O Town, is it your royal wil,
That my great consort represent the part
Of Polly Peachum, in the Beggar's Opera?'

Speaking of the rival Pollys, Medley says, 'they were damned at my first rehearsal, for which reason I have cut them out; and to tell you the truth, I think the town has honored 'em enough with taking of 'em for a whole month; tho' faith, I believe it was owing to their having nothing else to talk of.' By the way the plan of Sheridan's Critic, with the idea of the wise Lord Burleigh shaking his head, &c, is taken entirely from the play, or rather farce, of Fielding. We have heard that Sheridan, when taxed with appropriating some ideas from another quarter, and convertingthem to the use of Sir Fretful Plagiary, was in the habit of taking additional credit to himself for making the knight act so much in character.

* A specimen of bathos hardly surpassed by Colley Cibber's well known parody on it:—

'Persuasion tips his tongue whene'er he talks:
And he has chambers in the King's Bench Walks.'

It is not probable that these encomiums, however well-merited, had any influence in overcoming the objections of the lady's family. Her own portion, as one of six daughters, being of course a small one, it is to be supposed that before her parents yielded their assent to the match, Murray was in the receipt of an adequate, if not a very large, professional income. The marriage took place in November, 1738, the month previous to the trial of Cibber v. Sloper, which may have had the effect of greatly increasing the number of his clients and the amount of his professional gains, but certainly was not the first occasion of his obtaining either.

This alliance exercised a very material influence over Murray's future career. After the resignation of Sir Robert Walpole, in February, 1741, among the different appointments which took place on the formation of the new ministry, was that of the Earl of Winchelsea to the post of First Lord of the Admiralty. His promotion to this office is sufficient evidence of his credit with the party then in power; and he had not long to wait for an opportunity of exerting it successfully in behalf of his son-in-law. In the course of the following year, the solicitor-general, Sir John Strange, resigned; and the vacant place was immediately filled by Murray. This appointment gave him a new sphere for the exercise of his talents. With the prudence and caution which were distinguishing features of his character, he had hitherto withstood the solicitations of his friends to embark in politics, and had constantly refused to become a candidate for a seat in parliament: alleging, as his reason, that while he continued to enjoy the patronage of all parties, he could gain nothing by attaching himself to one, a maxim he had probably learned from Pope, who originally had it from Addison. Having once, however, taken the decisive step of accepting office, he had no longer any motive for refraining to enter the house of Commons; nor indeed could he have avoided doing so, had he been inclined. Accordingly, on the 22d of November, 1742 (parliament having assembled on the sixteenth day of the same month), he was returned for Boroughbridge. This borough being one over which the Duke of Newcastle possessed considerable influence, it was probably as an avowed adherent of the Pelham party, that Murray first launched himself into the political world. Among the Tories, the Jacobites, and the discontented Whigs, who had coalesced in opposition to the measures of Sir Robert Walpole, this party may be said to have steered in some sort a middle course. That, at least, such was their policy at that period, and for some time afterwards, is plainly shown, by the Duke's favorite project of uniting these conflicting interests; which project himself and his brother effected, on the resignation of Lord Granville (1774), by the formation of the broad-bottomed administration. Such principles as these were exactly suited to Murray, who was always averse from extreme or violent measures of any kind; and of whose political conduct throughout a long and honorable career, moderation and consistency were the distinguishing characteristics.

The former quality he displayed in an eminent degree on the occasion of the trial of the rebel lords in 1746, and (much to the credit of the times be it said) he displayed it in common with every other person concerned in the prosecution. Not even the shameless and unnatural attempt of the octogenarian Lord Lovat, to save his own life by the sacrifice of his son's, could tempt the solicitor-general to express the indignation it must have excited in his breast. He studiously confined himself to a plain statement of the facts, and exposition of the evidence, which he summed up, and commented upon in a manner that showed him to be a consummate master of his profession. His different speeches on these trials are fully and, as we learn from contemporary authority, accurately reported in the state trials. They are probably the only specimens from which a tolerable idea may be formed of his forensic eloquence; though, of course, from the nature of the duty he was called on to perform, the idea must be a very imperfect one. Towards the conclusion of the proceedings, he was warmly complimented both by the attorney-general and Lord Talbot, for the ability he had displayed. Lord Talbot, in particular, said of him that his eminent talents had never appeared to such advantage as on that day, when his candor and humanity lent an additional grace to his eloquence; and he concluded by expressing his hope that he might, at a future period, find the talents of the solicitor-general adding lustre to the highest civil employment in the kingdom. From such a character as Lord Lovat, praise could be of little value, except inasmuch as being the praise of a man condemned to death, towards him who had principally contributed to procure his conviction, it must have been candid and impartial. He said he had the honor to be Mr Murray's relation, though it was possible he might not know it; that his cousin's eloquence would have been of great service to him, had it been exerted in his behalf; but that although he was the principal sufferer by it, he could not refrain from listening to it with pleasure; declared he considered him an honor to his country; and hoped his Scottish origin and connexions might not prove a bar to the preferment he so well deserved.

There was some reason for the apprehension intimated by Lord Lovat, that the country and the political principles of Murray's relations might stand in the way of his advancement. His family, though not openly committed in the cause of the Pretender, was generally supposed to have preserved its hereditary attachment to the house of Stuart; and his elder brother, indeed, had been, ever since the death of Queen Anne, in the service of the exiled prince, from whom he had received the title of Earl of Dunbar. Murray's elevation to office under the English government had caused some suspicion to prevail among the adherents of the Pretender abroad, that this titular Earl of Dunbar was disaffected to their common cause; and on the other hand, with equal injustice, whispers had been industriously circulated among the political opponents of the solicitor-general, that he was secretly attached to the Jacobite principles avowed by his brother. Subsequently, it was even imputed to him, that his temperate and dispassionate conduct towards the rebel Lords, when they were brought to trial, was attributable to his prepossession in favor of the cause for which they suffered: a charge equally applicable to every person concerned in the prosecution, since the behaviour of every individual among them was marked by the strictest decorum and moderation; and equally destitute of foundation with regard to all, as had they chosen to indulge in invective or vituperation against the prisoners, they would only have lowered their own characters as men and gentlemen, without thereby in the least strenghening the evidence. If it were not that no accusation is too grossly or palpably ridiculous for political rancor to countenance against the objects of its animosity, we should suppose Murray's enemies would have been anxious to avoid any allusion to his conduct on this occasion; as it is very certain no servant of the crown exerted himself with more zeal, or with so much effect, as he, throughout the whole of the trials.

After the death of the Prince of Wales in March, 1751, the adversaries of Murray's party endeavored to further certain political purposes of their own, by bringing forward, in a more tangible shape, the rumors that had been indistinctly noised abroad concerning his disaffection to the reigning family. The opposition, now deprived of their chief, were reduced almost entirely to silence in parliament; but though, for the time, the very existence of two separate parties seemed equivocal, individuals belonging to both were no less keenly alive to their own interests at that period than at most others. The great object with every one who aspired to power, was to secure to himself or his allies, some place about the person of the young prince (afterwards George III.), it being conjectured (and very reasonably so, as subsequently appeared in the instance of Lord Bute) that those who could ingratiate themselves with the heir apparent, would have a very good chance of obtaining a share in the government when he became king. Accordingly, there was as much of intriguing to procure the management of the future sovereign, as ever there had been of fighting among the Greeks and Trojans to secure the body of Patroclus. Now it happened, that Andrew Stone, the Duke of Newcastle's secretary, was one of the prince's governors; and another was Johnson, Bishop of Gloucester. Both had been contemporaries of Murray at Westminster, and the intimacy of the three had continued ever since; insomuch that Johnson owed his rise from the place of second master of the school to a seat on the bench of bishops, entirely to the interest of Stone and Murray. It may easily, therefore, be conceived with what satisfaction the intriguers seized on an opportunity of bringing forward an accusation which implicated the three at once, and charged them with the common sin of Jacobitism.

Early in February 1753, Lord Ravensworth came suddenly to town, and gave Mr Pelham to understand that he had a charge of this nature to prefer. The information was by no means graciously received. Indeed the minister appeared very little disposed to proceed to an inquiry. But as the whole affair had been communicated to several of the opposition, he could not avoid an investigation; and it was decided, that Lord Ravensworth should communicate his intelligence to the privy council. It is not our intention to enter into the details of the proceedings. They are given with great minuteness in Horace Walpole's Memoirs, and may be found in a more condensed form, among the other gossipings of Bubb Doddington's Diary, to which works we must refer our readers for more ample information on the subject. Suffice it to mention here, that after a long and tedious sifting of the matter, it appeared there was no better foundation for the charge, than some loose words casually dropped by one Fawcett, an attorney at Newcastle, in a conversation at table; which intimated that, upwards of twenty years previously, he had known Murray, Johnson, and Stone to visit a notorious Jacobite named Vernon, and that at his table they were in the habit of pledging the Pretender's health. Even this evidence, little as it went to prove, was prevaricated upon, and explained away, and par-

tially retracted by Fawcett himself, when summoned before the council; and the fact alleged was distinctly and solemnly denied by each of the parties accused. Upon this the charge was at length altogether dismissed; and an attempt set on foot by Lord Ravensworth and the Duke of Bedford to revive the subject, in the shape of a parliamentary inquiry, proved abortive.

To be continued.

## ON THE LAW RELATING TO

### MASTERS OF SHIPS AND COMMON CARRIERS.

In conformity with the intention expressed in a former essay on the law of Principal and Agent, it is proposed in some degree to complete the outline then presented, by now considering the law relating to Masters of Ships and Common Carriers.

Of those employed as Commercial Agents, few have more various duties to perform, or without express authority, subject their Principals to greater responsibility, than Masters of Ships. While the ostensible and apparently sole object of their appointment is the navigation of the vessels committed to their charge, they are occasionally required to act the part of merchants, and from necessity constituted the legal representatives, not only of the owners of the ship, but sometimes also, of the proprietors of the cargo.

Successfully, or even safely, to execute their trust, various and somewhat dissimilar qualifications are requisite. Nautical skill must be combined with mercantile information. A theoretical and practical knowledge of the art of navigation, is essential to conduct the vessel in safety to its destined port—but even in relation to the navigation of the ship, this knowledge forms but part of the qualifications necessary. Commanding those 'whose home is on the deep,' and whose habits, uninfluenced by the charms and the charities of domestic life, render them insubordinate and audacious, there is required of the Master firmness and decision to preserve authority, and enforce discipline, yet so regulated by good sense and moderation, as to prevent authority and discipline from degenerating into tyranny and cruelty. Exposed at times to the attacks of enemies and pirates, courage is necessary to protect the property confided to his care. Storms and tempests are the incidents of his voyage, and to escape disastrous results from encountering them, he must possess presence of mind in time of danger. His courage and self possession should, as has been said by a celebrated French Jurist, (Emerigon,) 'be able to dissipate fear, to calm disturbed minds, and inspire confidence in the breasts of the most timid. He should have the talent to command, and enforce obedience to his orders. When the vicissitudes of the voyage require of him to act the part of a merchant, he should possess business qualifications, and be conversant with the forms and course of trades.

But it is not in relation to those and other requisites for his office, that we are now to inquire. It is his character as an Agent—his authority to bind those by whom the ship is owned, to act for the proprietors of the cargo, and especially his liability in common with the owners of the ship, for injuries or losses resulting from his negligence or misconduct, or for which as Carriers the law makes both the Masters and Carriers responsible, which it is proposed to consider.

The authority of the Master to bind the owners is seldom expressly given. It is implied from his appointment, which holds him forth to the world as worthy of trust and confidence. According to the principle stated in a former essay, they are answerable for all his acts, for the performance of which an authority may be presumed from his situation and character, although he contravenes his private instructions. All his lawful contracts, therefore, relative to the *usual employment* of the ship, are obligatory upon his employers, whether they are the absolute owners of the vessel or only the charterers, provided in the latter case, the charterer has the exclusive possession and navigation of the ship. (St. Abt. 23, note.)

Where the ship is a *general one*, that is, not chartered, but employed to carry the goods of a number of persons not connected with each other, the Master when aboard has authority to make contracts relative to the freight. He cannot, however, bind his owners by an agreement to carry goods free of freight, as such an arrangement would obviously not be within the scope of his authority. The master may also, when the vessel is in a foreign port, where the owners have no Agent, charter her by virtue of his general authority. (2 W. C. C. R. 149.) But if the owners themselves have contracted for the employment of their ship, the Master cannot by the implied authority of his character, alter such contract, or substitute another for it. (11 Mass. R. 99.) Yet so far is he the Agent of the owner, from the mere relation of Master and owner, that where a ship while abroad, was sold by the owners at home, the purchaser was held liable for supplies subsequently furnished upon a contract with the Master, though neither the Master nor the person furnishing the supplies, knew of the sale of the vessel, and consequent change of ownership. (6 Mass. R. 422.

The power of the Master is not confined to making engagements relative to the *employment* of the ship; he may bind the owners by contracts respecting the *means* of employing and navigating her. To him is usually confided the hiring of the seamen, and the purchasing of the requisite supplies for the voyage. The usage, and his character as Master, furnish presumptive evidence of his being authorized to contract for such purposes, even at the place where the owner resides, and of course much stronger proof of his authority when the ship is abroad. To bind the owners, however, by such contracts, the supplies must appear to be reasonable, or it must be shown, that the money advanced for the purchase of them was wanting. There must also be nothing in the circumstances of the transaction, to repel the presumption, that the Master acted under the authority of the owners.

In the contracts thus made by the Master, the owners are rendered liable; but he is also personally bound to those with whom he contracts, unless by the terms of the contract it is expressly otherwise provided, or unless the circumstances show that credit was given to the owners alone. The Master's authority is not confined to contracts personally obligatory upon the owners. He may in certain cases create a lien upon the ship and even hypothecate or pledge the whole, or sell part of the cargo, though owned by strangers.

The most staunch and well found ship may be disabled by gales and tempests; the best planned and most lawful voyage be interrupted by the violence of belligerants, the cupidity of privateersmen, or the unjust and arbitrary acts or edicts of foreign princes. From these and similar causes, the ship and cargo are sometimes, at an intermediate port, where the owners have no authorized Agent, placed in situations of embarrassment and peril; to release them, and prevent the voyage from being broken up, often requires the exercise of an extraordinary authority in behalf of the owners, which as the necessity for it is rarely anticipated, is seldom expressly given. This authority, where there is no other authorized Agent, the law has vested in the captain. It exists, however, only in cases of necessity, and is to be exercised as a last resource.

Thus, where funds are wanted in a foreign country, though it may be even at the port of destination, (3 Johns. R. 352,) to repair the ship, to purchase provisions, or for any other purpose *necessary to complete the enterprise, in which the vessel is engaged*, whether the necessity has arisen from extraordinary dangers, or in the ordinary course of events, the Master may, *if he cannot obtain it otherwise*, borrow money at maritime interest on bottomry, and pledge the ship and freight for the repayment at the end of the voyage. The terms *bottomry* and *maritime interest*, are familiar to most merchants, but it may not be improper to state their legal acceptation. A bottomry bond is a security, by which the ship and freight are pledged by way of mortgage, for a loan or advance to the Master or owner. It is called *bottomry*, the bottom or keel being figuratively used to denote the whole vessel. The lender generally speaking, takes upon himself the risk of the safe arrival of the vessel. If it is lost, he loses his right to repayment, but in consideration of the risk which he thus incurs, the law allows him to stipulate for, and receive a greater rate of interest, than would otherwise be legal. This is called maritime interest, varying as to its rate, according to the contract of the parties. A respondentia bond is, where the loan is upon a pledge of merchandise, the condition of repayment being the safe arrival of the goods pledged; the amount loaned, both principal and interest, being at the risk of the lender during the voyage, who is, therefore, also allowed to receive maritime interest.

To return to the authority of the Master to raise money on bottomry at maritime interest. When he does so, as the loan was not on the personal credit of the owner, the owner is not personally responsible. The lender, if the ship arrive safe must resort to *the specific security* of the vessel and freight, or to the Master upon his personal engagement as the obligor of the bond.

The authority thus given to the Master, to pledge the ship and freight, is intended to promote the interests of the owners, but as being exercised abroad, it may be perverted and abused, the law has endeavored to guard against such results, and as far as practicable to protect the owner from fraud and collusion, and from the injuries which might follow from an improvident exercise of this power by the Master. For this purpose various safeguards have been established. It has been determined that the Master cannot borrow on bottomry, where the advances are not necessary for repairs or supplies, or for effectuating the objects of the voyage, or the safety and security of the ship—nor where the Master has other funds which he might use—nor where he can borrow on the credit of his owner—nor where the consignees of the owner have funds in their hands.

In these cases, the necessity, which is the ground of the authority to borrow, does not exist, and the authority, therefore, is not conferred.

Neither is the Master authorized to hypothecate the ship for advances *previously* made, nor for

the debts of his owner. (2 Wash. C. C. R. 145.) It follows of course, that he cannot do so to advance his own private interest—nor can he do it for the benefit of the cargo. (9 Johns. R. 29.)

To be concluded next week.

## RECENT AMERICAN DECISIONS.

### FALSE IMPRISONMENT.

1. Where an offender arrested under a warrant *indorsed* in pursuance of the act 'for the better apprehending of felons and other offenders,' was taken into the county where the magistrate resided who issued the warrant, he not being a justice of the county where the offence was committed, it was *held*, that an action for false imprisonment was properly brought, the officer having neglected to comply with the requirements of the statute. *Green vs. Rumsey*, 2 Wend. 611.

2. *False imprisonment* will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a party accused, by operating upon his fears, although the party be in the custody of the officer, under a valid warrant issued upon a charge of felony. *Holley vs Mix*, 3 Wend. 350.

3. In an action for *false imprisonment* against two, where *several* damages are given, the plaintiff may cure the irregularity by entering a *nolle prosequi* against one, and taking judgment against the other. *Ib.*

4. A *misnomer* of the person, in process on which an arrest is made, subjects the actors to an action for false imprisonment. *Scott vs. Ely*, 4 Wend. 555.

### FORFEITURE OF ESTATE.

1. Since the statute allowing the wife and her heirs to enter into lands belonging to her, aliened by the husband, after the decease of the husband, it seems that a feoffment by the husband of the wife's estate does not work a forfeiture of his life estate. *Jackson vs. Mancius*, 2 Wend. 357.

2. If a forfeiture of a life estate accrues by the disseizin of the tenant for life, the reversioner is not bound to enter until the natural termination of the life estate. *Ib.*

### FORMER RECOVERY.

Where an erroneous judgment is recovered, and the amount thereof collected, and such judgment is subsequently reversed for defect of form merely, and restitution and costs of reversal awarded to the defendant in the original judgment, such defendant cannot plead the payment made by him on the erroneous judgment in bar to a second suit for the original causes of action. *Close vs. Stuart*, 4 Wend. 95.

### FRAUD.

1. *Actual fraud* in the conveyance of property may be shown by a *creditor* although his debt accrued *subsequently* to the conveyance sought to be avoided. *Wadsworth vs. Havens*, 3 Wend. 411.

2. So a purchaser for a valuable consideration has a right to avoid a precedent fraudulent conveyance. *Ib.*

3. Where a *nephew*, a simple, ignorant young man, was induced by his uncle, to accept a conveyance of land worth not exceeding $240, in satisfaction of a claim of at least $500, it was *held*, on an appeal from chancery, that from the nature of the transaction, the inadequacy of the consideration, the relative character, capacity, and connexion of the parties, *fraud and imposition* might well be *presumed:* and a decree directing the payment of the original claim by the uncle, and a re-conveyance of the land by the nephew, was affirmed. *Hall vs. Perkins*, 3 Wend. 626.

### STATUTE OF FRAUDS.

A *promise* by one person to indemnify another for becoming a *guarantor* for a third, is not within the statute of frauds; such promise need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise. *Chapin vs. Merrill*, 4 Wend. 657.

### FRAUDULENT CONVEYANCE.

1. A voluntary conveyance is a deed *without any valuable consideration.* If anything *valuable* passes between the parties, it is a *purchase;* and it was accordingly holden that a bond executed by a son to his parent for $500, with interest annually, *if demanded*, was a valuable consideration, and would sustain a conveyance of land as a *purchase;* the securing to the grantor an annuity or rent equal to the legal interest of the bond, being deemed sufficient, even though it had been the intention or expectation of the parties that the principle of the bond should not be exacted. *Jackson vs. Peek*, 4 Wend. 300.

2. In the case of a *voluntary conveyance*, as much as in any other case, the question is as to *actual fraud*, which must be passed upon and decided by a jury. *Ib.*

3. A trifling accruing indebtedness or a declaration by a grantor at the time of the making of a settlement upon his children that he owed *some money*, where he retained under his control property amply sufficient to meet such demands, is not sufficient to avoid a conveyance. *Ib.*

4. Where on the trial of a cause, a party seeking to avoid a conveyance admits that there is *no actual fraud* in the transaction, the court will not look into the facts and circumstances disclosed by the evidence, to determine whether the transaction be in fact fraudulent or not, although a verdict be taken and a case made, subject to the opinion of the court. *Ib.*

### FRAUDULENT JUDGMENT.

1. The taking of a judgment for a larger amount than is actually due, for the purpose of defeating another creditor, subjects the plaintiff to the penalty given by the statute of frauds, although a part of the debt covered by the judgment be actually due. *Wilder vs. Fondey*, 4 Wend. 100.

2. The motives of a plaintiff in entering judgment upon a bond and warrant where he has no security besides the judgment cannot be questioned; but where he has other security, and takes the only fund against which other creditors can proceed, his motives may be submitted to the consideration of a jury. *Ib.*

3. The statute of fraud reaches fraudulent *executions* as well as fraudulent *judgments.* An execution for the full amount of a *bona fide* judgment where the whole or a part of the judgment is satisfied, is within the operation of the statute. *Ib.*

4. A bond and warrant may be taken, and judgment entered thereon to cover future advances, but if an execution issues upon such judgment for more than is actually due, it is fraudulent if intentionally done; and whether issued intentionally or by mistake, for the amount directed to be levied, is a proper question for a jury. But to entitle a party to give proof upon such point, he must distinctly state the evidence he wishes to offer, unconnected with the question of the validity of the judgment. *Ib.*

### GRANT.

A grant by the sovereign authority of the state of New York to A B and five others, as patentees, for and on behalf of themselves and their associates, *the freeholders and inhabitants of the town of Hempstead*, is a valid grant, being made an individuals by name, as *trustees* for the freeholders and inhabitants. *North Hempstead vs. Hempstead*, 2 Wend. 109.

### GUARDIAN AND WARD.

1. There can be no guardianship in socage of lands, granted by the state of New York since the 4th of July, 1776, the act concerning tenures declaring that all lands held under the authority of that state, shall be and remain *allodial* and not *feudal.* *Combs vs. Jackson*, 2 Wend. 153.

2. At the common law, where there was no guardian in socage, the father was guardian *by nature* to his heir apparent, until he arrived to the age of 21; this guardianship gave a control of the *person* only, and not of the estate, real or personal, of the infant. *Ib.*

3. Under the New York statute of descents, all the children are heirs apparent of the father, and he is entitled, as guardian by nature, to the guardianship of their persons until they attain the age of 21, or marry, except where lands, granted before the revolution, descend to the children from their maternal relations, in which case, as the lands cannot go to him, if they be socage lands he will be guardian in socage, and may take the rents and profits thereof for the use of his children, until they attain the age of 14, and until another guardian be appointed. *Ib.*

4. A guardian *by nature* has no control over the real or personal estate of his infant children. *Ib.*

### HUSBAND AND WIFE.

1. Where a bond is given by a husband to secure a separate maintenance to his wife, on an agreement between them to live separate and apart, and they separate, and the wife subsequently returns for the purpose of resuming her duties and privileges as a married woman, and is received by her husband as his wife, the previous agreement to live separate from each other is at an end, and the bond which was given for the separate maintenance falls with the agreement. *Shelthar vs. Gregory*, 2 Wend. 422.

2. The subsequent abandonment of the husband by the wife does not revive the bond or the legal liability of the husband to afford her a separate maintenance. *Ib.*

### INCORPORATED COMPANIES.

1. The members of an incorporated company made by statute *individually* liable as carriers at common law, are responsible to the same extent and in the same manner as if there were no act of incorporation. *Allens vs. Sewall*, 2 Wend. 327.

2. A suit brought against them for the loss of a packet entrusted to their agent, should be against

ll the co-partners, as the action is *quasi ex con-actu*; but the non-joinder of all cannot be taken dvantage of on the trial, but must be pleaded in batement. *Ib.*

INDICTMENT.

Where there are two counts in an indictment or a misdemeanor, one good and the other bad, nd the defendant is convicted, the indictment ill not be quashed on demurrer, or the judgment rrested or reversed for that cause. *Kane vs. The People*, 3 Wend. 363.

INFANT.

1. Where an infant took a mare on hire, and rove her with such violence, and treated her so ruelly otherwise, that she died; it was *held*, that hough *case* would not lie, *trespass* might be main-ined against him. *Campbell vs. Stakes*, 2 Wend. 37.

2. If an infant who has a horse on hire, does ny wilful and positive act, amounting to an elec-on, on his part, to disaffirm the contract of hiring, he owner is entitled to the immediate possession. *Ib.*

3. If the infant wilfully and intentionally injure e animal, an action of trespass lies against him r the *tort*. *Ib.*

4. Infancy, with an averment that the injury ppened through the unskilfulness, want of know-dge, discretion, and judgment of the defendant, uld be a good bar to an action of trespass ought for killing a horse let to hire, by violent ving and cruel treatment. *Ib.*

5. *Infancy* is admitted by a replication of a new mise to a plea of infancy, and need not be wed by the defendant. *Goodsell vs. Myers*, 3 end. 479.

6. The *ratification* of an *infant's* contract should a promise to a *party* in interest or his agent, or least an explicit admission of an existing liabil-from which a promise may be implied. *Ib.*

7. The ratification should be equivalent to a r contract. *Ib.*

8. The note of an infant is *voidable* not *void*, may be affirmed after the infant comes of age. eld in a case where the action was on a *negoti-*e note. *Ib.*

9. An *express* promise need not be proved to er an *infant* liable for *necessaries*; but where e sought to be charged otherwise than for ssaries, an express promise must be shown. rs. *Ballou*, 4 Wend. 40 3.

0. An *infant* is liable to his step-father for upport; a husband not being bound to sup-his wife's child by a former marriage. *Ib.*

INJUNCTION.

here there is an unlawful diversion of a m of a water from the mills and hydraulic s of a party, it is a proper case for the allow-of a preliminary *injunction*, as the injury, if ted in, might be irreparable. *Case vs. t*, 4 Wend. 632.

INSOLVENT.

An insolvent discharge, after a verdict and judgment, in an action of trespass, does otect a defendant from imprisonment. *Hod-Chace*, 2 Wend. 248.

A plea *puis darrein continuance* of a dis-charge under the act abolishing imprisonment for debt in certain cases, is not a *waiver* of a plea in bar before put in; and the plaintiff cannot con-fess the plea and take judgment, but must pro-ceed, and try the former issues. *Rayner vs. Dy-ett*, 2 Wend. 300.

3. An *insolvent discharge*, obtained in the state of New York cannot be pleaded in bar of a suit brought in a court of that state, on a contract made in another state subsequent to the passage of the act under which the discharge is obtained, between parties not inhabitants of the state of New York at the time of the contract although previous to the presenting the petition for the discharge, they become such inhabitants. *Witt vs. Follet*, 2 Wend. 457.

4. An action cannot be maintained against the maker of a promissory note payable to *bearer*, by a person to whom the same has been transferred, where the maker has obtained a discharge from all his debts as an insolvent debtor, previous to the transfer; although after the discharge, but before the transfer, the maker makes a *new promise* to the *payee* to pay the debt, and such new promise is set up by way of replication to the plea of dis-charge. *Depuy vs. Swart*, 3 Wend. 135.

5. An insolvent's discharge under the act ex-onerating a debtor from the payment of his debts, *discharges the debt* for which a note has given; the note becomes *functus officio*, loses its negotia-ble qualities, and a person to whom it is transferred after such discharge acquires no right to maintain an action upon it. *Ib.*

6. A promise to pay a debt discharged under such insolvent law, is a *new contract*. A suit on such contract can be brought only in the name of the person with whom the contract is made: and a note, the evidence of the original debt, has no connexion with such suit, other than as furnishing a consideration for the new promise. *Ib.*

7. In declaring in an action brought after such new contract, the plaintiff may set forth the origi-nal cause of action, and in his replication aver the new promise. *Ib.*

8. The moral obligation resting upon a debtor who has obtained an insolvent's discharge, is a good consideration for a subsequent promise to pay a debt. *McNair vs. Gilbert*, 3 Wend. 344.

9. An action cannot be maintained by the as-signee of a note payable to bearer, *directly* on the note, where the negotiability of such note has been destroyed by an insolvent discharge granted to the maker. *More vs. Viele*, 4 Wend. 420.

10. Nor can such assignee avail himself of a *new promise* subsequent to that discharge, unless it be made to him personally, to his agent, or to a third person *to pay the assignee*. *Ib.*

11. A *discharge* of an insolvent debtor, void as to its effect in relieving the defendant from the payment of his debts, is equally inoperative to pro-tect him from the imprisonment of his person. *Witt vs. Follett*, 4 Wend. 501.

12. A foreigner who has resided in the state of New York, and transacted business as a com-mission merchant for seven years, and then re-turns home taking with him his effects, and un-certain whether he will return or not, loses his character of an *inhabitant*; so that, though he returns to that state after a sojourning of only three weeks in his native land, he is not entitled to be discharged as an *insolvent debtor*, if, after his return, he engages in no business, and his residence, after his return, is merely of a tempo-rary nature. *In the matter of John M. Wrigley*, 4 Wend. 602.

INSURANCE.

1. Where a vessel, warranted not to be em-ployed in an illicit trade, is condemned by an Ad-miralty Court, acting as a Municipal Court to carry into effect navigation laws, for a violation of such laws, to support the allegation of a breach of such warranty, it is incumbent on the insurers to prove the existence of the laws alleged to be violated, as courts cannot judicially notice the mu-nicipal laws of foreign countries, but require them to be proved like other facts. By Walworth, Ch. *Ocean Ins. Co. vs. Francis*, 2 Wend. 64.

2. The facts of seizure and condemnation are not enough to support the allegation of a breach of warranty; the law under which the same took place must be produced and proved. By Spencer, *senator*. *Ib.*

3. Where a vessel is warranted as being *Brit-ish*, general evidence of her national character is *prima facie* sufficient, until doubts are raised by proof on the other side. By Walworth, Chan-cellor. *Ib.*

4. The insurer, when he sets up the breach of a condition as a defence, must prove the breach, or at least rebut the general presumption, by proof on his part. By Spencer, *senator*. *Ib.*

5. Whatever may be the law upon the question, how far a citizen or subject is bound, by the legis-lative or executive acts of the government to which he belongs, *it seems*, he is not bound by the *judicial acts* of a tribunal, merely because he is a subject of the government under which that tribu-nal is organized. By Walworth, Ch. *Ib.*

6. How far and in what cases a citizen is bound to look to his own government only for re-dress for injuries committed by the judicial, legis-lative, or executive departments of his own coun-try within the scope of their authority, *quære*. The question whether the assured can recover for an act done under the authority of his own state, does not arise, where from the sentence of the court, it does not appear that the seizure and condemnation were, by virtue of such authority, for a violation of a municipal law of the govern-ment to which the party belonged. Without proof of the existence of such law, and that the condemnation was for a violation thereof, the whole must be considered illegal and unauthor-ized. By Spencer, *senator*. *Ib.*

7. Where underwriters make no objection to the sufficiency of proof of interest, put their refu-sal to pay on the ground that they are not liable for the loss, it is a waiver of preliminary proof of interest. *Ib*

8. Testimony that a voyage was fair and law-ful, and that the vessel was not engaged in any illicit trade, is evidence of *fact* not of *law*. *Ib.*

9. The neglect of a supercargo to put in a claim to a vessel captured for an alleged violation of navigation law does affect the claim of the assured for a total loss. *Ib.*

10. Where a policy of insurance was effected upon goods and merchandise laden or to be laden on board a ship *for and during the term of six calendar months*, without reference to any partic-ular voyage, the risk to commence from and im mediately following the loading of the goods on board the vessel, it was *held*, that a *trading voyage* was evidently contemplated by the parties: that the policy was to be construed in the same man-

ner as if a trading voyage had been expressed, with liberty to touch and trade at such ports and places on the globe as the insured should choose, subject to the accustomed and usual mode of transacting business at the several places visited by the vessel; and that however *often* the goods might be changed the policy would attach. *Coggeshall vs. American Ins. Co.* 3 Wend. 283.

11. If goods, while in the transportation from the shore to a ship engaged in a trading voyage, are lost, the insurer is liable, if the means employed for such transportation are according to the known course of trade and established usage of the place where the goods are thus attempted to be laden on board the vessel. *Ib.*

12. *It seems* that it is not an established point, in this country, that the insurer would be discharged by the insured taking the goods in his *own* lighter for the purpose of landing them, if the goods should be lost. *Ib.*

13. Underwriters may contract so as to incur risks antecedent to the date of the policy. *Ib.*

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SHIPS AND SHIPPING.

Under the 10th section of the act of 1825, ch. 67 (276,) the forcing a mariner on shore must be done, not only without a justifiable cause, but also maliciously to justify a conviction. If done under a mistaken sense of duty it is not a case for conviction.

'Maliciously,' in the statute, means with a wilful disregard of right and duty, or doing the act against a man's own conviction of duty.—*U. States vs. Ruggles.* 5 *Mason*, 192.

A master of a ship has authority to confine his seamen in a common gaol, in a foreign port, for offences and misconduct, in extreme cases, and where the proper correction or punishment cannot be effectual on ship board. *Ib.* 192.

The crew of a ship who have signed shipping articles for a voyage under a particular master, without any clause providing for a change of master, are not discharged from the articles, by the dismissal of the master by reason of sickness, or any other reasonable cause, and the appointment of a new master, but they are bound to obey the new master.

If in such a case they combine together to refuse to do duty on board and to refuse obedience to the new master, that is an endeavor to make a revolt within the meaning of the crimes, in the act of 1790. ch. 9. (36) §12.—*United States vs. Haines*, H. 272.

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## GEORGIA AND THE CHEROKEES.

The Supreme Court of the United States terminated its annual session yesterday.

Among the decisions pronounced previous to the adjournment, was one upon the application, on the part of the Cherokee nation, for an injunction to stay certain proceedings of the State of Georgia. The decision of the Court was an unequivocal denial of the injunction.

The opinion of the Court was read by Chief Justice Marshall, and is therefore presumed to be from his luminous mind and pen. We have not been able to obtain it for publication, anxiously as we desired to do so. We heard it read however, and shall venture so far to report the grounds of it, as to state, that the Court disclaim jurisdiction of the case, on the ground that the Cherokee nation is not a *foreign* nation, in the sense of the Constitution. These Indian nations, it is the opinion of a majority of the Court, are not sovereigns, independent of the sovereignty of the United States, but domestic dependent nations, in a state of 'pupilage' to the United States, or in a relation corresponding to that which wards have to their guardians. The Supreme Court, therefore, cannot take cognizance of cases to which it is sought to make them parties as nations. With respect to the rights of the Cherokees, however, as individuals, to the lands guarantied to them, it was pretty distinctly intimated, in the opinion of the Court, that there is a mode by which they may be brought before the Supreme Court for adjudication.

The Opinion went on to say, that, if the objection to entertaining jurisdiction in this case were not fatal to the application, there were other grounds on which an application for the interference of this Court in the case would encounter grave objections. If jurisdiction was exercised in the case, it must be on the ground that the Cherokees are a foreign nation; and the relations between foreign Powers and the States are placed in the charge of a different branch of the Government. For this Court to undertake to arbitrate such questions, would be to assume a political power not intended to be vested in it.—*If* it were true, as argued, that the Cherokee Nation is oppressed by the State of Georgia, &c, &c, it belonged not to this Court (the Opinion concluded,) but to other tribunals, to assert their rights and redress their wrongs.

Mr Justice Baldwin delivered a very long separate opinion, agreeing entirely in the conclusion to which the majority of the Court had arrived, but not concurring in the views taken in the Opinion which had been read.

Mr Justice Johnson also delivered a separate opinion on the question.

*Our own* opinion on the subject is of little consequence; but the reasoning of the Court upon the Constitutional provisions bearing upon the case appeared to us to be conclusive.

The Baltimore Republican says—'The Court were divided on the question. The Chief Justice and Justices Johnson, McLean and Baldwin, against Justices Thompson and Story.'—*Nat. Int. 12th inst.*

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## THE SUPREME COURT.

Extract of a letter to the Editors of the United States Gazette, dated WASHINGTON, MARCH 10, 1831.

The session of the Supreme Court will terminate next week. It has been one of unusual interest, as many great questions of constitutional and general law have been presented and decided in the cases which have been disposed of; others of equal interest remain for decision.

The very important case of the Charlestown Bridge v. The Warren Bridge is now before the Court. It has been ably argued by Mr WARREN DUTTON, Mr WIRT, and Mr JONES; and Mr WEBSTER will close the argument tomorrow. Mr DUTTON, of Boston, has appeared for the first time in this Court, and he has fully justified the high reputation he holds in his own State. His opening address was lucid, learned, and eloquent. His manner is impressive, logical, and comprehensive, and his classical illustrations those of an accomplished scholar.

You are aware that this case is one of great interest in Massachusetts. It is brought before this Court under no circumstances to create jealousy of its interference with the decision of the State Court or the powers of the Legislature. It presents a question of property, and this appeal is almost sanctioned by the recommendation of the late Chief Justice Parker, of the Supreme Court of that State. The closing remarks of Mr DUTTON were listened to with profound attention, and I am particularly enabled to send them to you in almost his own words:

'After a contest of more than seven years with popular prejudice and passion, after struggling through that worse than Serbonian bog, judicial legislation, beset with difficulties and involved in darkness, it is a source of unmingled satisfaction to me to find myself at last standing on solid ground, and in the gladsome light of jurisprudence. That I have an oppportunity to submit this act, establishing the Warren Bridge Corporation, to the consideration of a tribunal, which the profound wisdom of the framers of our Constitution has provided for the ultimate determination of all controversies of this sort; a tribunal separated by distance, and elevated by the dignity of its office far above and beyond those excitements, interests, and passions, which sometimes vex and agitate particular communities; a tribunal that, looking with an eye of pure intelligence upon the law and constitution, pronounces its judgment unbiassed and unawed, solely in obedience to their dictates.'

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THE JURISPRUDENT.

BOSTON, SATURDAY, MARCH 26, 1831.

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## CASES IN THE GENERAL COURT OF VA.

NOVEMBER, 1830.

A correspondent has obligingly furnished us with notes of the principal decisions of the General Court of Virginia, at the November term, 1830: Present, Justices Stuart, Brockenbrough, Johnston, Smith, Allen, Daniel, Semple, Upshur, Field, May, and Lomax; as reported in the Richard Enquirer, of November 26th, from which the following abstracts are made.—*Jurist.*

A party being indicted and convicted under 1 R. C. p. 428, c. 3, s. 30, for carying four slaves named H. S. P. and *Hyat*, the property of E. D. and one named G. the property of L. J. D. out of Virginia, without the consent of said owners, and with the design of depriving them of their said slaves; a writ of error was petitioned for, on the ground that at the Examining Court, the defendant was, as appeared by the record, examined for so carrying away four slaves, named H. S. P. and *Harriet*, and one slave named G. belonging to such owners respectively. The petition was rejected by the Court *unanimously*. *Thomas vs. The Commonwealth.*

A justice of a County Court, who leaves the state, with the intention of settling in another state but after staying nine months in such other state, without, however, having any established residence there, returns to Virginia, thereby loses his office of a justice of the County Court. *Powston vs. The Justices of Accomach.* See also *Chevs. The Justices of Spottsylvania.*

A writ of error will not be granted to reverse a judgment against the defendant, in an indictment for nuisance, by raising a milldam so as to overflow a highway, because the indictment does not allege distinctly and specifically where the mill is situated, and what particular piece of road was over flowed. *Stephen vs. Commonwealth.*

[It was objected that it did not appear, from the indictment, except by inference, that the mill was in the county where the trial was had; it is to be presumed, therefore, that the road overflowed was alleged to be in the county.]

On an indictment for passing counterfeit money, evidence that at or about the time when the offence is alleged to have been committed, the defendant passed other counterfeit money is admissible to prove the *scienter*. *Martin vs. The Commonwealth.*

It being proved that the defendant in such an indictment had confederated with another person for the purpose of passing counterfeit money, evidence that counterfeit bills were passed by such other person similar to those alleged to have been passed by the defendant is admissible. *Ib.*

It is not indispensable that the notes alleged in such an indictment to be counterfeit should be proved to be such by the testimony of the officers of the bank by which the bills purport to have been issued; this fact may be proved by other witnesses. *Ib.*

Where some of the jurors left their box after the jury was empannelled, but before any evidence was given, but it appeared that they could not have communicated with any person during their absence from the box, the proceedings will not be set aside on this account. *Ib.*

[A part of the judges considered the circumstances of the jury's separating *before* or *after* any evidence was given, to be material: others did not consider this distinction entitled to so much weight, but all concurred in not setting aside the verdict, because from the particular circumstances, it was evidently not possible that the jurors could have been tampered with during their absence.] *Ib.*

In an indictment for counterfeiting bank notes, being proved that the defendant had such notes in his possession, and also implements for counterfeiting them, the jury were instructed that this was *prima facie* evidence that he counterfeited them. *Spencer vs. Commonwealth.*

The possession of such bank notes and apparatus, is *prima facie* evidence that the notes were counterfeited *at the place* where they were first found in possession of a person. By a majority of the court, Johnston, Semple, May, and Lomax, dissenting. *Ib.*

See *United States vs. Britton*, 2 Mason, 470.

[Two of the dissenting judges, May and Semple, were of opinion that the possession of the notes, and apparatus, though not *prima facie* evidence of the possessor's counterfeiting them, were such evidence of his aiding in so doing.

But another question arose in this case, which strikes us as of some importance. The two judges who named understood the bill of exceptions to state that the judge who presided at the trial instructed the jury that the facts above stated were *prima facie* evidence of the facts inferred. This would, they thought, be an instruction as to the weight of evidence, and they were, therefore, of opinion that the verdict ought to have been set aside. But Mr Justice Story, in Britton's case, cited above, considers the inference as to the fact of forging in such case, to be an established *presumption of law*, and if it be so, the court was bound, if so requested, or if the question was presented, so to instruct the jury, as much as they would be to instruct them that a registry of deed is notice to all the world. The reasons given in Britton's case in favor of such a presumption, are certainly very strong. Another question suggests itself in this case, whether the court should instruct the jury that the possession of counterfeited notes, and the apparatus for counterfeiting them, is *prima facie* evidence, or, in other words, ground of legal presumption, that the possessor was the counterfeiter; for, whether he should appear to have been so or not, seems to depend on the circumstances of the particular case. We are not aware that it has been made the subject of legal presumption. To instruct the jury that a fact *is proved*, is to instruct them on the *weight* of testimony; but to instruct them that *if such a fact is, in their opinion, proved*, then the law raises such or such a presumption is strictly within the province of the court. The question in such case, and that a legal one, is, whether the law does raise any such presumption? The doctrine laid down by Mr Chief Justice Tilghman on this subject, in Stower v. Lessee of Whitman, 6 Bin. 419, to this effect, seems to us to be correct. We make no distinction between what is called a presumption *of law*, and a presumption *of fact*; considering them to be the same.

Under the insolvent laws of Virginia, if a debtor presents a schedule of his property, and offers to take the oath prescribed by the statute as a condition of his discharge from imprisonment, the justices, before whom he offers to take the oath, (being the proper magistrates) are bound to administer it, though they may have reason to think he swears falsely. [As all the debtor's property, whether included in the schedule or not, passes, by assignment by law to the sheriff, for the benefit of the creditors, their right to the proceeds is not affected by the schedule and oath, though if the debtor conceals or abstracts any part, it may be more difficult to prove it to be his.] *Harrison vs. Emerson & als. Justices of the Peace.*

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### ADMIRALTY COURT.

(Before Sir C. Robinson, attended by two Trinity Masters.)

*The City of Edinburgh—Salvage.*

Dr Adams, for the salvors, in this case, stated that the City of Edinburgh steam-vessel, left Leith on the 12th of January last, but meeting with rough weather, the Captain, Richard Fraser, put into Hamburg harbor, where he remained for several hours. The weather improving, however, he again proceeded on his voyage for London, but shortly after he had left the port, a heavy sea struck the vessel astern, stove the boat, and did other damage, so that shortly afterwards both engines were disabled, and the captain ran for Blakeney harbor for shelter. Before, however, she arrived off the harbor, on the 13th, she lost her best bower anchor and cable. In trying to get into the port without a pilot, the vessel was going in a direction which would have grounded her, had not one of the salvors, William Baynes, warned her off by waving his jacket. The steamer then stood out, and the salvors lost sight of her in a shower of snow. At night they saw her again, and discovered that her Union Jack was reversed (a signal of distress), an ensign was in her mizen rigging and lights were hung out for assistance. The weather, however, was so severe that they durst not venture out to assist her without a certain prospect of destruction. They remained, however, on the beach all night, in order to assist if she went to pieces, for at this time she was so strained that her sides could be seen through from the engine-room. On the 14th, towards night, the wind in some degree abated, and the salvors immediately put off to her. They joined her at about the same time as another boat from Wells (about five miles distant), and assisted in weighing anchor, sounded the bar in the harbor, and ultimately succeeded in getting her in. The salvors contended that she was in such a bad condition that the Captain told them at the time they boarded that he had determined on running her ashore to save what he could. He promised them that if they could succeed in getting the vessel in they should be handsomely rewarded, as the vessel and cargo were worth 33,000*l.* and there were 150 passengers on board.

The King's Advocate (with whom was Dr Phillimore), contended for the owners, that these fishermen of Blakeney were entitled to no more than the regular remuneration for pilotage, for that the signals to which they had referred were merely signals for a pilot and not of distress. That the salvors might have put off and have reached her on the 13th, as the sea was not so high as to frighten persons used to it. That the passengers took their meals at the usual times, and that many of them were playing cards throughout the night of the 13th. It was further proved in evidence that the salvors had said at the time they saw the signal, that it would not pay them to pilot her in, if they did not do so as salvors, and that they had prevented some sailors (who had volunteered) from joining her by taking away the lifeboat. The Learned Gentleman also alleged that the storm was over when the salvors came on board the vessel, and concluded by contending, that the Court ought not to award more than the remuneration which had already been offered.

Sir Christopher Robinson, in giving judgment, inquired of the Trinity Masters, who were on the bench, whether they thought that the salvors might have ventured out on the 13th and 14th, before they did, and whether it was not their duty to have made a trial?

The Trinity Masters replied, that there did not appear to have been more danger than the salvors ought to have encountered as mere pilots, and that at least they ought to have made a fair trial.

The Court then awarded the salvors the sum that had been tendered them, and decided that the owners should pay all costs.

Dr Dodson appeared for the Wells boatmen, but the Court deferred their case till a future day.

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The appointment of Lord Winford, as Judge by the late British Ministry, is a fruitful source of comment in the papers formerly on the opposition side. The following is from a late number of the Morning Chronicle :—

*A Cheap Judge.*—'Tom, what are you doing?—Nothing, plase your Honor. And what are you doing, Jack!—I'm helping Tom, sir.'—Joe Miller.

——————— 'Nil sine magno
Vita labore dedit mortalieus.'—Horat.

A fifth Baron! Good lack, cries John Bull, in a stew,
Why now really, Sir Robert, what is he to do?
To do, says Sir Robert, why first he's to shake
Up the other four Barons, and keep them awake
Let me tell you, this labor alone is worth more
Than five thousand per annum, five thousand times o'er
But if it should happen, that shake as he will,
All the other four Barons, are sound asleep still
Then into the bargain, he's paid to find out,
What these others four Barons are dreaming about.

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VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. I. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defeusive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Second edition. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

Peter Parley's Tales about Europe.

Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. Jan. 1.

THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett. Second Edition.

EVENTS IN PARIS, during the 26, 27, 28, and 29th of July, 1830. By several eye witnesses. Translated from the fourth Paris edition. This day published by CARTER, HENDEE, & BABCOCK.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I. —Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

BY GRAY AND BOWEN.

Printed by Isaac R. Butts, No. 25 School Street.

# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, APRIL 2, 1831. NO. XXXVI.

## LORD MANSFIELD.

Concluded.

Vernon, the Jacobite alluded to by Fawcett, although he followed the calling of a mercer, was a member of the ancient Derbyshire family of that name. Murray, Stone, and Johnson, had all been intimate with his son at Wesminster school, and their boyish friendship led to an acquaintance with himself, which was continued after they had left the university. For Murray, indeed, he soon conceived a warm attachment, insomuch that on the death of his only son, he considered him as his heir; and eventually left him, by his will, a property in Cheshire and Derbyshire, which was estimated at the value of more than ten thousand pounds. This was some time after Murray's marriage. The testimony of Fawcett all bore reference to an earlier period; when Murray was a young lawyer, and Stone and Johnson were both in obscurity. At that time it appears that young Vernon and his three friends used frequently to sup at his father's house in Cheapside, on which occasions there is little doubt that the old tradesman made no secret of his attachment to the Jacobite party. Whether the others ever thought fit to humor him so far as to avow a similar predilection, was the question that constituted the whole gist of the deep and serious investigation before the council. The only person who treated the affair as it deserved, was the king himself, who repeatedly declared, it was of very little importance to him what the parties accused might have said, or done, or thought, while they were little more than boys: he was quite satisfied with the assurance that they had since become his very faithful subjects and trusty servants.

Putting Murray's solemn asseveration of the falsehood of Fawcett's statement entirely aside, we think the constant drinking of the pretender's health before a mixed company, at a time when such symptoms of disaffection might, and often did, entail very awkward consequences on the persons displaying them, would have been an act quite inconsistent with the caution and the prudence of his character. Whether the improbability of the charge, coupled with his own denial of its truth, were then generally considered sufficient to disprove it altogether, we have no means of ascertaining. But his political opponents either did give it entire credence, or had their own reasons for affecting to do so; and the imputation of this political crime was, for many years afterwards, a favorite weapon with his assailants. Even so late as the time of Junius, we find it turned against him; and Horne Tooke, when he was tried in the court of king's bench, had no scruple in making free use of it. But it was in the hands of Pitt, and shortly after the investigation, that it proved most formidable. At the time the charge was made, Pitt was himself a member of the administration; and though his feelings of jealousy or personal enmity did occasionally betray themselves, even while he was enlisted under the same banner with Murray, he, of course, could not then make an habitual show of hostility against him. But on the death of Mr Pelham, (March, 1754) and his subsequent dismissal from the office of paymaster of the forces, which happened the year aftewards, (November, 1755) he was thrown into opposition, and had full opportunity of giving scope to his eloquence in repeated attacks against all the adherents of the Duke of Newcastle. Murray, as the acknowledged leader and champion of the ministerial party in the house of commons, would naturally have been singled out by him as the opponent most worthy to be coped with, and most difficult to silence; even had he not been further instigated against him by that spirit of personal rivalry which, according to Horace Walpole (and in such a case we may give full credit even to this prejudiced partizan), had materially contributed to bring about his defection from their common cause. Many examples of his attacks upon Murray, and some in which he taunted him with his supposed inclination towards Jacobitism, may be found in Walpole's Memoirs. From these it would appear that Pitt never failed to have the advantage, and that Murray invariably quailed beneath the pointed sarcasms of this great orator. The authority is, no doubt, questionable; but the account, nevertheless, wears the appearance of truth. There was a degree of timidity about the character of Murray, which was very likely to unfit him for stemming such bold and rapid torrents of invective or irony as the genius of Pitt delighted to pour forth. In closeness of argument, in happiness of illustration, in copiousness and grace of diction, the oratory of Murray was unsurpassed; and, indeed, in all the qualities which conspire to form an able debater, he is allowed to have been Pitt's superior. When measures were attacked, no one was better capable of defending them; when reasoning was the weapon employed, none handled it with such effect; but against declamatory invective his very temperament incapacitated him from contending with so much advantage. He was like an accomplished fencer, invulnerable to the thursts of a small sword, but not equally able to ward off the downright stroke of a bludgeon.

We have the testimony of every historian of Murray's time, to his ability as a parliamentary orator. In the house of commons he had no competitor but Pitt. 'They alone,' says Lord Chesterfield, 'can inflame or quiet the house; they alone are attended to in that numerous and noisy assembly, that you might hear a pin fall, while either of them is speaking.' Horace Walpole's frequent testimony to the same purpose is the more valuable, inasmuch as he gives it with evident reluctance. Unfortunately we have now no better means of estimating his skill as a debater than by the effects it produced. Pretended reports of his speeches in parliament may be found among the publications of the day; but there is none on which we can place much reliance, even as far as the arguments are concerned, much less the language, which indeed they scarcely affected to give with accuracy. It was in 1738, that the House of Commons declared it a breach of privilege to print any account of its debates; and though this had no further direct effect than that of inducing booksellers to publish them under fictitious titles (such as the debates of the kingdom of Lilliput in the Gentleman's Magazine), yet it certainly acted as a check upon reporters, who might previously have been in the habit of openly taking their notes in gallery. For the most part, therefore, a general notion of the subject of debate, with a more or less vague recollection, or perhaps a few loose memoranda of the principal topics insisted upon by the speakers, were the only materials which the professional caterers for public curiosity could command. Upon this slender ground work, or often on none at all, they were in the habit of constructing compositions, which were given out as the actual record of the proceedings of the house; though for the whole of the language, and the greater part of the ideas, they were often indebted in a much greater degree to their invention than their memory. The account of the magazine speech-maker in Jonathan Wild, is perhaps not very highly caricatured. Horace Walpole, and some few other writers of his class who have acquainted us in a summary way with the most important transactions of parliament, during their own time, have not in any case attempted more than an outline of any particular debate. The highest credit is certainly due to the industry and the skill, with which the editors of the parliamentary history have availed themselves of several important manuscript notes taken by different members, who were present at the debates; but from such imperfect and sometimes prejudiced accounts as these, we can no more form a just or adequate notion of Murray's powers as an orator, than from the mere general description of his commanding though not tall figure, his graceful gestures, his sparkling eye, and his melodious voice, we can bring before our imagination a correct picture of the man.

The well-earned celebrity of Murray both as a debater and as a statesman, raised a general expectation that he would be selected as the fittest person to succeed Mr Pelham in the cabinet. His high parliamentary reputation, however had never estranged him from his profession, to which, and to which alone he had repeatedly declared he would look for preferment. Walpole, indeed, in speaking of his claims to the office of prime minister, insinuates that he was not disinclined to advance them, but 'was always waiving what he was always courting.' No one, however, who has read this affected writer's memoirs, and been fatigued with his incessant strainings after antithesis, will require to be told that he makes little scruple of sacrificing truth, and dirtorting if not wholly mis-stating facts, whenever by so doing he can contrive to torture his language into a point. In this he strictly resembles the school of French writers, on which he had evidently modelled his style. It must, however be acknowledged that he involuntarily corrects many of his misrepresentations delivered in the form of such conceits as the one just quoted, by contradicting them in some of the few places where he condescends to express himself in plain language. Thus in a subsequent part of his memoirs, finding, no doubt, that what

he was about to state, could by no ingenuity be converted into a resting place for the see-saw of an antithesis, he distinctly and simply declares the fact mentioned above (which is besides authenticated by other authority), that Murray invariably refused to go out of his profession for advancement.

He had not long to wait for opportunities of rising to the very eminence which had probably been, throughout his whole career, the object of his ambition. The chief justice of the king's bench, Sir William Lee, died within a month after Mr Pelham (8th April, 1754,) and Sir Dudley Ryder being appointed to succeed him, the vacant post of attorney-general fell to the lot of Murray. In little more than two years afterwards, (July, 1756,) the death of Sir Dudley left the place of chief justice of England open to him. The claims of Murray to succeed him in this office were incontestable; and indeed no attempt was made to deny them. But the peculiar circumstances in which the Duke of Newcastle was at that time placed, in consequence of the loss of Minorca, made him more than ever anxious to retain in the House of Commons his ablest and most powerful ally, without whose assistance he was aware it would be vain to indulge the hope of continuing at the head of the administration. Every effort was accordingly made by him to induce Murray to forego his claims at that critical period. We are assured by Horace Walpole, that he offered him (in addition to his place of attorney-general, the emoluments of which were computed at about 7000*l.* a year), the Duchy of Lancaster with a pension of 2000*l.*, and the reversion of a tellership of the exchequer for his nephew, Lord Stormont. At the beginning of October, after every attempt to procure a coalition with Pitt had failed, and as the approaching meeting of parliament was about to bring matters to a crisis, the same authority informs us, that the duke bid up as high as 7000*l.* a year in pensions, on condition that Murray would retain his seat in the house of commons for a month, a week, nay even for one day. Murray, however, was resolute in his refusal. The office of chief justice of the king's bench, with a peerage, was one he had long been aspiring to, and for which, indeed, he had foregone every opportunity of rising by means independent of his profession. His professional reputation had kept pace with his political; and the bar at that time could produce none able to compete with him. He, therefore, justly considered himself entitled as a matter of right, to an office of which no man in the kingdom was so able to discharge the duties, and which he had earned by a sufficiently long and extremely arduous course of services to government. Finding, therefore, the Duke of Newcastle selfishly resolved to neglect no means of withholding it from him, he at length gave his Grace to understand, that if his claims were disregarded, the ministry should gain nothing by his disappointment, as he would throw up the attorney-generalship, and leave them to encounter the coming storm by themselves. This intimation was decisive. The duke had now no alternative but to resign, and consequently no motive for wishing to deprive Murray of the honors he had so well merited. Accordingly on the 8th of November, 1756, he was called to the degree of sergeant, and the same evening, was sworn in as chief justice of the king's bench, at the chancellor's house in Ormond-street, the other judges, and most of the officers of the court being in attendance. Immediately afterwards the great seal was appended to a patent, creating him baron Mansfield, of Mansfield in the county of Nottingham. On the following Thursday, (Nov. 11th) he took his seat in the court of king's bench.

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## ON THE LAW RELATING TO

### MASTERS OF SHIPS AND COMMON CARRIERS.

Concluded.

It is required that the necessity of the loan, if disputed, should be proved by the lender; but if the necessity exists, and he acts fairly, he is not bound to see to the proper application of the money by the master, nor affected by his dishonest appropriation of it.

It has been doubted whether the consignee of the ship or cargo, could take a bottomry bond for advances, as it afforded an opportunity for collusion and fraud. But it is now settled, that where a necessity existed for the hypothecation, where the consignee had no funds in his hands, and the fairness of the transaction is established, that the bond being given to a consignee will not affect its validity; though in such cases a court would scrutinize the circumstances of the loan with a jealous eye.

To render a bottomry by the Master valid, the money must have been advanced on the credit of the ship—if it has been lent without a bottomry, and from doubts as to the solvency of the owner or other circumstances, the lender subsequently wishes the further security of the ship, the Master cannot pledge it, though the money borrowed was necessary, and has been applied to the purposes of the voyage.

A ship bound from Philadelphia to Ostend, was obliged to put into Dover in distress, where she was refitted; and the consignees at Ostend being informed by the captain of his situation, furnished him with a credit on London, by which he raised money sufficient to pay the expenses incurred. The ship pursued her voyage to Ostend, where the consignees having accepted bills drawn by the owner beyond the amount of freight and cargo, told the captain he should not leave the port, unless he would repay the money advanced in England for repairs, or hypothecate his vessel. The captain could not repay the money, and for some time refused to hypothecate the ship, but finding expenses to accumulate, he at last consented. The consignees introduced him to another mercantile house, to whom he executed a bottomry bond, but received no money. The vessel returned to Philadelphia; but in the meantime the owner had failed, and had assigned his ship to his creditors. The foreign bond holders libelled the vessel in the admiralty of Pennsylvania; but the distinguished Judge, and accomplished scholar, who then presided in that court, (the late Francis Hopkinson, Esq. whose mantle has so happily fallen upon his son and successor,) decided that the law never designed in this manner, to give partial advantages in mercantile connexions, or secure the balance of a running account between owners and consignees. That under the circumstances, the captain had not power to hypothecate the vessel to the consignees, and that the hypothecation to the plaintiffs, who were not at all interested in the transaction, and whose names were only used to save appearances, was the same as if made to the consignees. (Hopkins. Adm. Decis. 163.) This decision was appealed from; but was unanimously confirmed by the High Court of Errors and Appeals.

It is a general rule of law, that the Master has no authority to *sell* the ship, and that by such a sale, no interest is vested in the purchaser; but as has been observed by Sir William Scott, (1 Rob. Adm. R. 221,) 'laws which will not admit of an equitable construction, to be applied to the inevitable misfortunes or necessities of men, cannot be laws framed for human societies.' In cases of extreme necessity, therefore, not only are exceptions to general rules established, but all rules are superseded. The Master, it is true, is appointed only to navigate the ship, and it is evidently beyond his commission to sell, yet in a case of urgent necessity and extraordinary difficulty, his sale is made in the exercise of a sound and honest discretion, and for the benefit of all concerned, would be sanctioned. But in the language of Judge Washington, the sale can only be justified in cases of extreme necessity in a foreign country, and to prevent the property from perishing. (2 Wash. C. C. R. 150.) There must be no opportunity of consulting the owner; and the Master must act with the most pure good faith. (St. Abbot. 10. Note.) To evade this prohibition to sell, or to justify their conduct, Masters of ships sometimes obtain a sentence of condemnation of their vessels as unseaworthy, and a decree of sale by some Court of Admiralty; but it is now well settled, that such a decree obtained upon the petition of the Master, and the report of surveyors, that the ship is unseaworthy, or not reparable, is not within the legitimate power or authority of such courts, and that the title of the purchaser at such sale, may be contested by the original owners of the ship, wherever it is subsequently found, and the facts upon which the decree of sale was founded be disputed by them. Accordingly, in a late case in England, (10 East. 143,) where a ship had put into Tortola, and being leaky, the Master applied for a survey, and upon the surveyor's report, she was, by the Vice Admiralty Court, decreed to be sold; the sale was declared to be invalid in a suit by the owners against the purchaser—the absolute necessity of it not being established, although it appeared to have been made *bona fide*, and intended at the time for the benefit of all concerned.

The Master, as such, does not represent the owner of the cargo. His duty is to keep it safely, and convey it to its destined port, and generally speaking, if he exercises any other authority over it, his conduct is unlawful. But in cases of urgent and unforeseen necessity, the character of Agent for the owners of the cargo, is by the policy of the law sometimes cast upon the Master. Were it otherwise, the property might be left without protection, or not reach the intended market. One case in which he is thus authorized to act for the owner of the cargo is, that of ransom from an enemy or pirate. If a part of the cargo is delivered, or a sum of money paid for that purpose by the Master, his act will be justified, and the owners of the ship and other goods be bound to contribute. Ransom from an enemy is prohibited to English subjects by several acts of parliament. (Abbot, 347.) The contract is made void, and the party subjected to a penalty. No such prohibition exists in our law, and an instance during the late war of the ransom of a valuable ship and cargo, captured at the Capes of the Delaware, will be recollected by many. So too, the Master may in certain cases pledge the whole of the cargo, or absolutely sell part of it, to raise money for the repairs of the ship, to enable her to proceed to the port of destination. The ground upon which this extraordinary power over the

property of those whom he does not expressly represent, is vested in him, is the extreme necessity of the case, and the supposed tacit agreement of the owner of the cargo to such measures as alone will prevent the voyage in which he is equally interested with the owner of the ship, from being broken up, or unreasonably delayed. (2 W. C. C. R. 237.) The Master cannot, therefore, either sell or hypothecate the cargo, where it is apparent, that the owners of it cannot possibly be benefited by such an act. A sale of the whole cannot of course be for the advantage of the owners; and the Master, therefore, cannot sell the whole; but a sale of part may be for the owner's benefit, as thereby the Master may be enabled to carry the residue to the destined market. For the same reason, that as thereby the whole may be conveyed to its proper market, he may hypothecate the whole. The part or proportion which he may sell, to enable him to prosecute his voyage, is not fixed by law, nor could it well be. It must depend upon the necessity and circumstances of the case. The only limitation is, that the sale must not be of the whole.

The power to sell or pledge the cargo, can be exercised by the Master only at an *intermediate port*, and not at that of the ship's destination; because the only motive which can justify it, is to enable the ship to prosecute the voyage. Nor can the Master sell part of or hypothecate the cargo even at an intermediate port, and for the purpose of enabling the ship to perform the voyage, unless the ship and freight, and the personal credit of the owner, are not sufficient security for the sum which it is requisite to raise, nor where the owner of the ship or the Master himself has goods on board. These are to be the first used to raise money, they form the proper security for the captain to give, and should therefore first be given.

The credit of the owners of the ship, and their property, must be shown to be insufficient, and the necessity urgent, to justify the interference of the Master with the rights of the owners of the cargo. His duty is to carry it to the place of its destination, and there deliver it to the Agent of the owner. If contrary to this duty, and without a sufficient cause, he sells, or pledges it, both he and his owners may be made responsible for the loss sustained, by the proprietor of the goods. Nor will the master's acting in good faith, excuse him or the owner, or render valid the sale of the goods, as if the absolute necessity of the measure cannot be clearly made out.

The same urgent necessity, (which according to the maxim, has no law,) has been held to justify the Master, without reference to the repairs of the ship, or the prosecution of the voyage, in selling at an intermediate port, where there is no authorized Agent of the shipper, goods which were damaged, or of a perishable nature. In a case decided by the Supreme Court of Pennsylvania, the ship by stress of weather had been driven into a port out of her course. Part of the cargo, consisting of saltpetre, being damaged by sea water, the vessel being condemned as unseaworthy, there being no supercargo on board, nor Agent of the owners at the port, the captain sold the *entire* cargo. He was sued by the owners of the saltpetre, who contended, that as the article, though damaged, was not perishable, it should have been stored, and that the sale was unlawful. The *expediency* of the sale having been established by the verdict of the jury, the court decided, that the Master could lawfully make it on the grounds before stated. But in the same case it was ruled, that though the ship was condemned as unseaworthy, those goods which were in good condition, and not perishable, the Master had no right to sell without the order of the owner, to whom he was bound to give immediate information. (6 Binney, 262.) Under such circumstances, the Master should either tranship the goods, if he has the means of doing—if not, deposit them until instructions are received, or return them to the owner. The tranship if practicable, would generally be the most correct course. A sale, where the goods are not damaged or perishable, can scarcely be justified by any circumstances—nor will it excuse, that it was made under the order of a Court of Admiralty, upon the application of the Master, if in fact the necessity to sell did not exist.

The owners of a ship are not only liable for the contracts and engagements of the Master, while acting within the scope of his employment, but they are also in certain cases responsible for injuries done to the property of others, by his want of care or of skill in the management of his vessel. Both Master and owners are bound to all who may be affected by his acts, for his skill and the care in the navigation of his ship. Therefore, where a vessel is run down or injured by another, the owner as well as the Master of the vessel, by which the injury is done, are liable in damages to the full extent of the injury, if it proceeded from want of attention, or of nautical skill on the part of their captain, or was wilfully done by him. (1 Wash. C. C. Rep. 142.) The difficulty generally is, to discover to which party the blame is imputable. There are, however, settled nautical rules, by which in many cases it may be ascertained. Thus the vessel that has the wind free, must get out of the way of one that is close hauled—and where a vessel is entering a harbor, where others are anchored, neglect to check the course of the entering vessel, will be a fault creating responsibility for the damages which may ensue. If the collision happened without any negligence or fault, but from the violence of the wind or other physical cause, the damage must be borne where it falls. (3 Kent. Com. 184.) The Supreme Court of Pennsylvania has decided, (4 Dallas, 206,) that the owner is liable for such an injury committed, while his vessel was in charge of a regular pilot, on the ground that the pilot was in the actually service of the owner of the ship. But it seems the better opinion, that the *Master* is not answerable, while the ship is under the direction of the pilot, for injuries done to other vessels by collision. (1 John. R. 105.) In England by an act of parliament lately passed, (6 George IVth, c. 107,) both owners and Masters are exempted from liability for injuries to others, by reason of the neglect, incapacity, or default of a licensed pilot, while the vessel is under his charge. No similar statutory provisions are known to exist in the United States.

For personal violence to his crew, or the maltreatment of his passengers, the Captain alone is answerable, and not the owners. In relation to the crew, the law, while it vests in the Master the power of enforcing discipline, by confinement or personal chastisement, when milder measures are not sufficient, punishes by damages all undue severity. As to passengers, it requires that his behaviour towards them should be decorous, and that they should receive all the accommodations stipulated for by their contract. In respect to them, to use the language of Judge Story in a recent case, (3 Mason, 245,) the duty of the Master is one of responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board, but for reasonable food, comforts, necessaries and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In the case referred to, where the conduct of the captain had been harsh and indecorous to passengers in his ship, consisting of a family, some of the members of which were females, the learned judge upon proceedings instituted in the Admiralty, decreed 400 dollars' damages against the captain.—*Journal of Law.*

## RECENT AMERICAN DECISIONS.

### EVIDENCE.

14. Where a vessel insured against the perils of the sea on a voyage from the *East Indies* to *Holland*, was greatly damaged, and put into the *Isle of France*, from whence advice was sent to *New York* to the assured, who forthwith abandoned the vessel to the underwriters there as for a *total loss*, given notice on the *sixth day of July*, and in the meantime the master had caused the vessel to be repaired, so that on the *twentyeighth day of June* she sailed from the Isle of France, being tight, staunch, and strong, bound to a port in Holland, where she subsequently arrived in safety, it was *held*, although a technical total loss had originally occurred, that the plaintiff was not entitled to recover as for such loss, but could recover only for a *partial loss*. *Dickey vs. American Insurance Company*, 3 Wend. 658.

15. If a *master* of a vessel, in the exercise of his legitimate duties as the agents *of whom it may concern*, converts a *total*, into a *partial* loss before abandonment, the fact that the loss is no longer *total* takes away the right to abandon; and the result is the same where a *total loss* is converted into a *partial loss* by the acts of a stranger. *Ib.*

16. If the vessel is abandoned while the loss continues total, all the intermediate acts of the master are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the assured. *Ib.*

17. While it is doubtful whether the assured will or will not exercise his right of abandonment, the acts of the master cannot destroy the right to abandon. *Ib.*

18. Where repairs are made by the underwriters or by the master as their agent, and the voyage is not lost, and the vessel arrives in safety, the assured cannot abandon. *Ib.*

19. It is a well settled rule of *American* insurance law, that if a vessel is damaged by any of the perils insured against so that the necessary repairs to restore her to her former state, and render her seaworthy will exceed *three fourths* of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss. This is usually called an injury to more than *half her value*, because one third of the expense of repairs is deducted, new for old. *Ib.*

20. An underwriter is not answerable for a *partial loss* on *memorandum articles*, except for general average, unless there is a *total loss of the whole*, of the particular species, whether the particular articles be shipped in bulk or in separate box-

es or packages. *Wadsworth vs. Pacific Insurance Company*, 4 Wend. 33.

21. In the United States, *partial loss* and *average* are understood by commercial men to mean the same thing, and that *average other than general* includes every loss for which the underwriter is liable, except general average and total loss, which last includes total loss with salvage. *Ib.*

22. *Partial loss* includes both general and particular average and the latter term includes all partial losses except general average. *Ib.*

23. Where the exception in the memorandum clause is broad enough to include other losses besides those arising from the inherent decay of the articles specified, the insurer is entitled to exemption from every risk plainly and explicitly included within the terms of the exception. *Ib.*

24. An underwriter is bound to know the general course of trade in relation to the voyage and the property which he insures. Where, therefore, it appeared that it was the usual custom in the port of New York, when a vessel laden with hides was detained at quarantine, to send the cargo by lighters to a depot at Brooklyn, and in such transhipment to lade the hides on deck as well as in the hold of the lighter, it was *held*, that the underwriter could not for that cause object to a recovery. *Ib.*

25. In a case of a *technical total loss* of a vessel insured, if no freight *pro rata itineris* has been earned, or if the expense of sending on the cargo by another vessel will exceed a *moiety* of the freight agreed upon by the charter-party, it is *a technical total loss of the freight* which will authorize the assured to abandon: a technical total loss of the vessel involves a loss of the freight. *The American Ins. Co. vs. Centre*, 4 Wend. 45.

26. A vessel injured by a peril of the sea cannot be abandoned merely because materials to make *full repairs* cannot be procured at the place where she happens to be; if the vessel is not injured to a moiety of her value, it is the duty of the master to make her seaworthy and to proceed on the voyage, and the underwriter will be bound to furnish a complete indemnity for any additional expense subsequently incurred in completing the repairs. *Ib.*

27. In making an estimate of the probable expense of the repair of a vessel so as to ascertain whether the injury sustained will authorize an abandonment, the expense is to be estimated with reference to the costs of repairs at the port of necessity; if, however, full repairs cannot be made there, but the vessel can be repaired in part, so as to render her seaworthy, and enable her to pursue her voyage, then, to the probable expense at the port of necessity, it is proper to add the expense of the additional repairs at the place where the vessel would most probably be repaired in full. *Ib.*

28. The master is not authorized to sell the ship or cargo except in a case of absolute necessity, where he is not in a situation to consult with his owner, and where the preservation of the property makes it necessary for him to act as the agent of whom it may concern. *Ib.*

29. In *England* it is held that it is the duty of the master to repair the vessel, unless there be an *actual total loss*, or he has no means of repairing, and cannot procure any by the hypothecation of the ship or cargo: *in this country* it is held, the right of the master to sell is more extensive; if there be a *technical total loss*, and the master has reason to believe that his owner will elect to abandon, he is under no obligation to repair, but may sell the vessel, and such sale does not take away the right of abandonment, or convert a *total* into a partial loss. *Ib.*

30. A ship owner, entitled to abandon the vessel by reason of the extent of injury received by her from the perils insured against, cannot be required by a shipper of the cargo to repair for the purpose of sending on the cargo; he can only be required to send it on if another vessel can be procured. *Ib.*

31. *It seems* that where a cargo is sent on by another vessel for the benefit of the salvage on the freight, the underwriter on the freight is bound to pay the expense of the transhipment, and the owner or underwriter on the cargo is only chargeable with the extra expense beyond the amount of freight as fixed in the original charter-party. *Ib.*

32. Whether shippers have a right to demand a return of the goods without paying freight, where a vessel meets with a disaster on the day after sailing, and returns to her port of departure to repair. *Quære.* *Ib.*

33. Where an insurance was effected by the owners of *five sixths* of a cargo of specie to the extent of $90,000, upon their interest in the cargo to the extent of $30,000, and a loss happened, it was *held*, that they were entitled to recover the *whole* sum insured, and not merely five sixths thereof. *The Pacific Ins. Co. vs. Catlett*, 4 Wend. 75.

34. An averment in the declaration that a large quantity, viz: 30,000 Spanish milled dollars, were laden on board the vessel for the contemplated voyage, and that the plaintiffs were 'the owners of and interested in the said specie to a large amount, to wit, the amount *of all the money* by the said plaintiffs insured thereon,' and that the policy was made on their account and for their sole use and benefit, it was *held* to be supported by proof that the assured were the owners of five sixths of the $90,000 shipped on board the vessel, and that there was no variance between the proof and the averment, the averment being not of an entire interest in the whole cargo, but of an interest in the cargo to the amount insured thereon. *Ib.*

35. A sale of the cargo and an investment of the proceeds in other merchandise by the owner of the remaining *one sixth* of the cargo for the purpose of remittance, he having gone out in the vessel as *supercargo*, a technical loss having happened and the cargo having been left under his control by the master of the vessel at the port of necessity, does not destroy the right of the other owners who had insured their separate interest in the cargo to abandon the same to the underwriters, if, under the circumstances of the case, it would have been the duty of the master to have made the same investment for the benefit of whom it might concern. *Ib.*

36. On a policy of insurance entered into *in behalf* or *on account of the owners* of a cargo, no one but the *owners* can sustain an action upon it; where the policy is entered into *for whom it may concern*, the action may be sustained by any one, although he has but a special interest in the cargo, as by lien, *respondentia*, or otherwise. In either case, however, it must appear that the policy was made in behalf of the person claiming to recover. *Ib.*

37. One whose interest was *not intended* to be insured, cannot claim the benefit of an insurance effected by others, although, by the *terms* of the policy, his interest would seem to be covered. *Ib.*

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### INSURANCE COMPANIES.

1. An *insurance company* may make a valid promissory note, which will be held good until the contrary be shown. *Barker vs. Mechanic Fire Insurance Company*, 3 Wend. 94.

2. A note by which J. F. as president of an insurance company, promises to pay a sum certain, is not the note of the company, but of the maker alone. *Ib.*

3. The Utica Insurance Company have a right to invest their *surplus funds* in loans. But having called in a part of their capital for the express purpose of making loans in a particular way, viz. by the issuing of checks in the shape of bank notes, it was *held*, that loans thus made are in violation of the *restraining* act, and that a note taken upon such loan is void. *Utica Ins. Co. vs. Cadwell*, 3 Wend. 296.

4. The money lent may however be recovered under the common count, and *checks* drawn, received as money, and duly paid, will be considered *money*. The recovery, however, in such case, being on the *contract* as distinguished from the *security*, an action cannot be sustained against the borrower *and* his sureties, the sureties not being parties to the contract. *Ib.*

5. An insurance company, authorized to take and hold securities *bona fide* pledged to them to secure the payment of debts contracted with them, cannot loan money *on the hypothecation of stock* and the taking of a note as collateral security for the payment of the loan; when, by the act of their incorporation, they are prohibited from *discounting* notes. *North River Insurance Company vs. Lawrence*, 3 Wend. 482.

6. Where a power to loan money in a particular mode is given to a corporation, all other modes are necessarily excluded, and all securities other than those allowed to be taken by the act of incorporation, are void. *Ib.*

8. A *contract* for the loan of money made with an *incorporated company*, as well as *the security* taken on such loan, is void, if the power to loan money is not expressly given, or necessarily incident to the powers granted to such company by its charter. *Beach vs. Fulton Bank*, 3 Wend. 573.

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### INTEREST.

1. *Interest* cannot be charged by forwarding and commission merchants, on items of an account for freight, wharfage, and storage; they are entitled to interest only on cash advances. *Trotter vs. Grant*, 2 Wend. 413.

2. Instead of allowing interest to their customers on moneys received, *it seems* they may apply such moneys to the satisfaction of annual balances, unless otherwise directed, and allow interest only on the excess beyond the charges. *Ib.*

3. An account consisting of items on the part of the plaintiff, and only of *credits of payments* on the part of the defendants, is an unliquidated running account, which does not carry interest without an agreement either express or implied. *Wood vs. Hickok*, 2 Wend. 501.

4. The testimony of a witness that it is the uniform practice of *grocers* to charge *interest* on goods sold, after ninety days, unless a special

agreement to the contrary is made, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice, and are presumed to be informed. *Ib.*

5. *It seems* that if the custom of a merchant to charge interest after ninety days is known by those who deal with him, or if the length of credit is stated in an account rendered at the sale, an agreement to pay interest may be implied. *Ib.*

6. In assessing the damages for the breach of a contract, the jury may allow interest by way of damages. *Dox vs. Dey*, 3 Wend. 356.

7. *Interest* may in all cases be collected by action of debt on judgment: and where the judgment is rendered on *contract*, it may be collected by directing its levy upon execution. *Sayre vs. Austin*, 3 Wend. 496.

8. A merchant or manufacturer whose uniform custom it is to charge *interest* after ninety days upon articles sold or manufactured by him is allowed to charge interest accordingly to those who are in *the habit of dealing with him*, they being *presumed* to know such custom and to acts in reference thereto. *M'Allister vs. Reab*, 4 Wend. 483.

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JUDGMENT.

1. A suit cannot be maintained in New York, on a judgment obtained in a *justice's court* in a sister state, unless the statute organizing such court be shown; if, on the statute being proved, it appears that the subject matter of the suit was within the jurisdiction of the court, and that the proceedings were had in conformity to the statute, the judgment will be entitled to full faith and credit. *Thomas vs. Robinson*, 3 Wend. 267.

2. The priority to which a judgment in favor of the United States is entitled, does not extend to create a *prior lien* on real estate; it merely gives a right of prior payment out of the general funds of the debtor in the hands of the assignee. *Forsyth vs. Clark*, 3 Wend. 637.

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JUDGMENT AND EXECUTION.

1. An execution was held to be dormant and fraudulent as to a subsequent execution, where the plaintiffs directed a stay of proceedings from *March* until *July*, and the sheriff delayed proceedings until *December*, in consequence of a conversation with them in *August*, inducing him to expect further directions before proceeding to close the execution; the second execution having come to the hands of the sheriff in *October*. *Benjamin vs. Smith*, 4 Wend. 332.

2. The interest in lands of a *cestui que use* may be sold by execution. *Jackson vs. Walker*, 4 Wend. 452.

3. It is not necessary, in the return to an execution by virtue of which lands have been sold particularly to describe the land sold; the identity of the property may be shown by parol. *Ib.*

4. A variance between the judgment and execution being amendable, cannot be taken advantage of on a trial for the recovery of land sold by virtue of the execution. *Ib.*

5. Where the *heir*, previous to the death of his ancestor, conveys by deed all his interest in the estate of his ancestor, and there is a judgment against the heir previous to the conveyance on which, after the *descent* of the property, a sale is had, the purchaser at such sale, and not the grantee under the conveyance, takes the land. *Jackson vs. Bradford*, 4 Wend. 619.

6. Althougha *covenant of warranty* would bar by by way *estoppel* the heir and his issue from setting up title to the estate, such estoppel does not affect the purchaser under a judgment entered previous to the conveyance creating the estoppel. *Ib.*

7. A sale of the property of a defendant by virtue of a judgment and execution which is satisfied, the purchaser having full knowledge of the fact, *it seems*, would be considered a nullity, although the defendant assented to the proceedings. *Jackson vs. Anderson*, 4 Wend. 474.

8. At all the events, the *assent* of a defendant in an execution that *an agent of the plaintiff* (between whom and the defendant many equities existed) might become a purchaser at a sheriff's sale, does not render valid a sale and purchase by a third person. *Ib.*

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JURY.

1. A challenge to the array will not be allowed, on the ground that in the selection of grand jurors, all persons belonging to a particular fraternity or association were excluded, if those who are returned are unexceptionable, and possess the qualifications required by statute. *The People vs. Jewett*, 3 Wend. 314.

2. It is good cause of exception to a *grand juror*, that he has formed and expressed an opinion as to the guilt of a party whose case probably will be presented to the consideration of the grand inquest; so also a grand juror's having evinced feelings of hostility towards such party is good cause of exception. But these exceptions must be taken before the indictment is found, and will not afterwards be heard. *Ib.*

3. A *challenge* to a juror for *principal cause* was sustained where the juror had said that he believed the defendant was guilty, although he testified that he had no fixed opinion upon the subject of the defendant's guilt; that he only entertained impressions derived from history and common reports, meaning thereby printed statements in papers, and reports in conversation; that he never heard witnesses to the transaction testify, nor say anything on the subject in question; if the evidence supported the circumstances he had heard, he had a fixed a belief respecting the guilt of the defendant; if these circumstances should be done away by evidence, he should not consider him guilty. *The People vs. Mather*, 4 Wend. 229.

4. So a juror was held properly excluded, on a *challenge* to the favor, who testified that he had formed, though he had not expressed an opinion that the defendant was guilty. His opinion was formed upon reports and what he had read. On the trial of a former challenge, he had heard a witness testify respecting the subject in question. His opinion was made up previous to hearing that testimony, but what the witness had stated had tendered to strengthen his opinion. He had read reports of trials, affidavits or statements under oath relating to the same subject. His opinion was made up from reading them and other matters. And the charge of the judge to the triors in this case was approved, in which he instructed them that if they believed that the juror had a fixed opinion, which it would require testimony to remove, he was disqualified, whether that opinion was founded on rumor alone or on rumor and printed statements. *Ib.*

5. A juror who has formed an opinion of the guilt of the accused is not competent to serve; although he declare that if the circumstances on which his opinion is founded are not supported by proof, his opinion of the guilt of the accused will be removed. *Ib.*

6. There is no distinction as to the grounds of the opinion formed by the juror of the guilt of the accused: whether it be founded on being an eye witness, or on hearing the testimony of those who were present at the transaction, *or* whether it be based on rumors, reports, and newspaper publications; in either case it is good cause of challenge. *Ib.*

7. When the facts on which a *challenge* rests are disputed, the proper course is to submit the question to *triors;* but if neither of the parties ask for triors to settle the issue of fact, and they submit their evidence to the judge, and take his determination thereon, they cannot afterwards object to his competence to decide that issue. The production of evidence to the judge without asking for triors will be considered as the substitution of him in the place of triors; and his decision will be treated in like manner as would the decision of triors; and therefore although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted, in analogy to the principle that if on the main question in a criminal case the defendant is found not guilty, there cannot be a new trial. *Ib.*

8. Where an accused party waived his right to object to a juror, against whom good cause of challenge existed on his part, it was *held*, that the public prosecutor could not insist upon having the juror excluded, under an agreement that all should be considered as challenged by both parties. *Ib.*

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## ENGLISH CASES.

COURT OF KING'S BENCH.

*De Montort vs. Saunders and Co.*

This was an action on a bill of exchange, dated February, 1829, for 600*l.* drawn by Saunders and White, of the Mauritius on Saunders, Brothers and Co., of London, made payable to Rugier de la Gene, accepted by the London house, and indorsed by the payee to the plaintiff.

Mr Steers having opened the case for the plaintiff,

Mr Brougham, for the defendants, stated that a plea in abatement had been pleaded, and that it was his duty to commence in support of the affirmative of that plea. For the present the defendants did not deny their liability in the abstract, but they denied that they were liable, except along with others. In other words, they said that they had partners who were not sued as joint defendants, and that this was fatal to the action. It had been decided by Chief Justice Gibbs, in the Common Pleas, that where a partner was omitted, even although that partner should be dormant, and the holder of the bill had no reasonable grounds to suppose that there was any such partner, the action could not be supported. It was true that Lord Tenterden had subsequently overruled that case to a certain extent; for his Lordship held that, if a man held himself out to the world as carrying on business alone, and the holder of a bill on him had no reasonable ground to suppose that he had a partner; or if two or

more partners carried on business under a certain firm, consisting of persons who alone were held out to the world as forming the firm, and the holder of a bill on them had no notice of any other partner, then neither he nor they could support a plea in abatement, by seting up a dormant partner. This decision had been acquiesced in; but it did not apply to this case, for by the very terms of the bill, 'Saunders, Brothers *and Co.*,' the plaintiff had reasonable grounds to conclude that there were other partners in the firm, and if he had chosen to put the question he would have been told who these partners were. It might be said, perhaps, that this was not a kind of defence much to be favored; but, in this case, the defendants, from some temporary embarrassments, had made an arrangement with their creditors for time, and payment by instalments, and had obtained a letter of license in the meantime, which the plaintiff did not choose to sign, and the defendants thought themselves bound in honor, and in justice to their other creditors, to set up this defence.

After evidence had been heard on each side and Mr Campbell addressed the jury for the plaintiff,

Lord Tenterden—The question for the jury was, whether the plaintiff had reasonable grounds to suppose that there was any other partner in the firm than Saunders and Brothers. It was said that the words 'and Co.' were notice, but these words alone could not be considered as notice, for it was quite common—whether proper or not was another question—to add these words 'and Co.' where there were no partners except those named. The jury had heard the letter read which had been written by the defendant to the plaintiff's solicitor, and it was for them to say, looking at that letter, the words 'and Co.' and all the circumstances of the case as it now appeared before them, whether the plaintiff had reasonable grounds to suppose that the defendants alone constituted the firm, and took the bill on their credit. If he had reasonable ground to think so, and took the bill on their credit, then, in conformity to a decision of his, which had been acquiesced in, their verdict ought to be for the plaintiff. If they thought that the plaintiff had notice, and had not given credit to the defendants alone, then they would find for the defendant.

Verdict for the plaintiff, for principal and interest—633*l.* 16*s.*

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ROLLS COURT—JANUARY.

*Gill vs. Shelly.*

In this case a testatrix had left a certain fund to 'children.' It appeared that of the only children whom she could have contemplated one was legitimate and the other illegitimate. The question in the case was whether the latter should take equally with the former.

Mr Bacon contended with considerable ingenuity that unless some intimation was given in a will that illegitimate children had been intended by the testator, evidence could not be received to prove such an intention and that all property devised to 'children' should go to those alone who were legitimate, or even to one as in this case.

His Honor considered it to be a general rule that any person was at liberty to give evidence to prove that he came under a *description* of legatees. In this case it appeared that the testatrix must have been aware that there only existed an illegitimate and legitimate child—her intention in using the word 'children' could therefore not be doubted. She must have intended both and consequently the illegitimate child should take equally with the legitimate one.

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## COURT OF CHANCERY.

The Lord Chancellor and Sir Edward Sugden. The Court of Chancery has become a place of public amusement since Lord Brougham has presided in it. First, there is the entertainment of seeing *how* the Chancellor looks, which the members of the Mechanics' Institute, who consider his Lordship as belonging to themselves, enjoy daily; for these honest people drop into the Court to gaze at the Judge with much the same feeling that a girl opens a drawer and looks at her doll to gratify the complacency of possession, and to be assured of its safety. The second entertainment is derived from the scenes which are now of frequent occurrence in that once grave place. Lord Brougham carries something of the vivacity of debate into the Court, and a leading practitioner carries a considerable portion of the irritability of disappointment into it; the result is, some smart altercation, with much petulence on the one hand, and a remorseless dry sarcasm on the other.

To employ a trite but expressive phrase, Sir E. Sugden has never been 'right in his mind' since Lord Brougham ascended the Woolsack. Loss of place, together with that circumstance, seems to have utterly spoiled the learned gentleman's temper, and he bears himself as one crossed in love of office. When Mr Brougham took leave of the Bar it was remarked that Sir E. Sugden alone neglected to rise and acknowledge his parting salutes, as though he would express, 'I will not rise to you, whose rise has stopped my rising.' The spleen has not confined itself to dumb show, it has broken out in words, as spleen will do, on a very slight occasion.

While delivering a speech, Sir E. Sugden obseved that the Chancellor was writing and he stopped. The Lord Chancellor desired Sir Edward to proceed.

Sir E. Sugden replied that he could not, unless he were in possession of the attention of the Court.

His Lordship said he was giving his full attention to everything that was stated, and of that he alone was competent to judge; he was taking a note of something said by the Learned Counsel, and he should choose his own time for making his note; papers might be put before him for signature, but signing his name was merely mechanical, and did not at all withdraw his attention. If a Judge were not at liberty to do anything merely mechanical while Counsel were addressing him, the business of the Court must be suspended every time he blew his nose, or took a pinch of snuff. If one of his predecessors had given such intense attention as was expected, he would not now appear with so smiling a countenance.

Sir E. Sugden sat down.

The Lord Chancellor inquired if he had anything more to state in reply.

Sir Edward Sugden declined to say anything further.

The Chancellor's illustrations of snuff-taking and nose-blowing were, perhaps, too farcical for his place, and for the respect which a Judge should show for a member of the Bar, even when he is in error; but the conduct of Sir Edward was provokingly captious, and obviously proceeded from a settled purpose to take and make offence: It is notorious that Lord Eldon was in the habit of carrying on all the correspondence of State intrigue when presiding in the Court of Chancery, and purporting to be hearing the statements and arguments of counsel; and Mr Sugden never found any fault with the practice in those days, or stopped till his Lordship's attention should be disengaged. After barristers had been addressing the Court for hours, without making any impression on Lord Eldon's mind or ears, he would declare he must take home the papers to look into the case, without which proceeding, indeed, it was physically certain he could know nothing about it. The large full-bottomed wigs worn by the Judges would seem as if they had been devised for the protection of their organs of hearing on these occasions. Why Sir E. Sugden should, in the long time of Eldon, have been patient of scribbling, and letter-reading, and note-despatching on the Bench, and so impatient of any employment of the pen by Chancellor Brougham is only to be explained by the supposition that disappointment induces displeasure in the one instance, as expectation causes content in the other.

The Whig journals have teemed with zealous vindications of the Lord Chancellor, (for the zealous vindication of a Lord Chancellor is always a sweet and promising office, and nothing can more agreeably fill up the time of an unemployed barrister,) and fierce attacks on Sir E. Sugden, whom, according to liberal practice, they have not failed to reproach with the humbleness of his origin, or 'meanness of birth,' as it is on such occasions termed by the railers against prejudices. What the vocation of Sir E. Sugden's father had to do with the affair, is not easy to see. Lord Eldon did not come of high degree, and yet he was the very pink of temper and courtesy. If it were clear that humble birth was the cause of splenetic conduct, it would not be unreasonable to advert to a man's descent when he gives way to ill-temper, or even to call legitimacy in question when the faults of low-breeding were manifested by a person of rank or family; but the fact, that men unhonored with ancestry cannot behave themselves decently, is not yet established as a certain truth. The burliest of patriots, the great town-bull of Reformers, the bruin Radical of the day, the 'Radical' of the 'Times,' who rages and roars against the aristocracy by the hour or the column, concluded some charges against the Marchioness of C——, with a moral reflection, referring her alleged meanness of conduct to her ungentle blood! And this is *liberality*, a**ye**, and consistency too! In one column it is proved that the aristocracy are all greediness, and it is asserted in another that rapacity is attributable to plebeian descent! Thus it is that the professed foes of illiberal prejudices are ready to turn those very prejudices against persons they desire to wound. Oh that people who take the name of *liberal* would wear it with more credit! A better name there is not in the vocabulary; in the Latin,* it implied more than the word gentleman, and it should comprehend every good quality belonging to education and accomplishment.—*Monthly Commentary.*

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* I marvel that the lovers of coincidences have never remarked that *liber*, the book, comes from *liber*, the tree; as *malum* the fruit, and evil, came from the tree of knowledge; and that *libertas*, liberty, proceeds from the book which is now everywhere disseminating its spirit. There are those who would push the remark to *Liber* Bacchus, and make a bad point on the intoxication of knowledge.

THE JURISPRUDENT.

BOSTON, SATURDAY, APRIL 2, 1831.

## SUPREME COURT—SUFFOLK.

MARCH TERM—1831.

*Clarke vs. Paine.*

PLEA IN ABATEMENT.
Indorsement of Writs.

This was sci. fa. against Paine as indorser of an original writ. The original Plaintiff was described as of New Orleans, and the sci. fa. was indorsed A. B. by 'J. E. Smith.'

It was contended that the sci. fa. was not propperly indorsed, it not being indorsed with the *christian* and *surname* of the indorser. Two questions were considered.

*First*, whether a sci. fa. was an *original writ* within the meaning of the statute.

*Second*, whether the indorsment as made in this case was sufficient.

1. The Court remarked that according to the English practice such a writ would not be there considered as *original*. But there were reasons for regarding it otherwise here. It might be contended that wherever a new party is introduced, the writ should be considered as original. Such construction would seem to be necessary to secure the rights of all parties.

2. As to the other point, the Court had no doubt that the writ was well indorsed. The object of the statute was to require such an indorsement as to leave no difficulty in identifying the person. If the indorsement was in the usual way of signing the name, or if it was so signed that a jury might find the fact of the signature, it was sufficient.

There may be cases where the party has no *christian* name. Such a case had occurred in the Common Pleas. The plaintiff sued, and indorsed his writ by the name of Cæsar. That was his only legal name.

The court examined the early statutes, in relation to the indorsement of writs.

The existing statute was little more than a re-enactment of the old laws, with some slight variations or additions. The Court would look to the object and design of the original acts. There object was mainly to create a liability against the attorney and to provide a remedy in case of groundless suits. The same was the object of the revised acts. The same principles are introduced, the mode only is varied.

The christian and surname are required merely to designate with more certainty the person. The surname alone might in many cases, be doubtful. The statute requires the writ to be so indorsed as to bind the indorser. It is always a question of fact whether the indorser has so signed the writ as to bind him. The case in 3 Pickering, was in point. The indorsment in this case was held sufficient. The plea adjudged bad.

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*The Horseman's Manual, or a Treatise on the Law of Warranty relating to Horses.* By R. S. SURTEES.

This is a small Treatise of less than 150 pages upon a subject of considerable interest to gentlemen in, as well as out of the Profession. The law of warranty and purchase of horses, although, to a very numerous class of citizens, highly important and frequently perplexing to Judges and Lawyers, has received but little attention from bookmakers and compilers. No attempt, of which we are aware, of any merit, has been made, with the exception of the above, which has just appeared from the London Press, to collect and arrange in form the various and somewhat conflicting opinions, which are scattered through the Reports.

In no kinds of traffic are greater impositions practised than in the purchase and sale of the horse, and, although the law has sufficiently guarded the rights of the parties, in this respect, as well as others, the remedies, in practice, are frequently found inadequate and defective.

With us especially, in New England, it is rather a matter of course to pocket a loss sustained in a bargain of this kind, through misrepresentation or gross fraud, in preference to going before a court with a '*horse cause.*' If a case of the kind gets there, ten to one, it will be tried by a panel of horse jockeys or by Judges, who have never had anything further to do with the animal, than to get soundly cheated in purchasing one for family use, and to be compelled to ride the circuit by the light of a '*buck eye,*' upon limbs crippled by *spavin* and *string halt;* or a body worn out by '*roaring*' and '*glanders.*'

The little work before us appears to be well arranged and the subject judiciously discussed. It cannot fail to be a convenient and useful manual to gentlemen who deal in matters of *sale* and *warranty* themselves, or who advise others touching the same.

The following authorities or cases are cited and commented upon in the course of the work.

Adams v. Richards, 2. H. Bl. 573. Alexander v. Comber, 1. H. Bl. 20. Alexander v. Gibson, 2 Camp. 555. Bayley v. Merrel, Cro. El. 339. Baglehole v. Walters, 3 Camp. 154. Broennenburg v. Haycock, Holt, N. P. C. 630. Best v. Osborne, 1 R. and M. 290. Basset v. Collis, 2 Camp. 523. Bloxsome v. Williams, 1 Carr, N. P. 294. Bexwell v. Christie, Cowper, 395. Buchanan v. Parnshaw, 2 T. R. 745. Brown v. Staton, 2 Chitt. 353. Coltherd v. Puncheon, 2 Dowl. and Ry. 10. Chandeler v. Lopus, Cro. Jac. 4. Curtis v. Hannay, 3. Esp. 83. Caswell v. Coare, 1 Taunt. 567. Conolly v. Parsons, 3 Ves. Jr, 625. Dyer v. Hargrave, 10 Ves. 507. Dunlap v. Waugh, Peake N. P. C. 167. Drury v. Defontaine, 1 Taunton, 131. Eaves v. Dixon, 2 Taunton, 343. Elton v. Brogden, 4 Camp. 281. Ellis v. Mortimer, 1 New Rep. 257. Earle v. Patterson, Mss. Fielder v. Starkin, 1 H. Bl. 17. Fenn v. Harrison, 3 T. R. 707. Fennel v. Ridler, 8 D. and R. 204. Geddes v. Pennington, 5 Dow, 159. Garment v. Barrs, 2 Esp. 673. Howard v. Castle, 6 T. R. 642. Hands v. Burton, 9 East. 349. Helyear v. Hawke, Esp. 72. Hurgh v. Gray, Mss. Jones v. Cowley, 6 D. R. 533. Joliff v. Bendall, 1 R. and M. 136. Lewis v. Cosgrave, 2 Taunt. 2. Mellish v. Motteux, Peake N. P. C. 156. Mackenzie v. Hancock, 1 R. and M. 436. Mesnard v. Aldridge, 3 Esp. 271. Onslow v. Eames, 2 Starkie, 81. Parkinson v. Lee, 2 East. 323. Pickering v. Busk, 15 East. 45. Richardson v. Brown, 1 Bing. 349. Skrine v. Elmore, 2 Camp. 407. Shillitoe v. Claridge, 2 Chitty R. 425. Taunton v. Adams, Mss. Wallace v. Woodgate. 1 C. & P. 575.

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## PASSENGER LAW.

A new Passenger Law has been made by the Legislature of Massachusetts, which, we fear, will be vexatious to [illegible] and to individuals, if executed according to its letter. There is a dispensing power, and if this can be legally exercised before the arrival of vessels, in establishing rules or exemptions, the apprehended inconveniences may be obviated. The act, as it stands, applies to vessels coastwise, (steam boats not excepted,) as well as from foreign ports, and says no Captain shall permit an alien passenger to land till he (the Captain) shall have delivered to the Mayor and Aldermen of the city, or the Selectmen of a town, (at which place soever he may arrive,) a list of his passengers and shall forthwith together with the owner or consignee of the vessel, give bonds, to the amount of $200 for each passenger, to indemnify the State for any expense it may be put to for said passenger for three years; or these bonds may be commuted for $10 each passenger. But these bonds may be dispensed with when there shall appear to be no hazard of cost to the Commonwealth. The question arises whether each vessel or case is required to be adjudicated after arrival.

Another section says if any Captain shall land or permit any passenger to land contrary to this act, the master, owner and consignee shall each forfeit $200—one half to the informer, and the other to the State.

The object of the law is good. It is to keep out paupers. But it may cause trouble, without accomplishing what is intended—as we may be thronged with paupers, coming by land.

The act is to go into operation on the first of July, and there will be time, previous to that date, for persons concerned in the coasting and foreign trade to consider of its provisions, and whether it can be enforced without delay, detriment, expense, and trouble.—*Traveller.*

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## SUPERIOR COURT.

Charles H. Russell and William H. Russell vs. Samuel Swartwout, Collector of the Port or New York. This was an action brought by the plaintiffs to recover an excess of duty paid on certain Goods imported from England in October, 1830. It appears that the Goods were a new article, fabricated entirely from worsted, under the title of sealiotes. The defendant contended that under the tariffs of 1824 and '28 these goods, although made of worsted yarn were chargeable with the woollen duty—that is of 45 per cent on the minimum of $2,50 the square yard. For the plaintiffs it was contended that the duty should be charged as on worsted stuffs at the tariff of 25 per cents *ad valorem.* The Goods were detained from the plaintiffs until they paid the duty claimed, and they gave notice when paying it that they would sue for the sum overcharged, which amounted on this package of Goods to $102—the amount charged was above $200. The Judge charged the Jury, that if the articles were worsted stuff goods and would have been considered so before the tariff of 1824 or 1828, they should give a verdict for the plaintiffs. The goods would not came under the duty merely because they recently come into use. The Jury without leaving their seats, returned a verdict for the plaintiffs.—*N. Y. Courier.*

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*Imprisonment for debt.*—The law, abolishing Imprisonment for Debt, as regards females, and for all sums under $10, as respects males—may be considered an experimental act. If it proves salutary, or if it causes no losses, troubles, and no impositions in the community, it will probably be extended after there has been time to ascertain the effects.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰων. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

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POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. 1. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

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THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

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MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

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GRAY AND BOWEN, have just received, No. 1, of SURGICAL ANATOMY OF THE ARTERIES, with plates and illustrations. By Nathan R. Smith, M. D. Professor of Surgery in the University of Maryland. January 1.

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SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

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WHITMAN'S LETTERS. This day published by GRAY & BOWEN, 141 Washington Street, 'Two Letters to Rev. Moses Stuart,' on Religious Liberty, occasioned by his Letter to Rev. Wm. E. Channing. By Bernard Whitman. Second edition. March 19.

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REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

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PARLEY'S ASIA. This day published by GRAY & BOWEN, Peter Parley's Tales about Asia, with a Map and numerous Engravings. This is designed as a fourth volume in a series of Geographical and Historical Tales for Children. Tales of America, Europe, and Africa, have already been published. Tales of Islands in the Pacific Ocean, Tales of the Sea, and Tales of the Sun, Moon, and Stars, will complete the series. These three last are in a state of forwardness.

GRAY & BOWEN, have just published, TALES OF TRAVELS West of the Mississippi, with a Map and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. This volume is the first of a series which is intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.
Peter Parley's Tales about Europe.
Peter Parley's Tales about Animals, with three hundred Engravings.
Peter Parley's Juvenile Tales.
Peter Parley's Winter Evening Tales.
Peter Parley's Geography for Children. Jan. 1.

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THIS DAY PUBLISHED, by GRAY & BOWEN, an APPENDIX to the American Almanac, for the year 1831, being the latter part of the fiftyfifth, and the beginning of the fiftysixth year of the Independence of the United States.

Extract from the Preliminary Observations on the Astronomical Department of the American Almanac.

The Appendix is intended to answer all the essential purposes of a Nautical Almanac, and the insertion therein of the distances of the Moon from the Planets, and of the proportional logarithm of the difference between the distances, it is hoped, will be found an improvement on any Almanac hitherto published. Jan. 1.

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HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

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HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

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JUST PUBLISHED, by GRAY & BOWEN, The North American Review, No. LXXI. for April, 1831.

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NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

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AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

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WORKING MEN'S PARTY. This day published by GRAY & BOWEN, 141 Washington Street, A Lecture on the Working Men's Party, delivered before the Charlestown Lyceum, October 6, 1830. By Edward Everett. Second Edition.

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WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

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GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

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LIBRARY OF EDUCATION. This day published by GRAY & BOWEN,

The Library of Education, Vol. I.—Containing 'Some Thoughts concerning Education.' By John Locke, and a 'Treatise of Education,' by John Milton, with an Appendix, containing Locke's Memoranda on Study. Edited by Wm. Russell, late editor of the Journal of Education.

Extract from the Preface.

'The present volume is intended to form one of a series of standard treatises on the subject of Education. The work now commenced will, it is hoped, form a useful source of information to parents and teachers; furnishing to the latter a sort of professional library, to which individuals may resort for assistance in the labor of instruction, and offering to the former an aid to the formation of just and extensive views of the whole scope of education, as well as a preparation for cooperating with instruction, in their exertions for the mental advancement of the young.' Jan. 1.

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THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, APRIL 9, 1831. NO. XXXVII.

## SPENCE AND BURKE ON CIVIL LAW.

An Inquiry into the Origin of the Laws and Political Institutions of Modern Europe, particularly those of England. By George Spence, Esq. of Lincoln's Inn, 8vo. 1826.

A Historical Essay on the above Laws and the Government of Rome, designed as an Introduction to the Study of the Civil Law. By Edmund Plunkett Burke, Esq. of the Inner Temple, Barrister-at-Law. The second edition, revised, 8vo. 1830.

The press of contributions on subjects of more general interest than civil law, has hitherto prevented us from fulfilling our intention of touching upon it more fully; and the same circumstance must, we fear, be our excuse for introducing to our readers the two works, whose titles stand at the head of this article, with little more than a short account of their contents. We are, however, in some degree reconciled to the necessity which compels us to notice them thus briefly, by the persuasion that, as both of them have been for some time before the public, they are in all probability already in the hands of those who are aware of the general importance of the matters on which they treat, or of their close connexion with the history of our own legislation and jurisprudence.

Having been engaged some years since, Mr Spence tells us, in a translation of the Code Napoleon, 'he was induced in consequence to look attentively into the civil law of the Romans, where he found that a great proportion of the doctrines of the common law of England, even many of those which are purely artificial, were to be found 'in the Institutes, the Pandects, the Code and the Novels. This induced him to study the civil and criminal code of the Romans with some minuteness, and to compare the political and judicial institutions of modern Europe, and of our own country in particular, with those of ancient Rome, in order to discover to what extent the former might be traced from the latter, their venerable and classical originals.' In pursuance of the plan traced out by him for this inquiry, he has divided his work into two parts. The first contains a general sketch of the colonial policy of the Romans, and of the government, military as well as civil, of their provinces. The second, comprising three books, is devoted, 1. to a popular summary of the Roman law; 2. an account of the institutions of the Germans; and 3. a view of the principal modifications introduced into those institutions in consequence of the subsequent connexion of the German nations with the Empire. As the author has apologised in his preface for the defects of method which he is aware to be found in his book, we shall not enter into any criticism of this mode of dividing the subject. We shall content ourselves with informing our readers that the execution of what may properly be called the last part, (namely the second and third books of the second part, which form considerably more than half of the work,) is decidedly inferior to the remainder. We are far from wishing to convey an impression that in this as well as in the first portion, Mr Spence has not displayed a degree of research and industry really surprising in a gentleman so extensively engaged, as he is well-known to be, in the active and practical duties of his profession. But the obstacles to be encountered in the discussion of all that belongs to the legislation and the civil polity of the middle ages, have been stumbling blocks to so many even of the most acute and laborious antiquarians, that our author may well console himself for having been betrayed into occasional inaccuracies in this department of his work. Indeed it is one so beset with difficulty, that nothing short of the undivided energy of a penetrating intellect, assisted by a large store of a peculiarly and almost revoltingly abstruse species of learning, can have any chance of unravelling its intricacies. It is not once in a century that the qualities of acute discrimination, copious knowledge, unwearied patience, and assiduous application are united in one man, as they confessedly are in the first legal antiquarian of our times, Savigny; and perhaps the whole catalogue of eminent specimens of literary research, can produce nothing superior to his history of the Roman law during the middle ages. This work, Mr Spence, as he himself informs us (p. 212,) and as may easily be gathered from text, has had no opportunity of consulting. Could he have foreseen that a translation of it was so shortly to appear in our own language, we are of opinion that he would have suspended the publication of his inquiries until he had perused it, and that, having perused it he would have been convinced of the uselessness of attempting to glean any thing from a subject so completely exhausted by the labors of the father of the present historical school. If we are right in this opinion, or if Mr Spence will accept our advice in this matter, he will not fail to suppress this portion of his book in a subsequent edition, and publish the remaining part (up to p. 214,) entirely by itself, with such alterations and amendments as his own reading and reflection will doubtless have suggested to him. The public will thus be in possession of a work much wanted by those who are beginning the study of the civil law in this country; namely a brief and concise manual in English, of its leading doctrines, together with such general information as to its history, as is necessary for a correct knowledge of the system these doctrines compose.

Mr Spence's present plan has of course restricted his historical disquisitions respecting the civil law of the Romans within a very short space. This subject is treated at greater length in the work which stands second at the head of this article, and of which we now proceed to give a brief account.

Mr Burke's essay comprises seven chapters, in which he successively treats, first, of the constitution of Rome previous to the establishment of the empire; second, of the Roman legislation during the same period; third, of Pontifical law; fourth, of Prætorian law; fifth, of the jurisconsults and their influence; sixth, of the constitution under the emperors; seventh, of the imperial jurisprudence. This classification which so far as we know is original, appears to possess very considerable advantages over that which has been most usually adopted in the histories of the Roman law with which we are acquainted, namely a chronological arrangement (or nearly so) of the different subjects. Indeed we are so far partial to the method adopted in the work before us that we are by no means sure we could not wish it to be carried still further, and to see the first chapter united with the sixth, as well as the second with the seventh; so as to exhibit, in one unbroken view, the entire history of the constitution, and, in another, that of the jurisprudence and legislation, without regard to the marked difference usually supposed to exist between everything that relates to law and government under the republic and under the empire; which difference, by the way, as the author has found occasion to show, is in many respects imaginary. This change would be very easily effected, as it would require little more than an alteration of titles and divisions; which we ought not to refrain from observing, is a sufficient proof that the apparent want of unity exists more in form than in spirit.

One very essential advantage which the author has obtained by preferring an analytical to a chronological arrangement, is the opportunity of introducing reflections and observations, which, whatever their intrinsic merit, might often appear little better than ill-timed interruptions, had he given his work the form of a continuous register or catalogue of facts. In short, he has been enabled to aim at a higher mark than that of the mere chronicler, and has thus succeeded in producing a work which may be read as well for pleasure as for instruction—a species of praise we heartily wish it was oftener in our power to bestow. As we have said so much, we think it but justice to ourselves as well as to the author to support our opinion by one or two quotations which, however, must be of a length better suited to our limits than our inclination. The chapter on Pontifical Law opens with this passage:—

'Of all the numerous privileges which the original constitution of Rome has reserved to the patricians, there was not one more important than the exclusive right of being eligible to the offices of the priesthood. Among a people ignorant and unenlightened as were the founders of the state, religion and government are ever so closely connected, that the care of both necessarily devolves on the same persons. The men, who are too ignorant to comprehend, or too indocile to obey, the most salutary laws enforced by beings of their own nature, will cheerfully and reverently submit to any restraint, however rigorous or unjust, which they believe to be imposed by a supernatural power; and the history of every uncultivated people will prove that, whatever may be the nominal form of their government, almost the whole of the real authority is exercised by the priesthood. This, however, is an evil which the progress of civilization, and of knowledge gradually counteract; and the share which the officers of religion bear by right of their office, in the government of a nation, may generally be taken as an estimate of the degree of perfection that government has attained. The Gauls and the Britons have been ruled by their Druids; they were unlettered savages. Europe has submitted to the will of a pontiff; but it was in an age of

darkness and ignorance. One of the first efforts produced by the revival of knowledge was a struggle to throw off the temporal yoke of ecclesiastical authority; and modern policy has effected no greater improvement than an entire separation of civil from religious government.

'This was a point to which the Romans never completely arrived. The degree of political importance attached to the office of sovereign pontiff may be partly appreciated from the fact, that the emperors continued to retain it for themselves, long after they had forsworn the religion to which it belonged. It is worthy of remark, however, that, notwithstanding their influence and their power, the priesthood of ancient Rome never claimed an exemption from the laws which governed the rest of the commuuity. The pontiffs were subject, like other citizens, to the notice of the censors; and in some cases could not refuse to obey even a summons from the tribunes. Cicero himself was a member of the college of augurs; but his quality of priest availed him nothing against the votes of the people, when they decreed his banishment. And this is far from being a solitary instance. For a body of men to enjoy the protection and the benefits of a country's laws, without submitting to their control, was an anomaly in government, reserved for the people of darker ages.' p. 111.

On the subject of the change of the government from a republic to an empire, we extract the following passage:—

'The revolution, however, that was thus effected in the constitutions was not so violent or so abrupt as the transition from a republic to an absolute government might naturally be imagined. The fate of Julius Cæsar was a warning to his successor that, however indifferent the citizens might be regarding the spirit of the old constitution, they would not easily tolerate an open violation of its forms. Accordingly, the outward semblance of the republican government was preserved, even to the minutest particulars. The power of Augustus was not inherent in his title of emperor, which had been frequently bestowed on the republican generals; which was often conferred as a military dignity, even after the change of the government; and which, as Taylor justly observes, would rather remind the citizens of the success of their arms, than the loss of their liberty. It was by uniting in his own person the offices of consul, of censor, of prætor, of sovereign pontiff, in short, of every considerable magistrature in the state, that he became the absolute master of Rome. There was no sudden creation of new charges, or abolition of established customs. Could the shades of Cato or of Brutus have been recalled from the tomb, they might have indulged the idea that their fondest wishes had been fulfilled; that their country had regained its freedom. They would have beheld the consuls preceded by their lictors; they would have witnessed the meeting of the senate; they would even have seen the *comitia* convened, and the tribunes of the people present at their debates. This pageantry could scarcely deceive the more enlightened citizens: but those who were clear-sighted enough to pierce the flimsy veil thrown over the nakedness of despotism, wanted the courage to tear it off; while the many, who seldom look farther than the surface, were deluded by the specious mockery, and mistook the shadow for the substance of their former liberty.' p. 203.

A part of the concluding paragraph of the work, relative to the adoption of the civil law among the modern nations of Europe, is all that we can afford space to insert:

'It was as a collection of written reason, the most flattering appellation a body of law can receive, that the civil law of Rome forced its way into the favor of the very small portion of the community which, at the time of this discovery, was competent to understand the language in which it was written, or to appreciate its merits. The regulations that had maintained the order and harmony of society in Rome, were found to be equally capable of producing the same effects in France, Germany, or in modern Italy; and their intrinsic value was enhanced by their practical utility. It is not true, therefore, that motives of personal interest, or of party spirit, led to their adoption by the different governments of Europe. The nation among whom they had originated was no more: neither the majesty of her name, nor the terror of her arms, could longer inspire veneration, or enforce submission; yet her laws were respected and obeyed. Even now, ages after the downfal of the Roman empire, after every trace of its dominion has been obliterated, its jurisprudence still retains an authority, which will endure so long as the blessings of order and civilization shall continue to be held dear.

'Our admiration of the dazzling achievements performed by this once mighty people, can never fail to be alloyed by the reflection, that the effects of such achievements, transitory as they are, can be purchased only at an immense expense of human crime, and human misery; but their civil wisdom, which is immortal, has conferred inestimable benefits on mankind, and the chief existing monument of it, their jurisprudence, is unquestionably the most honorable, as well as the most lasting record of their former greatness.' p. 297.—*Law Magazine.*

## LIABILITY

### OF OWNERS AND MASTERS OF VESSELS FOR THE LOST PROPERTY OF PASSENGERS.

The following case, in relation to the above subject, which came before the Supreme Court of Louisiana, is taken from the *New Orleans Commercial Intelligencer.*

H. R. Denis for the absent heirs of Malpica, &c., Appellee, vs Captain M'Kown, and the owner of the ship Belle, appelants.

*Appeal from the Parish Court of the Parish and City of New Orleans.*

J. Porter delivered the opinion of the Court.

This action is instituted to recover from *Mc Kown*, Captain, and *Curell*, Owner of the Ship Belle, the sum of $7378, which the petition alleges, the deceased, a passenger in the vessel aforesaid, brought on board of her on a voyage from *Vera Cruz* to *Habana*, and which it further alleges, the defendants refuse to deliver, though requested to do so.

The proceedings against the captain, appear to have proceeded no further than to bring him into Court: against the owner, they have been carried on to final judgment. The latter, in his answer, acknowledges the ownership of the vessel, and the voyage, but alleges, that during its progress a mutiny broke out on board, and that the passengers taking the control of the ship compelled the Captain to land them on the Spanish Main. It avers, the defendant is not responsible for the money and effects of the passengers who died, because they were taken possession of by the friends of the deceased, or by the mutinous passengers; and it further affirms that if the property did not come into the hands of the captain, officers or crew of the vessel, the defendant is not responsible.

The Court below, after hearing a great deal of contradictory testimony, gave judgment against the defendant for $6862, from which judgment he appealed.

Without noticing the evidence in detail, its discrepances, and the reasons which induce us to come to the conclusion we are about to state, we think it establishes—That the deceased, Malpica, came on board the ship Belle at Vera Cruz as a passenger to the Havana, and brought on board with him a sum of money equal in amount to that for which the inferior Court gave judgment, that no freight was paid for it, nor any notice that it formed part of his effects, communicated to the Captain. That after the vessel was out some days, Malpica died; that an inventory was made of his effects and property, in which the money was included; that the captain assisted at the counting of the money, but refused to sign the inventory; that he took possession of the trunk, and placed the money in the care of another passenger who did not take it with him when he debarked on the Spanish Main; that there was no mutiny on board, nor any act of the passengers which prevented the captain discharging all obligations imposed on him by law as commander of the vessel in relation to property situated as this was, and finally, that the evidence furnishes a strong presumption the captain converted the money to his own use.

On these facts the plaintiff contends the owner is responsible for the acts of the Master; and he has especially relied, in support of this position, on the commercial laws of Spain, the places where the voyage commenced and was to terminate, being in countries governed by these laws.

The defendant resists the application of the laws of Spain to the case on two grounds: First, that the laws of the place where the ship is owned must determine the responsibility of the defendants: Second, that there is no evidence on record of the laws of *Vera Cruz* and *Havana*, and consequently the Court must presume it to be the same as our own.

And as to the first point, we are of opinion, that the law of the place of the contract and not that of the owner's residence must be the rule by which his obligations are to be ascertained. The *lex loci contractoris* governs all agreements, unless expressly excluded, or the performance is to be in another country where different regulations prevail. What we do by another, we do by ourselves, and we are unable to distinguish between the responsibility created by the owners sending his agent to contract in another country, and that produced by going there and contracting himself.

The second offers rather more difficulty. The general rule certainly is, that courts cannot notice the laws of a foreign state, unless they be proved like other facts.

But when countries have once belonged to the same government, and the same rules prevailed in both, it is not understood by us that the separation of these countries renders the laws in existence at the time they divide, foreign to each other. The act of political separation does not destroy the knowledge possessed in both that they were subject to the same law, and what that law was. Any change made in it after the countries

became independent of each other; any statute passed in either would certainly come under the general rule, because it was at no time common to both; but laws which were, stand on quite a different footing.

The rule, like every other in regard to evidence, is founded on good sense. Courts require proof of the laws of another country, because they do not judicially possess the means of knowing them; but, when they do possess judicial knowledge of them, there seems to be no object in requiring evidence of that which is already known. We have looked into the jurisprudence on this head, and we do not discover that the different States in the Union require proof; the common law prevails in each: or that it has ever been deemed necessary to establish, by testimony, that the same system governs in England. It is true they require proof of British statutes which never were in force within their own State, but that is on the distinction already alluded to. It is a matter of history, that certain countries formed part of the same kingdom, or government, of which courts of justice take notice, without evidence; and if it be a fact that the countries separated were at one time under the same government, proof of the law at the time of separation is vain and of no use: for the Court knows its own law, which was the law of both.

We therefore think the laws of Spain may be referred to, and considered in the decision of the cause, although they have not been proved as facts.

By one of the laws of the Indies, it is made the duty of a master of a vessel, in case any of the passengers die during the voyage, to make an inventory of their property, and deliver it at the port of destination. *Jacobson*, in his Sea Laws, without referring to any special legislation as authority, declares it to be the duty of the Captain to do so. It would seem to us, to necessarily result from the duties which masters of vessels have to perform, and its importance cannot be doubted.

The valuable effects with which men frequently travel, and the unprotected state of their property on board a ship after their death, render it necessary that some one should be responsible for its safe keeping.

Numerous frauds would otherwise follow. On no one can this duty be so properly imposed, as the captain of the ship, whose situation and authority enable him effectually to discharge it. The present instance presents a case where this duty has been totally neglected. The master either converted the money to his own use, or permitted others to do it, without taking any measures to prevent them, and in either hypothesis his responsibility is the same. *Curia Philip.* lib. 3, cap. 11, No. 13. *Jackson's Sea Laws*, 133.

Our attention has been most turned to that part of the defence which claims immunity for the captain in consequence of the passenger bringing the money on board without giving notice of it. We have endeavored, but fruitlessly, to satisfy ourselves whether the master and owner are responsible for money or precious objects placed among the baggage of a passenger, and of which no particular declaration is made. The *consulado del mare* and the *laws of Ursby*, both treat of the effects of this concealment or a claim for average, if the objects have been thrown overboard; but they are silent as to the responsibility of the captain in other cases. A law of the Partidas, renders the owners responsible for everything which is brought on board, with the knowledge of the master, but whether the delivery of a trunk or parcel, without a declaration of its contents, would produce responsibility in the case supposed, the law is silent. It is probable it would. No exception is made, and even where the traveller is received through friendship, by carriers on land and water, or keepers of inns, this law makes them responsible for his effects, unless they receive them with an express declaration that the traveller must be take care of his own property. *Peters' Rep.* vol. 1, *Appendix*, pages 20. and 52. *Consulat de la Mer. par Boucher*, vol. 2, p. 451, Nos. 856 and 860. Part. 5, titl. 8, line 26.

But whether the master would have been responsible, in case the money had been lost before the death of the owner, need not be inquired into; on that event taking place, the knowledge of the property being on board was brought home to him.—He became by law the guardian of it, and was his duty to take it into his possession and deliver it to the representatives of the deceased. We find nothing in the law, and we see no good reason why on the death of a passenger, the captain should be discharged from all responsibility in relation to his effects, because he was not made acquainted with their kind and value, previous to the proprietor's decease.

The responsibility incurred by the master in this case, of which we have no doubt, settles the question as to the owners. The general principle on this matter, is so well established as to be familiar. The proprietor of the vessel is answerable for all acts of the master within the scope of his employment, even for his losses. *Abbot on Shipping*, 9. (Ed. 1829.) 3 *Kent's Comm.* 162. *Curia. Phil.* lib. 3, Cap. 12, *verbo Damos*, No. 29. 6 *John.* 160. 11th ibid. 107. 17 ibid. 1.

Counsel have endeavored to limit the responsibility of the defendant to the value of the vessel and freight earned. Such a limitation does exist in several countries, and it is wise perhaps, that it should; but the general law is otherwise, and the very passage of special statutes limiting the responsibility, acknowledges the previous rule to be otherwise. No such statutory provision is shown to exist in the country where the contract was made, and we cannot supply it.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

## RECENT AMERICAN DECISIONS.

### LANDLORD AND TENANT.

1. A landlord cannot in New York distrain either *on* or *off* of the demised premises, where the term has expired, and the tenant has abandoned or yielded up the possession to the landlord. *Williams vs. Terboss*, 2 Wend. 148.

2. The seventh action of the act to amend the act concerning distresses, (*Statutes, vol. 5, b.* 178,) is only an extension of the remedy given by the thirteenth section of the original act. *Ib.*

3. The effect of the several provisions of the two statutes is to give the landlord a right to distrain either *on* or *off* of the demised premises, at any time within six months after the expiration of the lease, where the interest of the landlord and the possession of the tenant both continue; provided the distress, if made off of the premises be made within thirty days after the goods are removed, or within thirty days after the rent becomes due when the goods are removed before the rent becomes due. But the landlord is in no case authorized to distrain goods carried off of the premises, where he would not have been allowed to distrain the same if the tenant had permitted them to remain. *Ib.*

4. The assignment by the assignee of a term for years of his interest, by way of mortgage for the security of a debt, does not divest him of his estate, and destroy the relation of landlord and tenant between him and his tenant, if the debt, for which the term was mortgaged be paid or satisfied previous to the accruing of the rent. *Evertsen vs. Sawyer*, 2 Wend. 507.

5. Nor does the sale of such an interest by virtue of a judgment and execution, destroy such relation previously to the purchaser's obtaining possession; if, however, the tenant to the defendant in the execution *disclaims* the title of his landlord by attorning to the purchaser, though such attornment is void by statute as divesting the landlord of his possession, yet the disclaimer may be set up as a bar to the landlord's right to recover rent accruing *after* the time that the right of redemption has expired. *Ib.*

6. In an action on the case by a tenant against his landlord, for destraining for a greater sum than is due for rent, where the tenant, to regain possession of his goods, gives a negotiable note, with sureties, for the sum claimed, if entitled to recover at all, the tenant is not entitled to recover, as *damages*, the difference between the rent due and the sum distrained for, if the note is not actually paid, and remains in the hands of the landlord, *Lewis vs. Lozee*, 3 Wend .79.

7. A negotiable note with sureties, taken by a landlord from his tenant, after a distress for the amount claimed as rent, payable in sixty days, under an agreement to relinquish the distress, and not to re-enter or distrain within sixty days, is a *collateral security* only, and not a payment or satisfaction of the rent; it appearing affirmatively that the note has not been paid or negotiated by the landlord. *Ib.*

8. Where a tenant took a lease of a village lot for 21 years, and covenanted to pay *all taxes, charges and impositions*, which should be imposed upon the demised premises: and during the term, the premises were subjected to an assessment for pitching and *paving a street*, under an act incorporating the village and authorizing such an assessment, passed subsequent to the date of the demise; it was *held*, that by the terms of the covenant, the tenant was liable to pay the assessment, although the expenditure was for a permament benefit extending beyond the term. *Bleecker vs. Ballou*, 3 Wend. 263.

9. Where a sheriff received an execution, and went with it in his pocket to the house of the defendant, but took no inventory and did no act to enforce the execution for eleven months afterwards, not even apprising the defendant of the fact, it was *held* that no such levy had been made as would debar the *landlord* of the house occupied by the defendant from claiming the *rent* due to him, although it accrued *subsequent* to the pretended levy. *Beekman vs. Lansing*, 3 Wend. 446.

10. Where it is a *condition* in a lease of personal property that the lessee shall keep it upon particular premises, and not remove it therefrom, a *removal* of such property by the lessee operates as a *forfeiture* of the term, and divests his title so, that no interest in the property removed remains in him that can be sold by execution. *Otis vs. Wood*, 3 Wend. 498.

11. If property thus circumstanced is levied on and sold under an execution against the lessee, the lessor is entitled to maintain an action of *trover* against the officer. *Ib.*

12. Where rent in kind is payable by the terms of a lease at such place in a *market town* as the lessor shall appoint, if no appointment is made, it is the duty of the lessee, to seek the lessor to ascertain the place of payment and there to deliver his rent. If the landlord could not be found, a delivery at any place in the market town it seems would be sufficient. *Lush vs. Druse*, 4 Wend. 313.

13. The price of wheat in a market town on a given day, obtained from the books of dealers in that article, is *prima facie* evidence of its value. *Ib.*

14. A landlord is entitled to *interest* on rents payable in wheat if the wheat be not delivered on the stipulated day. *Ib.*

15. Where a party after executing leases of portions of his farm to several tenants, granted the whole farm with the reversion of the demised premises to a tenant *in fee*, reserving an annual rent, and after such grant, entered upon the demised premises and distrained the goods of the *original tenants*, for rent accrued subsequent to the grant of the whole estate, it was *held*, that such entry and distress amounted to an *eviction* of the principal tenant, and worked a suspension of the rent. *Lewis vs Payn*, 4 Wend. 423.

16. Where a tenant is thus evicted, the presumption of law is, that he *continues* out of possession; such presumption may, however be rebutted by proof that he was subsequently restored to the possession. *Ib.*

17. Where the lessee enters wrongfully into *part* of the demised premises, the tenant is discharged from the payment of the *whole rent*, till he be restored to the *whole possession*. *Ib.*

18. *Riens in arrere* is the *general issue* to an avowry for rent; and under it an *eviction* may be shown. *Ib.*

19. A *tenant* cannot *set off* damage sustained by the breach of his landlord's agreement to finish or repair a house, against a demand for rent. *Allen vs. Pell*, 4 Wend. 505.

20. A *tenant for years* forfeits his term by a refusal *in pais* to pay rent, by denying the title of his landlord, and by accepting title from a hostile source. *Jackson vs. Vincent*, 4 Wend. 633.

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LEGISLATURE, *Member of.*

A member of the legislature may be arrested after his return home, although fourteen days after the adjournment of the legislature have not expired, *Corey vs. Russell*, 4 Wend. 204.

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LIBEL.

1. A publication by the editors of a newspaper affecting the character of a *candidate* for public office is not a *privileged communication*, relieving the publishers from the necessity of proving the truth of the charges made, to shelter themselves from damages, and casting the *onus probandi* upon the party slandered of showing actual malice or a knowledge of the falsity of the charge. Editors may publish what they please in relation to the character and qualifications of candidates for office, but they are responsible for the *truth* of the publication. *King vs. Root*, 4 Wend. 113.

2. The *belief* of the defendants in the truth of the charges contained in the publication does not destroy the presumption of *malice*. Malice need not be proved, but will be implied if the charge be *false*; and in determining the question of justification, the *motives* of the defendant will not be taken into consideration. *Ib.*

3. *Malice*, said to be the *gist* of the action in suits for libel or verbal slander, does not mean malice, or ill-will, towards the individuals affected, in the ordinary sense of the term. In ordinary cases of slander, the term *maliciously* means *intentionally* and *wrongfully*, without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from *actual malice* or *ill-will* towards the individual, frequently given in evidence to enhance the damages. *Ib.*

4. In ordinary cases of slander or libel, it is not necessary to allege in the declaration that the words were spoken or the publication made *maliciously*; it is sufficient to aver that it was done falsely and injuriously. *Ib.*

5. *Privileged communications* are *prima facie* excusable, from the cause or occasion of the speaking or writing; but even in the case of such communications an action will lie if the party making the communication knows the charge to be false, and adopts that mode of gratifying his ill-will or malice. In such case, however *actual malice* must be shown, and the question will be submitted to a jury: in ordinary slander, the question of *malice* is never submitted to a jury, except as to the amount of damages. *Ib.*

6. If a plaintiff has been injured in his character or feelings by an unauthorized publication it is the duty of a jury to award him a full compensation in damages, without reference to any particular ill-will entertained against him by the defendant. *Ill-will* or *malice* will enhance the damages, but need not be shown to entitle a plaintiff to a recovery. *Ib.*

7. The truth of the publication may be pleaded in bar of the action, but if the defence thus set up be not supported by proof, the defendant will not be allowed to allege that the charge was made under a mistake, and to support such allegation by evidence; such proof will be received as tending to reduce the damages by rebutting the presumption of malice, where the *general issue* only is interposed, but not where a *justification* has been set up. *Ib.*

8. Evidence of the *general character* of a plaintiff may in all cases be given by a defendant in action of slander or for libel to lessen damages, even where a *justification* has been attempted. So on the other hand, the plaintiff is at liberty to give evidence of *actual malice* and vindictive motives on the part of the defendant, to enhance the damages. The defendant however, in such case, may rebut all presumption of actual malice by showing the facts and circumstances which induced him to believe the charge to be true when made, although it afterwards turns out to be false. *Ib.*

9. Evidence of the opinions of others as to the truth of the charges made is inadmissible, if, in the publication, the defendants state what they publish as facts within their own knowledge, without reference to the opinions of others. *Ib.*

10. In an action for a *libel* the defendant cannot either *in bar* of the action, or in *mitigation* of damages, given in evidence *other libels* published of him by the plaintiff, not distinctly relating to the same subject. *Beardsley vs. Maynard*, 4 Wend. 336.

11. If the publication alleged to be libellous was in *answer* or *reply* to a previous publication by the plaintiff *it seems* that such previous publication would be received in evidence of mitigation of damages; but a criminatory retort in which no relation to or perceptible connexion between the subject-matter of the publications could be discovered, would not be considered an answer. *Ib.*

12. The publication of a libel by the plaintiff against the defendant *three days* previous to the publication of the defendant's libel against the plaintiff, will not be received in evidence in palliation of the offence on the ground of *provocation*. *Ib.*

13. It is not allowable to ask a witness *how he understood the libel*. Had the question been *how others understood it*, or *how it was generally understood, it seems* it would have been proper. *Ib.*

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LIEN.

1. An artisan has a lien upon the article manufactured by him until he is paid for his labor, or parts with the possession pursuant to the terms of his agreement; so held in the case of a *brick-maker*, who manufactured a quantity of brick, on a brick-yard furnished by another, together with wood and all other necessaries to carry on the work; and who agreed to pay him $1,75 for every 1000 bricks made and shipped on the return of the vessel in which the same were carried to market. *Moore vs. Hitchcock*, 4 Wend. 292.

2. Where in such case the bricks were sold as the property of the employer under an execution against him, it was held that an action of *trover* lay by the brick-maker against the purchaser, who removed the same; the purchaser being, however allowed to show the estate of the accounts between the employer and the brick-maker, and the latter being permitted to recover only the amount of his lien upon the brick *taken* by the purchaser, and not the amount of his lien upon the whole quantity manufactured by him, or according to the state of the accounts between him and his employer. *Ib.*

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LIMITATION.

1. Where a party has omitted to plead the statute of limitations, the court will not suffer him to amend by adding that plea. The action for *mesne profits* forms no exception to the rule. *Jackson vs. Varick*, 2 Wend. 294.

2. Where the maker of a note against which the statute of limitation had run, on its being presented to him for payment, said that the note had been paid in services performed for the payee; that the services were not done to apply on the note, but there was a running account between him and the payee, and he intended the amount should be set off against the note or against the payee, and agreed to produce his account, but at a subsequent day; it was *held*, that those declarations did not amount to an admission of a subsisting indebtedness, without which a promise could not be implied. *Bradley vs. Field*, 3 Wend. 272.

3. The acknowledgment of a defendant to take a case out of the operation of the *statute of limitations*, must be an unequivocal and positive recognition of a subsisting claim in favor of the plain-

tiff; it must be an admission of a previous subsisting debt which he is *liable* and *willing* to pay; and must not be accompanied by circumstances repelling the presumption of a promise to pay the debt. *Purdy vs. Austin*, 3 Wend. 187.

4. Where a defendant, on an account being presented to him after looking at it, threw it down in a passion, and said, 'I owe him (the plaintiff) no such money,' or asked 'I owe him so much money as that? Why did he not present the bill himself?' and added that he never had a bill from him that he would not settle with any one but him, that he did not owe him anything, or anything worth mentioning; that he had paid him a great deal of money, a horse, and the use of a house, and appeared much surprised, and signified that he had paid the plaintiff all his work amounted to, (the account being for work alleged to be done;) it was *held*, that the declarations of the defendant, instead of amounting to a recognition of a subsisting demand, were a denial of the claim of the plaintiff. *Ib.*

5. A plaintiff cannot avail himself of a *capias* issued to save the statute of limitations, although the same was regularly returned, entered on a continuance roll and the continuances carried down to the time of the issuing of the process on which the defendant was arrested, unless he shows that the process on which the arrest was made is a *continuation* of the process originally issued, as that it is an *alias* or *pluries*, &c. The continuation of the suit must be *proved*, and will not be *presumed*. *Souden vs. Van Rensselaer*, 3 Wend. 472.

6. Where a plea of *non assumpsit infra sex annos* was put in, instead of a plea of *actio non accrevit infra*, &c, and the plaintiffs replied a new promise, and gave evidence in support of the replication on the trial of the cause, the issue though *informal*, was held not to be *immaterial*, and that the defect was cured by the verdict. *Ib.*

7. A debt, barred by the statute of limitations in the life time of the testator, is presumed to be paid by him, and is therefore not a legal demand or a just debt. An executor has no right to *retain* for such a demand due to him personally, notwithstanding a provision in the will for the payment of all *just debts*, and that even in a case of parent and child. *Rogers vs. Rogers*, 3 Wend. 503.

8. An acknowledgment which is to have the effect of taking a stale demand out of the operation of the statute of limitations, ought to be clear and explicit in relation to *the subject* or *demand* to which it refers. *Stafford vs. Brian*, 3 Wend. 532.

9. If effect can be given to the declaration or admissions which may be proved to have been made by a defendant, without referring them to to the demand upon which the suit is brought, they will not be considered as referring to such demand, and as evidence of a new promise to pay it; and especially will they not be so considered where the defendant, in answer to a bill of discovery, denies under oath that he has ever acknowledged or promised to pay the demand. *Ib.*

10. The statute of limitations cannot be set up in bar to a recovery in ejectment against the grandchildren of a person dying seized, against whom there was no adverse possession, where, at the decease of the grandfather, the mother of the lessors, through whom the estate descended to them, was under coveture, against whom the statute had not began to run, and the action was brought within ten years after the decease of their father, the tenant by the courtesy. *Moore vs. Jackson*, 4 Wend. 58.

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LIQUIDATED DAMAGES.

A sum apecified *in the condition of a bond*, as the measure of damages to be paid by a party failing in the performance of his agreement, will be considered as *liquidated damages*, and not as a *penalty*. *Smith vs. Smith*, 4 Wend. 468.

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MALICIOUS PROSECUTION.

1. In an action for a *malicious prosecution*, the jury ought to be instructed by the judge as to the law involved in the question of probable cause, i. e. what constitutes a legal excuse for the defendant; and whether the facts relied on in the defence, on the supposition of their being found true by the jury, made out a *probable cause*. *Masten vs. Deyo*, 2 Wend. 424.

2. Where the circumstances relied on as evidence of probable cause, are admitted by the pleadings, it belongs to the court to pronounce upon them; and where they are clearly established by uncontroverted testimony, or by the concession of the parties, and fully establish a probable cause, the court may refuse to submit the cause to the jury, and may order the plaintiff to be nonsuited. *Ib.*

3. If, however, the facts are controverted, if conflicting testimony is to be weighed, or the credibility of witnesses to be passed upon, the evidence must go to the jury, but still under the instruction of the judge as to the law of the case. *Ib.*

4. In an action for a *malicious prosecution*, the recovery in a court of competent jurisdiction in favor of the plaintiff in the suit complained of as malicious, is *not conclusive evidence of probable cause*. *It seems*, that the *allegation* that the plaintiff in such suit, with a knowledge that he had no cause of action and that the defendant had a full defence, caused the defendant to be detained as a *prisoner* until judgment could be obtained against him, for the purpose of preventing a defence and hindering him from procuring the necessary evidence to substantiate his defence, would countervail the effect of the admission of such recovery; at all events, *evidence* of the want of probable cause *rebuts* the inference of the existence of probable cause, arising from the fact of a recovery in the suit complained of as malicious. *Burt vs. Place*, 4 Wend. 591.

5. The rule requiring the plaintiff to show that the suit complained of as malicious was decided in his favor, is complied with by showing a judgment, in his favor in the *Common Pleas*, on an appeal from a justice's judgment, although such latter judgment was in favor, of his adversary. *Ib.*

6. Evidence of the proof adduced, on the trial of the suit complained of as malicious, is inadmissible for the purpose of showing probable cause, where the defendant himself was not the witness; the party is bound to produce the witnesses, and is not permitted to prove what they testified to. *Ib.*

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ADMIRALTY.

The admiralty has jurisdiction over petitory as well as possessory suits, to reinstate owners of ships, who have been wrongfully displaced from their possession. *Schooner Tilton, 5 Mason R.* 465.

The admiralty has jurisdiction in case of a wrecked ship to decree a sale upon application of the master. *Ib.* 465.

The sale by an Admiralty Court of a wrecked ship upon the application of the master and a survey made, is within its jurisdiction, but is not conclusive upon the owner or upon third persons. *Ib.*

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ALIEN.

When an alien sues in the Circuit Court, the defendant must be described as a citizen of some particular state. Stating him to be a citizen of the *United States* is not sufficient. *Picquet vs. Swan, Ib.* 35.

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CIRCUIT COURT.

Where a party defendant is a citizen of the United States and a resident in a foreign country, not having any inhabitancy in any State in the Union, the Circuit Court of the United States have no power to maintain jurisdiction over him in a suit brought by an alien against him although he has property within the district, which may be attached. *Picquet vs. Swan, Ib.* 35.

The State courts have jurisdiction of offences committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when these flows are within the body of the County; and in such cases the Circuit Court of the United States has no jurisdiction under the statute. *U. S. vs. Grush, Ib.* 290.

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CITIZENSHIP.

To constitute a person a citizen of a state so as to sue in a court of the United States he must have a domicil in such state.

If he removes into a state *animomanendi*, that is sufficient whatever may be his motive for removal. But a mere temporary change of place, without any intention of permanent residence, constitutes no change of domicil. *Case vs. Clark, Ib.* 70.

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COUNTY.

Where an arm of the sea, or creek, haven, basin or bay is so narrow that a person standing one shore can reasonably discern, and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of the county.

In such case, it seems, that the Admiralty and Common Law Courts, have concurrent jurisdiction. *U. S. vs. Grush, Ib.* 290.

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CONTRACT.

Where a contract is made between citizens of the same state, and the deft. is afterwards discharged under the insolvent act of such state from imprisonment, and his person is exempted from future imprisonment thereon; still, if the contract itself is not discharged, a general judgment will be entered against him upon a suit brought in another state, according to the *lex fori*. *Titus vs. Hobart*, 378.

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DISSEIZN.

Where a party is disseized he cannot convey by a quitclaim deed his title to the premises of which he is disseized. *Wakefield vs. Rose, Ib.* 16.

DUTIES.

Under the tariff act of 22d of May, 1824, ch. 136, bombazines, being goods of which wool is a component material are liable to pay a duty of 30 per cent. *United States vs. Clark, Ib.* 30.

By the act of congress of 1799, ch. 128, Consignees are authorised to enter goods and give bonds for the duties. In such case the United States have no remedy over against the owner of the goods for whom the consignee acts as agent or trustee, if the duties are not paid. *Knox vs. Devens, Ib.* 380.

If a surety for a consignee or a custom house bond pay the debt, he has no remedy against the owner for the amount, if the latter did not request the surety to sign the bond; but the remedy for the surety is against the consignee only. *Knox vs. Devens, Ib.* 380.

If a collector of customs cancels a bond for duties, without receiving payment of the amount of duties, in connivance with the debtor, the cancellation is void, and the bond may still be declared open as a subsisting deed; for the cancellation is in such case, a flagrant violation of duty. *Johnson and Error vs. United States, Ib.* 465.

A collector of the customs is not at liberty to receive anything but money of the United States or foreign gold or silver coin made current in payment of duties; if he receives a check on a bank in payment, it is at his own peril, and if the check is not paid, the bond is not discharged; *a fortiori*, it is not discharged by the receipt of a memorandum check. *Ibid.*

The receipt of a collector acknowledging payment is prima facie evidence but not conclusive of the fact of payment. *Ib.*

A collector like other public officers, cannot bind the United States by any act beyond or contrary to, the authority given him by the Laws. *Ib.*

*Quære*, whether a collector is not to all intents, *functus officio*, as soon as a removal takes place by the appointment of another person in his stead. *Ib.*

ESTATE.

A liberty granted in a deed 'to dig a canal through the grantor's land' does not include as incident, the proprietory interest in the soil, when dug up and removed. *Lyman vs. Arnold, Ib.* 195.

FISHERY.

A lease of 500 years of certain land covered with a pond of water conveys as incident the water and fish therein. *Smith vs. Millen, Ib.* 191.

HUSBAND AND WIFE.

By the statute of *Rhode Island* respecting conveyances of real estate, no deed of the wife's estate by the husband and wife, conveys any title but that of the husband, unless the same deed be duly acknowledged by the wife, before a magistrate, in the manner prescribed by the statute. *Manchester vs. Hough, Ib.* 67.

By the customary and ancient law of *Rhode Island*, a feme covert may pass her estate by deed, in which her husband is joined, which is duly executed and acknowledged. *Ib.*

INSANITY.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated and his insanity be directly caused by the immediate influence of such liquors. *United States vs. Drew, Ib.* 28.

## ENGLISH.

ARCHES COURT — JANUARY.

(Before Sir J. Nicholl.)

*In the matter of the Earl of Rochfort.*

The COURT gave judgment in this case this morning. The Earl of Rochfort, it appeared, made a will in the month of April, 1824, by which he entailed all his real estates to the Duke of Hamilton, in male entail, and appointed the Duke of Hamilton, residuary legatee. It specified, however, that, if the personal effects were not sufficent to satisfy the mortgages, legacies and debts which had been contracted, then the real estate should be subject to the payment thereof. He appointed D. C. Killderbee, Mr Spencer Killderbee, his son, and Mr Wearn, his solicitor, as executors and trustees. In the year 1826 he executed two codicils—one in February and one in May. The Court, however, did not see that these two codicils made any material alteration in what had been stated by the will. The present codicil, however, which had been propounded, intended to make material alterations in the disposition of the real property. It is unexecuted, but it is drawn up with the intention of disposing of the estate of Easton differently from the way in which it was disposed of by the will—namely, to Mr Spencer Killderbee and his male issue, and, in default of male issue, to his daughters. It further gave all the furniture, plates, &c, as heir-looms with the estate; and also exonerates the Easton estate from any charge by debts, mortgages, and legacies. That codicil was dated merely 'Sept. 1830,' and not signed or more particularly dated. On the 3d September the Earl died, and it now became the Court to inquire what would be the effect of this codicil. It was quite clear that it would have no effect on the real estate, and no effect on the disposition of the copyhold estate, to be derived by the probate of this Court being granted upon it, the probate of this Court not being necessary to give effect to the disposal of real and copyhold estates; in fact, the copyhold property was not mentioned in it. The Court would, therefore, be extremely unwilling to take any step that would have even a collateral effect in the distribution of it, as such only could be the effect of the probate of this Court granted to that codicil. This instrument was supported by the evidence of Mr Wearm, the Earl's solicitor, who deposed that he was told by the Earl, in June, 1830, that he wished him to make an alteration in his will in favor of Mr Spencer Killderbee, for whom he had always expressed great friendship and affection. This was an intention that he had expressed three years before. On the latter occasion Mr Wearn told him that the sooner it was done the better. The Earl replied that he was going to London, and would do it immediately on his return. He said that he intended to give the estate of Easton to Mr S. Killderbee. It was not, however, till the 30th of August, when he had been ill some time, that he gave explicit directions and instructions to Mr Wearn to make this codicil. He repeatedly ejaculted 'Poor Spencer, poor Spencer!' After having received some loose instructions then, Mr Wearn afterwards attended the Earl several times, but found him dosing, and could not disturb him. The Earl told him that the estate was to go to Mr S. Killderbee, tied in the same manner as in the will, which was in entail male, whereas the Earl wished the present codicil to give to female in default of male issue. To explain this inconsistency, Mr Wearn afterwards consulted him, and understood him to assent, by nodding his head, to its going to female issue. Mr Wearn attended him on the day before his death, and read over the codicil to him, but he had not proceeded far when he saw the Earl was not capable of attending. Mr W. and another person attempted to rouse him, and he set up in the bed, and seemed determined to attend, but before it could be read he fell down quite exhausted, and expired on the next day, without having been able to sign or hear it read. The Court concluded with stating, that as the codicil related only to real property and heir-looms, over the disposition of which the probate of Court would have no effect, he (Sir J. Nichol) could not, although it was very unfortunate for Mr Spencer Killderbee, grant probate of this instrument, unless more satisfactory evidence of distinct intention could be produced.

Dr LUSHINGTON applied to the Court to order the costs to be paid out of the estate.

The Court granted this application.

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The following specimen of Professional poetry is copied from a London Magazine.

### CANONS OF DESCENT.

*Versified from Blackstone's Commentaries, by an Apprentice of the Law.*

CANON I.

Estates go to the issue (*item*)
Of him last seised *in infinitum;*
Like cow tails, downward straight they tend,
But never, lineally, ascend;

CANON II.

This gives that preference to males,
At which a lady justly rails;

CANON III.

Of two males in the same degree,
The eldest, only, heir shall be;
With females we this order break,
And let them altogether take:

CANON IV.

When one his worldly strife hath ended,
Those who are lineally descended
From him as to his claims and riches,
Shall stand precisely in his breeches;

CANON V.

When lineal descendants fail,
Collaterals the land may nail;
So that they be (and that a bore is)
*De sanguine progenitoris:*

CANON VI.

The heir collateral, d' ye see,
Next kinsman of whole blood must be;

CANON VII.

And of collaterals, the male
Stocks are preferred to female,
Unless the land come from the woman,
And then her heirs shall yield to no man.

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In the Court of Exchequer yesterday morning the Chief Baron announced his intention of retiring from public life. It may therefore be presumed (as an Evening paper remarks) that the arrangement by which it was intended, on this resignation, to restore Lord Lyndhurst to legal office as Chief Baron, will now be completed.—*Sun.*

THE JURISPRUDENT.

BOSTON, SATURDAY, APRIL 9, 1831.

## JUDGE THACHER'S ADDRESS.

We intended earlier to have recommended to our readers the interesting address of *Judge Thacher to the Suffolk Bar.* The subject of it is the *connexion between the moral and the professional character.* We give a short Extract below and shall, if possible, recur to it again.

'We belong, gentlemen, to a profession, whose duty it is to keep with vestal purity, and in a perpetual flame, this divine science. For numbers, we compose no small portion of the state. Go through the cities and villages of our country: what place is so barren, what village so small, in which is not found its lawyer, as well as its pastor? We mingle with the people in all their concerns, at home and abroad, in public and private, in the field and on the exchange. The influence of the profession is not confined to the administration of justice; it is felt in all the concerns of life and government. You see lawyers in every legislative assembly, among the first to originate, to counsel, and to effect measures of interest to the state. They are active members of every corporation, whether municipal, literary, commercial or humane. Nothing human is foreign to their pursuits. Holding in their hands the shield of the law, they are the protectors of innocence, the avengers of wrong, the expounders of right. Though generally poor themselves, they number the rich among their clients. The mariner pursues his adventurous course upon the ocean more cheerfully and securely, because he finds among the profession the seaman's friend. Even the miserable criminal arraigned for his crimes, wants not an advocate, who will boldly, and eloquently too, defend his rights, when all the good and just of society seem to be estranged from him. So that, I may add, by their universal knowledge, their professional skill, and their active character, they have a sway over the minds of men, which constitutes moral power in an eminent degree.

'The aggregate weight and influence of our society must depend on the individual characters of its members. No individual of any profession is an object of greater reverence than the lawyer, who to profound learning and exalted moral qualities, adds that most rare gift of heaven, eloquence. While all, therefore, may well be proud of an alliance to such a profession, each should strive by his personal virtues, to render himself and the society worthy of general confidence. Of all communities, that of bad men is least likely to be permanent; for they carry in their head and members the elements of division and decay. But the alliance of learning and virtue is the strong arm of the state. And therefore, in our professional pursuits, the study of justice is ever to be blended with the love and practice of mercy:—since mercy is the foundation of all charitable dealing, and judgment of all just conduct. And if the members of our profession, so numerous, so diffused, and with such powers of influence, will prove themselves true to virtue and to good government, they will compose a phalanx which no Roman legion could penetrate or divide.

'Amidst the divisions which successively agitate the state, on subjects of religion, manners, and government, it is your duty not to be indifferent spectators, but to share in them, that the conflicting parties may not lose the example of your wisdom and moderation. If every one, in his station, will do his duty faithfully, as a good citizen, things will go on well in the Republic. Your pursuits qualify you to investigate truth, and your opinions deliberately formed on any subject, will have great influence upon other classes of the community. You spend days and months in the investigation of controverted titles to real estate, and on disputed cases of small value. And all your powers of body and mind are often brought into intense exertion, to maintain the good cause of your clients. Ought it not sometimes, in the vacation at least, to occur to us, that we have titles of infinitely higher interest to investigate for ourselves?

'The late Samuel Dexter, whose powers of investigation were not inferior to any master of reasoning in ancient or modern times, whose noble form so indelible rests on our memory, whose deep toned voice and powerful eloquence still vibrate within these walls—and none who heard or knew him can ever forget him;—that great lawyer directed his attention in mature life, to the evidences for Christianity. And I well remember his declaration, that his inquiry had resulted in the belief, that its truth admitted a clear demonstration, and that the religion was divine.'

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CONTENTS of the Law Magazine and Quarterly Review of Jurisprudence, No. XI., for January, 1831.

ART. I.—*Lord Brougham's Local Court Bill—with full Particulars relating to the inferior Courts of Scotland, and the Continental Court of Conciliation.*

I. The Speech delivered in the House of Peers, December 2nd, 1830, by Henry Baron Brougham and Vaux, Lord High Chancellor of Great Britain, upon the Introduction of his Bill to reform the existing Legal Abuses of the Country. 8vo. London, 1830.

2. A Bill, intituled An Act for establishing Courts of Local Jurisdiction. Ordered to be printed, Dec. 2, 1830.

ART. II.—*Legal Reform in France.*

Lettres sur la Cour de Chancellerie d' Angleterre et sur Quelques Points de la Jurisprudence Anglaise, &c. Par C. P. Cooper, Avocat Anglais: avec une Introduction par M. P. Royer-Collard, Avocat á la Cour Royale de Paris, Professeur á la Faculté de Droit. Paris: Strasbourg: Londres: Bruxelles. 1830.

ART. III.—*The Life of Lord Mansfield (concluded.)*

ART. IV.—*Medical Jurisprudence.*—No. V. Case of Mr St John Long.

ART. V.—*Remedies against the Hundred.*

ART. VI.—*The Execution of Powers of Sale by the Survivors of several Donees.*

ART. VII.—*Mercantile Law.*—No. IX. The Contract of Sale—*continued*; And herein of Stoppage in Transitu.

ART. VIII.—*The Necessity of Transitive Laws (Lois Transitoires) in England.*

Juridical Letters; addressed to the Right Hon. Sir Robert Peel, in reference to the present Crisis of Law Reform: Letters II. III. By *Eunomus.* London: Paris. 1830.

ART. IX.—*The present State of the Laws relating to Tithes; with Remarks on the Archbishop of Canterbury's Commutation Bill.*

A treatise on the Law of Tithes. By William Eagle, of the Middle Temple, Esq., Barrister at Law. In two volumes, 8vo. London, 1830.

ART. X.—*State of the Registry Question.*

1. Notes respecting Registration and the Extrinsic Formalities of Conveyancing. By C. Cooper, Esq. Part 1. London, 1831.

2. Observations on the Second Report of the Commissioners appointed to inquire into the Law of Real Property. By Francis Mewburn, Gent. London, 1831.

3. A Popular View of the Law of Real Property, with an Application of its Principles to the Important Measure of a General Register; showing what Changes in the System a Register is calculated to produce. By W. Hays, Esq. of the Middle Temple, Barrister at Law. London, 1831.

4. Speech of John Campbell, Esq. M. P. on Thursday, Dec. 16th, 1830, on moving for leave to bring in the General Registry Bill. London, 8vo. 1831.

5. A Bill for establishing a General Registry for all Deeds and Instruments affecting Real Property in England and Wales. Ordered to be printed 21st Dec. 1830.

*Digest of Cases.*

Common Law.
Equity.
Bankruptcy.
Privy Council.
List of Cases.
Abstract of Public General Statutes.
Account of the various Ministerial Offices attached to the French Courts.

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## NEW PUBLICATIONS.

An Index to all the Reported Cases, Statutes, General Orders, in or relating to the Principles, Pleading, and Practice of Equity and Bankruptcy in the several Courts of Equity in England and Ireland, the Privy Council, and the House of Lords, from the earliest period down to the year 1831. By Edward Chitty, Esq. of Lincoln's Inn, Barrister at Law. 2 Vols. Royal 8vo.

A Treatise on the Principles and Practice of the Action of Ejectment and the resulting Action for Mesne Profits. The third Edition, with considerable Additions. By John Adams, Sergeant at Law. Royal 8vo.

A concise and comprehensive Form of a Lease for Farms, with Covenants, adapted particularly to most Soils in the County of Norfolk, and may be found useful in other parts of the Kingdom, with various Observations thereon; addressed to Agriculturists in general. By a Norfolk Land owner. 12mo.

Epitome of the Practice in the Court of Exchequer on the Plea Side; including the new Rules of Court of Michaelmas Term, 1830, and Extracts from the Act, 1st Wm. 4. c. 70, for the better Administration of Justice, &c, with Practical Forms and Precedents of Bills of Cost. By an Attorney of the Court. 8vo.

The Constable's Assistant, being a Compendium of the Duties and Powers of Constables, and other Peace Officers; chiefly as they relate to the apprehending of Offenders, and the laying of Informations before Magistrates. Fourth Edition, with Additions.

A Letter to the Right Hon. Lord Tenterden, on the Bill for establishing Courts of Local Jurisdiction. By William Raines, Esq., of Lincoln's Inn.

Sir E. B. Sugden's Acts; to which are added the new Act relating to Executors, so much of the 'Act for the better Administration of Justice' as relates to Ejectments. and the entailed Estates Bill, with Notes and an Index by S. Atkinson, Esq. of Lincoln's Inn, Barrister at Law.

ESSAY ON JUNIUS. This day published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

These volumes, by the author of Peter Parley, will complete a series of Tales for Children, designed to interest them in History and Geography. Those previously published are Parley's Tales about America, Europe, Asia, Africa, and Sun, Moon, and Stars. April 9.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

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Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰων. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. 1. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII. Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

II. Economy of Athens. 1. Die Staatshaushaltung der Athener, vier Bücher. Von August Boeckh. Mit einundzwanzig Inschriften. 2. The Public Economy of the Athenians. Four books; by Augustus Boeckh.

IV. Character and Abuses of the Medical Profession. Rules and Regulations of the Boston Medical Association.

V. Waverly Novels. Parley's edition.

VI. British and American Shipping. 1. The Merchant, Ship-Owner, and Ship-Master's Import and Export Guide; by Charles Pope. 2. Speech of Right Honorable William Huskisson in the House of Commons.—May, 1827.

VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

THE JURISPRUDENT

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, APRIL 16, 1831. NO. XXXVIII.

## LORD MANSFIELD.

Continued.

On the same day that Lord Mansfield presided, for the first time, in the court of King's Bench, the Duke of Newcastle resigned his office of prime minister; and in the following week (Nov. 19th), Lord Hardwicke gave up the great seal. The same political motives which had induced him to quit the woolsack, were, of course, sufficient to prevent Lord Mansfield, who had been his colleague in the cabinet, from becoming his successor; and he accordingly declined accepting the vacant place, though repeatedly and earnestly pressed upon him. The seals were shortly afterwards put in commission; Sir John Willes, the chief justice of the Common Pleas, Sir John Eardley Wilmot, a puisne judge of the King's Bench, and Sir Sidney Stafford Smyth, third baron of the Exchequer, being appointed to execute the legal functions of the chancellor. The administration, however, under which these arrangements took place, was not of long duration. The king's personal feelings of dislike against Pitt gave every advantage to the opponents of the minister, in their endeavors to oust him from his office; and they had not to wait later than the spring of the ensuing year before their efforts were successful. Pitt was displaced in the beginning of April, and for about eleven weeks there was actually no administration, this time being employed in fruitless attempts to unite the conflicting interests, passions, and pretensions, of the adherents of Fox and the Duke of Newcastle. The endeavor miscarried, notwithstanding the Duke's readiness to almost any concession for the purpose of effecting such a coalition, and the advantage he derived from the assistance of his friend, Lord Mansfield, in the course of the negotiation. The chancellorship of the exchequer had been given up by Mr Legge, on the resignation of Pitt; and the forms of that office not admitting the absence of a chief, it had been entrusted (9th April), till the new ministry should be formed, to the Chief Justice of the King's Bench, as it had been to Chief Justice Lee on the death of Mr Pelham, and to Chief Justice Pratt on the dismission of Aislabie, in the time of George the First. This appointment gave Lord Mansfield frequent access to the king, by whom he was confidentially consulted on the subject of the different ministerial arrangements then in contemplation. The difficulties that stood in the way of the formation of a cabinet, were, as it is well known, finally adjusted by a junction between Pitt and the Duke of Newcastle, the latter being appointed to the Treasury, and the former becoming secretary of state. The seals of the exchequer were then given up by Lord Mansfield, that Legge might be re-instated in the post he had quit.

The new ministry kissed hands on the 29th of June, and on the day following the chancery commissioners resigned in favor of Lord Mansfield's former school-fellow, Sir Robert Henley, who had succeeded him as Attorney-General. He took the seals, with the title of Lord Keeper, which he retained till the accession of George the Third, when after the customary resignation, they were re-delivered to him as Lord Chancellor, and he was created Earl of Northington. More difficulties had been experienced by the Duke of Newcastle and his colleague, in filling this office, than any other at their disposal. It had first been offered to Lord Hardwicke, who declined it, on account of his advanced age. It was then once more tendered to Lord Mansfield: but he saw sufficient reason, in the apparently unsettled state of the ministry, to justify his refusal; and Sir Thomas Clarke, the Master of the Rolls, was also prudent enough to resist the temptation of quitting his own secure place for the sake of so precarious an elevation. Chief Justice Willes would not accept it without a peerage, which the ministry refused to give him; and the unambitious Sir John Wilmot would take it on no condition whatever. In short, the offer was not made to Sir Robert Henley till it had been the round of half the judges of the kingdom. This promotion enabled Pitt to insist on the appointment of his friend Pratt (afterwards Lord Camden) to the attorney-generalship. Charles Yorke kept his place as solicitor.

The Duke of Newcastle had been the more anxious to overcome Lord Mansfield's objections against accepting the post of Chancellor, that he knew by experience how able a coadjutor he would prove as one of the administration. Finding himself, foiled in this object, and not being able to reconcile himself to the loss of his service, he had recourse to the dangerous and unconstitutional expedient, which has of late years been resorted to in the case of Lord Ellenborough, but which it is to be hoped will never again be attempted, of enrolling the Chief Justice of the King's Bench among the members of the cabinet. With the exception, however, of a short period during the year 1765, when he was nominated as one of the council of regency, Lord Mansfield ceased to be an active member as early as 1763. He then refused to sit with the Duke of Bedford; and, though subsequently consulted by ministers on occasions when they required his assistance, he never afterwards resumed his place in the cabinet.

In the Court of King's Bench it was his lot to preside a much longer period than any other judge, either before or since, has sat in any English court of Justice. In the course of nearly thirty-two years that he remained there, several changes took place among his colleagues. When he first took his seat, the puisne justice in the King's Bench were Sir Thomas Denison, Sir Michael Foster, and Sir John Wilmot; though the last, from the time he was named as one of the commissioners of the great seal, was rarely present in his own court till his resignation of that office. Sir Michael Foster died on the 7th of Nov. 1763, after an illness which had disabled him from attending to his duties for more than two terms previous, and on the 24th of the following January, his place was filled by the elevation of Sir Joseph Yates to the Bench. On the 14th of February, 1765, Sir Thomas Denison resigned, and the vacant post was occupied on the first day of the ensuing Easter term by Sir Richard Aston, who had been Chief Justice of the Common Pleas in Ireland. On the resignation of Lord Northington, Sir John Wilmot became chief justice of the Common Pleas (21st of August, 1766) in the room of Lord Camden who was appointed to the chancellorship. Sergeant Hewitt, being created a judge of the King's Bench before the end of the long vacation, took his seat in court on the first day of Michaelmas term; and about a year afterwards, when he was promoted, with the title of Lord Lifford, to the Chancellorship of Ireland, the solicitor general, Edward Willes, who was the second son of the former chief justice of the Common Pleas, was made a puisne judge in his stead. He took his seat on the 27th of January, 1768. In the vacation between Hilary and Easter terms, 1770, Sir Joseph Yates was transferred to the Common Pleas in the place of Mr Justice Clive, who had resigned. He was succeeded in the King's Bench by Sir William Blackstone, who afterwards, on the death of his former predecessor, (7th June, 1770) removed to the Common Pleas. During the same month, the vacancy thus created in the King's Bench was filled by Sir William Henry Ashurst. On the 14th of January, 1777, Mr Justice Willes died, and Sir Nash Grose was appointed to his place on the 9th of the following month. The death of Sir Richard Aston took place on the 1st of March, 1778, and on the first day of the next Easter term, the vacant seat was taken by Sir Edward Buller. All these changes occurred while Lord Mansfield occupied the station of Chief Justice of the Court. That his opinions on the many hundreds of legal points, that came under the notice of himself and his colleagues during this long period, were almost without a single exception adopted or coincided with by a set of judges, than who no period of our legal history can boast of more able or more upright men, is a fact which of itself forms a splendid eulogium on his learning, his genius, and his integrity.

We are told by Sir James Burrow, that while he continued to report the decisions of the court, which was from the time of Lord Mansfield's first taking his seat there, to the end of Hilary Term, 1772, (12 Geo. 3.) and even up to the date of their publication, (1776,) there was no instance of a final difference of opinion among the judges in any case, except in the celebrated literary property cause, Miller *v.* Taylor, and the equally well-known one of Perryn *v.* Blake. With the exception, too, of these cases, no judgment given during that time was reversed either in the Exchequer Chamber or in the House of Lords; and even in these the decisions of the court of King's Bench were not overruled without much doubt and diversity of opinion among the other judges. During the same period, not a single bill of exceptions had ever been tendered; and, although the average number of causes annually disposed of was upwards of eight hundred, it had never happened in the course of a year that so many as thirty came before the court a second time, in the form of special cases, or by motions for new triall

'And yet,' says Burrow, 'notwithstanding this immensity of business, it is notorious, that in consequence of method and a few rules which have been laid down to prevent delay, (even where the parties themselves would willingly consent to it,) nothing now hangs in court. Upon the last day of the very last term, if we exclude such motions of the term as by the desire of the parties went over of course as peremptories, there was not a single matter of any kind that remained undetermined, excepting one relating to the proprietary lordship of Maryland, which was professedly postponed on account of the present situation of America. One might speak to the same effect concerning the last day of any former term, for some years backwards.'

The efficiency and despatch with which the whole business of the court was conducted was due in a great degree to several improvements in practice introduced by Lord Mansfield. Before his time, whenever a special case or special verdict had been agreed upon, it had been usually left to be drawn up and settled at the leisure of the parties, without the interference of the court; a custom which often occasioned considerable delay before the case could be set down for argument, since frequent disputes arose as to trifling matters of fact, which could only be decided by repeated attendances before a judge, and in some instances, only by a new trial. Lord Mansfield remedied this evil, by causing the special case or verdict to be drawn up before the jury was discharged, so that doubts as to matters of fact could be satisfactorily decided by a reference to them, and any other disputed points could be settled on the spot by the judge. It was then signed in court by the counsel on either side, after which, of course, no further contest could take place on the subject. When a cause was set down for argument, the parties could not only calculate with certainty on a speedy judgment, but they had no power, even were they so disposed, to procrastinate the decision. The former custom of permitting counsel or their clients to put off the hearing by consent, was no longer allowed by Lord Mansfield. No delay could be procured, except applied for before-hand by motion, and on showing by affidavit good cause for postponement. Again, it had formerly been usual to hear at different intervals, two, three, or even four successive arguments on every case of importance, before judgment was given. Lord Mansfield seldom allowed more than one; and instead of postponing the decisions, he always, except in cases of difficulty, made it a point to give judgment immediately. In the very first case reported by Burrow, (Raynard *v.* Chace,) which was argued the day after he first took his seat on the Bench, the counsel and their clients, who expected as a matter of course, that there would be at least a second, and perhaps a third hearing, before the judges would undertake to pronounce their decision, were surprised to hear from the new Chief Justice, that the court, having no doubts on the subject in dispute, considered itself bound as well to spare the parties the cost and delay of further discussion, as to terminate the suspense of others who might be interested in the decision of the question, and would accordingly give judgment at once.

Those who are conversant with the routine of the courts, will have no difficulty in conceiving how much these alterations, and others of the same tendency, must have done towards facilitating and expediting the administration of justice. It is obvious, however, that mere rules of practice can never be of themselves sufficient to effect this object; and, indeed, that their efficacy must always depend on the learning and the energy of those who sit on the bench. That energy was not wanting, is sufficiently attested by the amount of business annually disposed of. To prove that there was legal knowledge in abundance, it would be enough, one would think, simply to state the fact, that out of the multitude of judgments given by the court of King's Bench, not only during the period mentioned by Burrow, but during the whole course of Lord Mansfield's chief-justiceship, two only were reversed by the House of Lords. Even putting this out of the question, we confess ourselves quite unable to conceive how any one familiar with his reported decisions can countenance the notion that he was deficient in professional learning. Nevertheless, as such an imputation has been brought against him from more than one quarter, it is incumbent on us to inquire, not what foundation there is for the charge, (for this we candidly acknowledge our inability to ascertain), but what causes may have contributed to give it birth.

In the first place, then, it is highly probable that the brilliancy of his genius, together with the extent and the variety of his acquirements, may have obscured and thrown into the shade whatever of mere learning he possessed. That this has frequently happened, it would be easy to prove by a number of examples. A very great majority of the admirers of Bacon, for instance, are not at all aware of his celebrity as a practical lawyer; and those who are, in enumerating his titles to fame, seldom think it worth while to dwell much on his legal knowledge, because this, and, indeed, mere knowledge of any sort, being within the reach of a very ordinary intellect, the fact of his having possessed it could add nothing to a reputation such as his. The same may have been the case, though in a less degree, with regard to Mansfield; and his panegyrists having constantly expatiated rather on the qualifications which distinguished him from most of his contemporaries at the bar or on the bench, than on the single one which he possessed in common with perhaps the majority of them, his detractors have been enabled, without much fear of contradiction, to assume, that in this very qualification he was deficient.

'It is with genius,' says Pope, 'as with a fine fashion: all those are displeased at it who are not able to follow it.' This apothegm, there can be no doubt, has something of the fault of most smart sayings, namely, that it is not altogether true. But partially so, it assuredly is; for whenever any individual outstrips his competitors in toilsome ascent up the steep of Fame, there will always be many among them who, in despair of being able to raise themselves up to his level, will console themselves by endeavoring to pull him down to their own. And the general reluctance, which prevails among a large class of mankind to acknowledge a superiority of any sort in their fellows, is augmented in a rapidly increasing ratio when superiority is aimed at in more than one particular. Even a single claim to excellence is rarely admitted without cavilling and dispute; but he that puts in several must look to have them contested without end. If such a man be a lawyer, he will still further have to contend against the popular notion almost universally prevalent in this country, and warranted, it is to be feared, by too many examples, that a thorough lawyer cannot by possibility be anything else: of which proposition the converse being necessarily implied, it follows, as an unavoidable consequence, that he who makes good his title to any other species of excellence is assumed to be no lawyer at all.

Another circumstance which, in the eyes of many, was likely to lend some countenance to this opinion with respect to Lord Mansfield, was, that he was entirely above the solemn pedantry and affectation of learning, which often pass current for learning itself. We have heard it related of a barrister not many years since deceased, who by means partly of this species of affectation, and partly of other even more unworthy artifices, had contrived to insinuate himself into a tolerably large practice, that when this desired end was once attained, he often, in familiar conversation with his friends, was wont exultingly to exclaim, 'Thank God! I can now afford to dispense with humbug.' Lord Mansfield chose to dispense with it all his life. The respect and admiration he always felt and professed for the general wisdom and beauty of our jurisprudence, did not prevent him from making light of some of the blemishes that disfigure it. The science of pleading, for instance, he valued, because he could understand its spirit; but for the solemn fooleries which lessen its utility and detract from its dignity (excrescences which mere men of routine think themselves bound to admire, simply because they cannot perceive them to be excrescences and nothing more), he seldom scrupled to avow his contempt. A mind like his could distinguish the chaff from the grain; and he never attempted to impose either on himself or on others, by considering both as of the same value. He was equally above the silly attempts made by many to enhance the dignity of legal science, or the merit of those who have distinguished themselves among its professors, by overrating the difficulties that attend the acquirement of it. He used to say that the number of books it was necessary for a student to make himself familiar with, was commonly very much exaggerated, and that many were read merely for the sake of acquiring knowledge which it was not absolutely essential to possess, but of which it might be hurtful to a lawyer's general reputation that he should be supposed ignorant. It was a mistake, he observed, to think that the increase of legal works added to the necessary amount of reading, since several of the older treatises were entirely superseded by others of more modern date; as for example in the case of Finch's Law, and Wood's Institutes, which had formerly been put into the hands of every beginner, but which no one thought of studying after the appearance of Blackstone's Commentaries. Of Coke he always spoke disparagingly; and to speak in any other terms of admiration of an author whose fame has been in a great degree acquired by his immense fund of learning, no matter how confusedly entangled together, is, we all know, a great crime in the opinion of those who can rest their pretensions to celebrity on no other foundation; besides which, as the sneers such persons are constantly wont to vent against enlarged views of legal science, have generally no other motive than their own inability to conceive or to comprehend any enlarged notions at all, so they in general think fit to assume that mere erudition can be held cheap only by men who possess little or none of it themselves. Were it worth while to enter upon a formal refutation of this very common fallacy, we might dwell much on the incon-

testable fact that the most learned men are by no means universally the most forward to make parade of their erudition, any more than the most wealthy are those who take the greatest pride in speaking of their riches, or the most nobly descended in boasting of their ancestry. The real benefit of learning, it has been said by a man well qualified to speak on the subject, is to be seen in the general tenor of a man's thoughts and style; and the citing of authorities and repeating of quotations is, for the most part, confined to smatterers, just on the same principle that tradesmen, whose stock of goods is scanty, seldom fail to make a great display in their shop windows. And we may further observe, without wishing to impugn the use, nay the necessity, of learning, with which, indeed, a lawyer can no more dispense than a handicraftsman with his tools, that it is after all but a mere instrument, the effects whereof depends entirely on the skill of him who wields it. The self-same brush and the self-same colors with which a dauber contrives to disfigure a signboard, might breathe life into the canvas under the hands of a Vandyck or a Reynolds.

Perhaps the occasional departure of Lord Mansfield, in his judgments, from the strict rules which had been laid down by his predecessors, may have caused it to be inferred by some that he was not sufficiently imbued with the knowledge of them. However this may be, it is certain that his anxiety to decide every case on the merits rather than on mere matter of form; his disposition to slight or to overrule judgments which had been founded on principles obviously no longer applicable to the state of affairs and of society; in short, his constant wish to administer justice as well as law, (they are not always synonymous), gave rise to much discontent and murmuring among many of the older practitioners of the bar. They might all shut up their old law books, they used to say, and content themselves with the only authority that had any weight in court, namely Burrow-Mansfield, by which appellation Burrow's reports were at that time generally designated among the profession. The same charge has been explicitly made by Junius in his well-known Letter to the Chief Justice, dated November 14, 1770. 'Instead of those certain positive rules by which the judgments of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. Decisions given upon such principles do not alarm the public so much as they ought, because the consequence and tendency of each particular instance is not observed or regarded. In the meantime the practice gains ground; the Court of King's Bench becomes a court of equity; and the judge, instead of consulting the law of the land, refers only to the wisdom of the court, and the purity of his own conscience.' The probable consequence that would arise from a system of purely discretionary judgment in court of law, is here, no doubt, well and forcibly pointed out: but who that reflects for an instant can believe that Lord Mansfield, or any other English judge, ever did or ever could lay himself open to so sweeping a charge as this? Surely the single fact, that his decisions were rarely appealed from, and, when appealed from, were almost invariably ratified by the courts above, is of itself quite sufficient to prove that, as a general imputation, the charge is groundless.

It cannot be denied that his anxiety to remedy particular grievances did occasionally lead to him to pass the strict boundaries which, without regard to isolated cases wherein they may work partial inconvenience, or even injustice, our laws have set up for the general security and advantage of the community. We may quote, as an example, his well-known dictum in the case of Corbet v. Poelnitz, (1 T. R. 5.) where he overruled the established doctrine, that a feme covert can neither sue nor be sued, nor can possess any property in her own right; giving, as his reason, that as times alter, new customs and manners arise, in consideration of which exceptions must be made, and must be variously applied. However, it would not be easy to find many other instances such as this. There can be no doubt that, even long before he was called to the bench, he had come to the settled conviction that the adaptation of judicial decisions to the manners, the wants, and the spirit of the times, was a benefit too great to be sacrificed for the sake of maintaining a rigid and literal uniformity with precedents which may have had their origin in a very different state of society. But he was always aware of the necessity of considering attentively the decisions of his predecessors, even when he could not follow them to the very letter. Indeed, he used to say his situation often resembled the one in which Sir Joshua Reynolds placed Garrick, between tragedy and comedy, inclination pulling him one way, and precedent the other.

Burke, in commenting on the principles of evidence discussed in the case of Ormichund v. Barker, (1 Atkyns,) says:—'The sentiments of Murray, then solicitor-general, afterwards Lord Mansfield, are of no small weight in themselves, and they are authority, by being judicially adopted. His ideas go to the growing melioration of the law, by making its liberality keep pace with the demands of justice and the actual concerns of the world; not restricting the diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce, and of our empire. This enlargement of our concerns, he appears, in the year 1744, almost to have foreseen, and he lived to behold it.

This, and several other passages of the like tenor, wherein the most brilliant encomiums are given to Lord Mansfield, ('that great light of the law,' as he is called,) are to be found in the report of the committee of the house of Commons, appointed to inspect the Lords' Journals, (5th March, 1794,) with reference to the proceedings in the trial of Warren Hastings, which report was wholly drawn up by Burke, and is inserted in most of the editons of his works. We shall make one further extract from it, which appears to us to account very satisfactorily, and with great judgment as well as acuteness, for the severe enforcement, in former days, of many of those very rules Lord Mansfield is especially commended for palliating, or even dispensing with. 'In ancient times it has happened to the law of England, (as in pleading, so in matters of evidence,) that a rigid strictness in the application of technical rules has been more observed than at present it is. In the more early ages, as the mind of the judges were, in general, less conversant in the affairs of the world, as the sphere of their jurisdiction was less extensive, and as the matters which came before them were of less variety and complexity, the rule being in general right, not so much inconvenience on the whole was found from a literal adherence to it, as might have arisen from an endeavor towards a liberal and equitable departure, for which further experience, and a more continued cultivation of equity as a science, had not then so fully prepared them. In those times that judicial polity was not to be condemned. We find, too, that, probably from the same cause, most of their doctrines leaned towards the restriction; and the old lawyers being bred according to the then philosophy of the schools, in habits of great subtlety and refinement of distinction, and having once taken that bent, very great acuteness of mind was displayed in maintainiug every rule, every maxim, every presumption of law creation, and every fiction of law, with a punctilious exactness. And this seems to have been the course which laws have taken in every nation.'

The evils which have resulted from a too strict adherence to the practice of earlier times, particularly with respect to pleading, have been admitted by the numerous modifications wherewith, as well before as since the time of Lord Mansfield, both the legislature and the courts of law have interfered to temper their severity. Nothing, indeed, can be so well calculated to produce among the public a feeling of disgust and dissatisfaction against the laws, as to find matters of litigation frequently put an end to without the slightest reference to the facts of the case, but solely and entirely on account of some technical flaw, some slip of the pen, some casual oversight of the judgment, committed in the course of a process of which the public in general can neither comprehend the meaning, nor even perceive the necessity. And this the rather, that such cases are not only decided on grounds quite distinct from their merits, but almost invariably are decided against, and in defiance of those merits; because it is for the most part only the party who is conscious of the weakness of his cause in point of fact, that is anxious to avail himself of technical objections of law. It is obvious that this must occasionally happen under every system of law, and every mode of administering it; but surely, it is the bounden duty of every legislator, and of every judge, to palliate, though he may not be able to remedy the evil—to diminish the frequency of its occurrence, though he cannot prevent it from ever occurring—to catch at every opportunity of discountenancing it—in short, to use every effort towards securing the substance, though by the sacrifice of the shadow, of justice.

To be continued.

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CANDOR ON BOTH SIDES.—The *Chelmsford Chronicle* gives the following anecdote; Mr O'Connell had an interview, the other day, with the Marquis of Anglesay, in Dublin, at which he stated that although strong excitement and regard for his country might induce him to speak of his Lordship, in his public character, with some severity, still *he meant nothing personal towards him.* To which the Marquis replied by requesting Mr O'Connell in future, to be a little more moderate and cool in his political expressions. 'And,' said he, 'Mr O'Connell, you *may* one day go too far; and if after this warning, you continue as violent should you come *to be hanged*, you must not consider it *meant as anything personal towards you !!*'

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It is reported (but we know not with what foundation) in the legal circles, that Mr Baron Garrow is about to retire from the Bench and that he will be succeeded by the present Solicitor-General who will be replaced by Mr Sergeant Wilde—*London Courier.*

## RECENT AMERICAN DECISIONS.

### MANDAMUS.

1. On the coming in of the return to an alternative mandamus, the papers on which the original motion was made must be presented and the points stated in writing, in support of the application. *The People vs. Delaware C. P.*, 2 Wend. 255.

2. Five years after the final disposition of an appeal cause in the C. P., this court will not interfere by mandamus, to direct the quashing of the appeal. *Same vs. Same*, 2 Wend. 256.

3. A mandamus will not be granted where parties have acquiesced a year in the proceedings sought to be set aside. *The People vs. Seneca C. P.*, 2 Wend. 264.

4. The respondents in an appeal cause, on whose motion an appeal is quashed, are not liable to the costs of suing out a mandamus, although at their request a return is made to an alternative mandamus, although they oppose the issuing of a peremptory mandamus, and although the relators obtain a judgment by default on demurrer, if the respondents have not appeared or been made *parties* to the demurrer. *The People vs. Jefferson C. P.*, 2 Wend. 301.

### MINOR.

A minor is incapable of holding a civil office within the state of New York; but it belongs not to the officer whose duty it is to administer the oath of office, to refuse to administer such oath. *The People vs. Dean*, 3 Wend. 438.

### MORTGAGE.

1. A conveyance of land, accompanied by another instrument showing the conveyance to have been intended as a security in the nature of a mortgage, though absolute in its terms, will be considered as a mortgage; and, not being registered or recorded, will be adjudged inoperative and void, as against a subsequent *bona fide* purchaser for a valuable consideration without notice. *Brown vs. Dean*, 3 Wend. 412.

2. Money paid by the holder of a mortgage to redeem mortgaged premises from a sale for taxes, is a charge upon the land, and may be demanded upon foreclosure of the mortgage. *Burr vs. Veeder*, 3 Wend. 412.

### MORTGAGE OF PERSONAL PROPERTY.

1. The possession of personal property by the vendor or mortgager inconsistent with the face of the deed, is *prima facie* evidence of fraud. *Divver vs. McLaughlin*. 3 Wend. 546.

2. A mortgage of personal property intended to cover future responsibilities and advances not expressed in the instrument, but resting in a parol engagement, is void *pro tanto* as against creditors. *Ib.*

3. Where a mortgage of personal property gives a false account, and is vague and indefinite as to the amount of indebtedness; where the state of the accounts betweeen the parties is not known until the property is taken by a creditor; where a whole stock in trade is mortgaged and the mortgager remains in possession, continuing his business, selling the articles transferred, and continuing so to do until the mortgage becomes absolute, and for upwards of two years and a half after, without any accounting to the mortgagee and the knowledge of the mortgage is confined to one or two individuals, the mortgage will be held fraudulent and void as against creditors, however honest may have been the intentions of the parties. Upon such a state of facts, it is a question *for the court*, and not for the jury, to decide whether the mortgage is valid or void. *Ib.*

4. If a mortgagee, by the circumstances of the case, would be precluded from pursuing the property mortgaged into the hands of a *bona fide* purchaser, he is equally debarred from setting up his claim against a judgment creditor who has levied upon the property by virtue of an execution. *Ib.*

### MURDER.

The crime of an accessory before the fact to a murder, is *murder*, and is not barred by the statute of limitations. *The People vs. Mather*, 4 Wend. 229.

### NEW TRIAL.

1. Where the evidence is contradictory, making it the duty of a jury to decide upon the credibility of the witnesses, the court will not set aside a verdict as against the weight of evidence, although it seems to preponderate against the finding of the jury. *Douglass vs. Tousey*, 2 Wend. 352.

2. A new trial will not be granted on the ground of excessive damages in an action of slander, unless the amount is so flagrantly outrageous and extravagant as manifestly to show that the jury acted corruptly, or under the influence of passion, partiality, or prejudice. *Ib.*

3. The omission by a jury to deduct from the sum allowed as rent, in an action by the assignee of a term, the *ground rent*, is no cause for a new trial, if the question was not raised at *nisi prius*. *Everlson vs. Sawyer*, 2 Wend. 507.

4. On a motion to set aside a nonsuit, and for a new trial, a defendant may object the *loss* of the note declared on, being a note payable to bearer, as an answer to the motion; although at *nisi prius* no such objection was taken, and the defendant there set up a defence on the merits by showing a want of consideration. *Kirby vs. Sisson*, 2 Wend. 550.

5. A new trial will not be granted, although a judge errs in refusing a nonsuit, if, in a subsequent stage of the cause, the facts necessary to the maintenance of the action be shown. *Lansing vs. Van Alstyne*, 2 Wend. 561.

6. A new trial will be granted for the mis-direction of the judge, although the evidence may have warranted the verdict found, where the chances are equal that the verdict resulted from the direction. *Wardell vs. Hughes*, 3 Wend. 418.

7. Whether a *new trial* can be awarded in a criminal case for the mis-direction of the court, where there has been an acquittal of the accused by the jury, is an unsettled question; if the power exists, it will not be exercised unless it is reasonable to infer that the acquittal was induced by such mis-direction. *The People vs. Mather*, 4 Wend. 229.

8. The substantial ground of objection to the introduction of evidence must be explicitly stated at the trial, or it will not be heard in *bank*, if the party could have obviated the objection if properly made. *Jackson vs. Christman*, 4 Wend. 277.

9. A new trial will not be granted where, upon the question of the *fraudulent alteration* of a deed there is conflicting testimony, and the evidence nearly balanced; the verdict of the jury in such case will not be disturbed. *Lewis vs. Payn*, 4 Wend. 423.

10. Where a general objection is made to a decision of a court on the trial of a cause, and on a review thereof it appears that the decision, if objectionable at all, is so only in part, the party is not allowed to avail himself of the objection, for the want of precision in stating it at the trial. *M'Allister vs. Reab*, 4 Wend. 483.

11. A new trial may be asked for on a *case* made, on the ground of the mis-direction of the judge, although no exception is taken to the charge of the judge on the trial. *Archer vs. Hubbell*, 4 Wend. 517.

12. Want of proof of *notice to quit* cannot be urged as a ground for a new trial, if the objection was not taken at the circuit. *Jackson vs. Russell*, 4 Wend. 543.

13. It cannot be objected to the granting of a new trial on the ground of newly discovered evidence, that such evidence is *cumulative*, if the evidence alleged to be newly discovered is of a *different kind and character* from that adduced on the trial; as where the evidence on the trial is *wholly circumstantial* and the evidence newly discovered is *positive* and *direct*. *Guyot vs. Butts*, 4 Wend. 579.

14. In ordinary cases, where the newly discovered testimony consists of *admissions* made by the party against whom it is intended to be used, the motion will not be granted; but where the suit is against *executors* of a deceased person on a *stale* demand, the motion will be granted; and in such case, the court will not be astute in inquiring into the discrepancies between the testimony given and that offered to be produced on the second trial, but will leave the credibility of the witnesses to be passed upon by the jury. *Ib.*

15. A *nisi prius* roll and *postea*, which ought regularly to have been produced *at the circuit* to admit proof of what transpired on the trial of a former cause, may be brought into court *in bank*, and will be received on the argument of the case on a motion for a new trial. *Burt vs. Place*, 4 Wend. 591.

16. It is erroneous in a judge to instruct a jury, that they may indulge a presumption not warranted by the evidence disclosed in the case. *Hollister vs. Johnson*, 4 Wend. 639.

### NON OBSTANTE VEREDICTO.

Motion for judgment *non obstante veredicto*, must be on the record, and not on affidavit. *Smith vs. Smith*, 2 Wend. 624.

### NONSUIT.

1. If a plaintiff proves all that is laid in his declaration, he ought not to be nonsuited. If the declaration is insufficient, the defendant may avail himself of the defect by demurrer. If he neglects to do so, he cannot object to the declaration at the trial, but will be put to his motion in arrest of judgment. The only ground of nonsuit at the trial is, that the proof is not sufficient to support the declaration. *Safford vs. Stevens*, 2 Wend. 158.

2. A nonsuit ordered by the court, without motion of the defendant, for a defect in the proof of one count in a declaration, when a good and distinct cause of action is shown under another count, but which is overlooked by the court in pronouncing judgment, will not be sustained, although the

plaintiff did not direct the attention of the court to the cause of action shown under such second count. Had the application for the nonsuit been made by the defendant, the omission of the plaintiff to direct the attention of the court to the proof establishing his right of action, *it seems*, would be considered a waiver of his rights. *Ib.*

3. A plaintiff has the right to submit to a nonsuit on the coming in of a jury, although the jury are prepared to certify a balance in favor of the defendant in an action of assumpsit, where a notice of set off has been given. *Wooster vs. Burr*, 2 Wend. 295.

PARTIES TO AN ACTION.

1. On an agreement to pay *to the attorney* of a defendant in a particular suit the taxable costs in the same, an action to enforce the agreement in the name of the *party*, will be sustained. *Safford vs. Stevens*, 2 Wend. 158.

2. Where an accommodation bill is pledged for less than its face, and the holder transfers it and receives its full value, and the indorser is subsequently compelled to pay it, such indorser cannot maintain an action against such holder for the surplus; the action must be in the name of party pledging it; as where a bill of exchange was drawn by K. and M. for $1500 on K. and R. and the indorsement of G. and B. was obtained for the accommadation of the drawers and drawees, and the drawees pledged the bill for $1000 to B. and H. who subsequently transferred it to D. L. for its full face, and received the money, and D. L. sued the indorsers and recovered the whole amount of the bill, it was *held*, that an action for money had and received, brought by the indorser against B. and H. to recover the surplus, would not lie. *Gregory vs. Burrall*, 2 Wend. 391.

3. An action on a bastardy bond, given to A. & B. as overseers of the poor of a certain town *must* be brought *in the names of the overseers of the poor in office* at the time of the commencement of the suit. *Armine vs. Spencer*, 4 Wend. 406.

4. In an action *by* a firm, the name of a *dormant partner* need not and ought not to be used. *Clarke vs. Miller*, 4 Wend. 628.

PARTITION.

The general phraseology and provisions of the *act for the partition of lands*, contemplate an assignment to each owner of his respective portion when capable of being ascertained. *McWhorter vs. Gibson*, 2 Wend. 443.

2. But if the defendants in such proceeding wish to retain their proportions of the estate undivided, partition may be made accordingly, and their consent to such partition will be construed into an assent that a *joint* judgment be rendered against them for costs. *Ib.*

3. A *partition* between parties holding a conditional fee or an estate, for life only, does not enlarge the estate, but merely severs the tenancy or possession during its continuance. And if, from the lapse of time since the partition, *releases* might be presumed, the presumption would be that the releases were made in accordance with and not in enlargement of the estates of the parties. *Jackson. vs. Christman*, 4 Wend. 277.

PAUPER.

An adjudication as to the settlement of paupers, for whose relief expenditures have been incurred by a town, may be made *subsequently* to such expenditures; and such paupers will be deemed county charges, and the county subjected to the payment of money thus expended. *The People vs. Supervisors of Oswego*, 2 Wend. 291.

PAYING MONEY INTO COURT.

1. Where money is paid into the Court of Chancery by order of the court, on a balance admitted to be due, and the same is paid to the credit of the cause generally, and not in extinguishment or satisfaction of so much of the complainant's demand, and such money is invested in public stocks, on which a loss subsequently happens, the loss must be borne by the defendant and not by the complainants, especially if the complainants were willing to receive the money as a payment on account, and such appropriation was objected to by the defendant. *Depeyster vs. Clarkson*, 2 Wend. 77.

2. Payment of money into court admits the cause or causes of action stated in the declaration to the amount paid in, but nothing more, and beyond that amount the defendant may make his defence. So it was held in a case where the declartaion contained a count on a promissory note and the common money counts, and the money was paid in *generally*. *Spalding vs. Vandercook*, 2 Wend. 431.

PAYMENT.

1. Where a bond was given to a lessor of the plaintiff in an action of ejectment to indemnify him against the costs of such suit, and such lessor on the costs being demanded of him under the consent rule after a judgment against the nominal plaintiff, executed a bond and warrant of attorney to secure the payment of the same, it was *held*, that his so doing was not evidence of payment entitling him to sustain an action on the covenant of indemnity. *Campbell vs. Jones*, 4 Wend. 306.

2. A release of the *equity of redemption* obtained by a *mortgagee*, is a *satisfaction* of the mortgage and also of the *bond* accompanying it as a collateral security, if the property when the release is obtained is equal in value to the debt for which it was mortgaged. If it be of less value than the debt, it is payment *pro tanto*. *Spencer vs. Executors of Harford*, 4 Wend. 381.

3. A *foreclosure* of mortgaged premises without sale, does not operate as an extinguishment of the debt, unless the mortgaged premises are of sufficient value to pay the debt. *Ib.*

4. A plea that the plaintiff in an action of debt on a *bond*, executed as collateral security to a *mortgage*, had become possessed of the *equity of redemption* by purchase, was *held* bad, for the want of an averment that the value of the mortgaged premises, when the equity of redemption was conveyed to the plaintiff, was equal to the amount due on the bond. *Ib.*

5. So a second plea, which alleged that two *years* after the plaintiff became possessed of the equity of redemption, he sold the mortgaged premises for a sum far exceeding the debt, was also adjudged bad for the want of the same averment, or another that the property was of the same value when the equity of redemption was conveyed to the plaintiff, as when he subsequently sold it. *Ib.*

PERPETUATING TESTIMONY.

1. In a proceeding under the act to perpetuate the testimony of witnesses, it is not necessary to state in the affidavit, on which the order for examination is founded, the probable inability of the witness sought to be examined, to attend the trial. *Jackson vs. Perkins*, 2 Wend. 308.

2. A commissioner should specify in the order the number of days for which notice is to be given; where, however, no time is specified, the commissioners will be considered as having deemed fourteen days (the shortest time specified in the statute) reasonable notice. *Ib.*

3. The appearance of a defendant, and cross-examining the witness, is a waiver of a defective notice. *Ib.*

4. Proof that a witness is seventyfour years of age, and the belief of another from his knowledge of the situation and infirmities of the principal witness, that she could not endure the fatigue of a journey from Albany to Ogdensburgh without the most serious hazard to her health, is sufficient to authorize the admission of the deposition in evidence. No witness is bound to endanger his life by his attendance at court. *Ib.*

5. To authorize the production of a deposition in evidence, taken under the act to perpetuate testimony, the party must produce *proof* of the inability of the witness to attend at the circuit, and not rely on the *presumption* of such inability arising from the advanced age of the witness. *Jackson vs. Rice*, 3 Wend. 180.

PHYSICIAN.

Physicians and surgeons are entitled to recover for the services of their students in attendance upon their patients. *Waring vs. Monroe, C. P.* 4 Wend. 200.

PLEADING.

*Nul tiel record*, no judgment, and no *ca. sa.* not incompatible in an action on recognizance against bail. *Shiland vs. Cory*, 2 Wend. 246.

2. Where a plea is an answer to but a part of the declaration, the plaintiff must demur, and doing so, he shall have judgment. *Hicox vs. Coates*, 2 Wend. 419.

3. Where a party sets up title by purchase to personal property, claimed under a *dormant* execution, it is not necessary to aver time or place of purchase, or of directions given to suspend proceedings under the execution, nor that such directions were given to defraud, nor is it necessary to set forth the consideration paid; and the omission in the pleadings to set forth these particulars cannot be taken advantage of, even by *special demurrer*. *Ib.*

4. The plea of *nil debet* to an action of debt on recognizance of bail is bad on general demurrer. *Niblo vs. Clark*, 3 Wend. 24.

5. It is no *departure for pleading* for a defendant, after pleading *liberum tenementum* to *rejoin* to a replication setting forth a demise, that in the demise was contained a *reservation* to do the acts complained of as trespasses. *Dutton vs. Holden*, 4 Wend. 643.

PRACTICE.

1. *It seems* that the oath of admeasurers of dower may be administered by the attorney conducting the proceedings. *Griffin vs. Borst.* 4 Wend. 195.

2. *Double* replications or rejoinders cannot be interposed but by leave of the court obtained on *special application*. *Ames vs. West.* 4 Wend. 211.

ASSIGNMENT.

1. A claim of a person to compensation for wrongs done under *Spanish* authority, and provided for by the treaty of 22d of February, 1819, with *Spain*, passed to his general assignee upon upon his insolvency. *United States vs. Hunter*, 5 *Mason*, 62.

2. A surety on a custom-house bond, who has paid it, has the same priority, as the *United States*, against the estate of his principal in the hands of his assignee.

If such surely become insolvent, and the same person is assignee of both estates, the funds of the principal to the extent of the debt due such surety, as a priority creditor, is by operation of law deemed assets of the surety; and if the latter is also indebted to the *United States* for other debts the *United States* may, by a bill in equity against the assignee, insure its priority out of such fund or assets. *United States vs. Hunter*, 62.

3. If under the act of 24th May, 1824, ch. 140. § 2, the secretary of the treasury omit to retain the amount of debts due to the *United States* from a person entitled, by an award under the *Spanish* treaty, to money provided for payment of such award, it does not prejudice the right of *United States* to proceed for payment of such debts, against the general assignee, who has received the money from the treasury. *United States vs. Hunter*, 62.

4. Wherever the principal can trace his property in the hands of his factor or agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it from the agent, or in case of his failure, from his assignee. *McIntire vs. Curtis*, 80.

5. Where a mortgage had been given to one partner to secure a debt of a firm, and after the failure of the firm, and an assignment of the debt, one of the partners entered into an arrangement with the debtor, without the consent of the assignee, by which he took negotiable notes for the debt payable on time, and afterwards he assigned the mortgage to the other partner, who was not party to the arrangement; it was *held*, that the mortgage was not extinguished. *Osborn vs. Benton*, 157.

6. Where goods on consignment at *Boston* were, on the failure of the owners, assigned for the benefit of creditors, and before notice to the consignees of the assignment could be reasonably given, another creditor of the debtor's attached them by a trustee process in *Boston*, the debtor and the creditors being citizens of the state of *Pennsylvania*; it was *held*, that the assignment if *bona fide*, was a sufficient title to pass the goods to the assignees, and to overreach the trustee process. *Bholen vs. Cleveland*, 174.

7. How far notice of a set-off is necessary to defeat the rights of an assignee. *Greene vs. Darling*, 202.

8. *Quære*, whether a party who has procurred an assigument of a debt of the plaintiff, can set it off against his own debt due to the plaintiff, which was previously assigned. *Greene vs. Darling*, 202.

9. Where the assignee of an insolvent debtor recovers a demand, and expenses are incurred thereby, the latter are a charge on the fund, and the right of priority of payment of the *United States* attaches on the residue.

The *United States* are not bound to contribute, *pro rata*, for the sum due to them. *United States vs. Hunter*, 229.

10. Under the trustee process of *Massachusetts* by statute of 1794. ch. 65, if the trustee swears he has no goods, effects, or credits of the debtor in his hands, he is entitled to be discharged, unless, from other parts of his disclosure, that averment is overthrown. *United States vs. Langton*, 289.

11. Where an assignment does not, on its face purport to be of all the debtor's property, it is incumbent on the *United States*, if they insist on a priority of payment under the act of Congress of 1799, ch. 128, § 65, to establish that it does, in fact, contain all the debtor's property.

A small portion left out by mistake or fraud will not defeat the priority of the *United States*. *United States vs. Langton*, 289.

12. An assignment of all the debtor's property in a schedule referred to, which enumerates only specific property and does not purport to be all, affords no presumption that it is all the debtor's property, or a general assignment. *United States vs. Langton*, 289.

13. The trustee process lies against assignees in favor of the *United States*, where a debtor makes an assignment of his property in trust to pay custom-house bonds or other debts due to the *United States*, to attach the funds to the amount of such trust, in the hands of the assignees, notwithstanding at law, the assignment passed the property clothed with the trust, to the assignees. *United States vs. Langton*, 289.

14. One of the trust of an assignment was to pay '8400 dollars on custom-house bonds, *on which M is surety*.' *M* being one of the assignees; he was surety on bonds to a less amount; but the debtor in fact owed bonds to the custom-house, to the amount of 8257 dollars; it was *held*, that no bonds were included in the trust but those on which *M* was surety.

*Quære*, whether parol evidence is admissible to explain the intent of the parties in the above assignment,, so as to show whether *all* bonds were intended to be included, or those only, on which *M* was surety. *United States vs. Langton*, 289.

15. Where there is a general assignment of a debtor's property, for the benefit of creditors, and the priority of the *United States* attaches, they having various debts due by bonds, with *different* sureties, all payments made by the assignees are to be applied *pro rata* to all the debts of the *United States*; and the latter are not at liberty apply the payments in any other manner, without the consent of all the parties in interest. *United States vs. Armory*, 455.

16. To entitle the *United States* to a priority of payment, under the 65th section of the collection act of 1799, ch. 128, out of funds in the hands of assignees, there must be a *general* assignment by the debtor of *all* his property. A partial assignment of a portion, however large, without fraud, is not sufficient. *United States vs. Munroe*, 572.

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ATTACHMENT.

Under the statute of *Massachusetts* of 1823, ch. 242, giving relief against fraud to secure attaching creditors, it is not necessary, that the second attachment should be returnable to the same term of the Court as the first attachment.

*Quære*, if the plaintiff must, in all cases under that act, sign and make oath to his petition to be admitted to defend against the first attachment, or it may be done, if he is abroad, by his agent. *Lodge vs. Lodge*. 407.

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AWARD.

1. An award, upon a submission of a question whether the parties had a right to set off, is conclusive.

*Quære*, whether a decision by a court of law, of concurrent jurisdiction on the same point, would not be conclusive. *Greene vs. Darling*, 201.

2. When an award directed each party to release to the other certain estate, and the term of 20 days was directed, within which the acts were to be done: the acts are to be deemed concurrent acts, so that neither party can insist upon a release without offering to execute a release on his own part to the other party. *McNeil vs. Magee*, 244.

3. Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his own part. *McNeil vs. Magee*, 244.

4. After long delay and laches a court of equity will not decree a specific performance of an award, especially where there has been a material change of circumstances, and injury to the other party.

*A fortiori*, it will not decree it against purchasers even with notice, if their vendee is dead and insolvent so that they can have no remedy over.

*Quære*, in what cases a court of equity will award damages as a compensation for delay on a bill for a specific performance. *McNeil vs. Magee*, 244.

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**THE JURISPRUDENT.**

BOSTON, SATURDAY, APRIL 16, 1831.

*Hayes' popular View of the Law of Real Property.*

The object of this work is 'to supply the want of a short familiar introduction to a knowledge of the history, principles and practice of the law of England relative to Real Property,' in reference to the subject of legal reform.

To remedy the numerous defects in this department of English Jurisprudence, the Commission appointed to investigate the subject, has recomded a *General Register* of instruments relating to real estate.

With a view to render the discussion of the alterations proposed intelligible, the writer of the little book of 130 pages above named, has undertaken to present a popular view of the subject, and to give such information relative to the rise and progress; actual condition; excellences and defects of the system of English Law, in regard to Real Property, as will qualify the general reader to comprehend the discussions and perceive the reasons of the proposed changes, without plunging into the depths of legal learning. He gives, in the first place, a historical sketch of Real Property Law—of the origin and progress and consequences of the distinction between the *legal* and *equitable* ownership; a distinction which runs through the whole law and judicature, the grand barrier, which divides Westminster Hall into two parts, and which no judge, since the time of Lord Mansfield, has attempted or desired to throw down; a distinction

unknown to the simplicity of their Saxon ancestors, as it was inconsistent with the feudal rigor of their Norman Conquerors, which sprung up with the craft of the Priesthood and was perpetuated by the wants of the laity, and by the ingenuity of lawyers, and exigencies of mankind, turned into the channels of commerce, and which has to this day continued to work the complicated machinery of the law of Real Property.'

The law formerly acknowledged no other title to land than the actual and visible enjoyment, or the right to such enjoyment. The land holder had a substantial interest, and his right was well termed *real* property. The dominion was single ; it had only one aspect, which looked directly to the soil. This was pure legal ownership. This dominion was the subject of tenure ; every landholder held of some superior.

Several important consequences flowed from the perfect unity of ownership and possession which formerly existed, and the doctrines of tenure which prevailed.

1. *In regard to the enjoyment.*—The tenant could only be deprived of his land by forcible dispossession, by violence and injustice, or his own neglect of duty. Owing to the imperfect occupation of land in those days, and the disorderly state of society, posessions were more likely to be disturbed than now. The old writers, therefore had much to say about, 'disseisins,' 'abatements,' 'intrusions.'

2. *As to the modifications of ownership.*—As the tenancy was not allowed to be vacant, or in suspense, all substitutions should be strictly *consecutive.* No substitution or gift over, was admissible in any other shape than of a 'remainder.'

3. *As to the forms of conveyance.*—These were simple, as all conveyances were of *land,* or of the present right to the future possession of land, or the determination of some existing interest, they were all perfected by ceremonies referrible to the soil, importing either immediate or future investiture. The thing itself was transferred.

An important change was introduced, in this system, by the introduction of '*equitable interest.*' This new interest was of an abstract and ideal character. The owner of the land was under a moral obligation to dispose of it for the benefit of another. The latter was said to have the '*use.*' This *use* charged the *conscience* of the legal owner, not the *land.* If the owner refused to discharge the obligation, there was no redress.

These '*uses*' were odious and repugnant to the principles of the common law. They were styled 'crafty,' 'subtle,' 'impious.'

Means were soon devised for compelling the legal owner to keep his faith by confession on oath to the keeper of the great seal. Here equity arose. One person then had a legal right on one side of Westminster Hall, and another a personal right to be enforced on the opposite side.

This equitable ownership, being the creature of conscience, could not be the subject of '*tenure.*' The doctrines of tenure were inapplicable to this secret agent created by a breath and often destroyed by an oath. This '*use*' might be transferred without the usual ceremonies requisite to the conveyance of land. It might pass without any form or solemnity whatever. With '*uses,*' too, the power of disposition by will was introduced. The land itself was not devisable, but the legal owner was bound, in equity, to observe the testamentary destination of the person to whom the '*use*' belonged.

Thus there existed two kinds of proprietorship, the subjects of distinct modes of alienation, and the objects of distinct jurisdictions. The vulgar notion of 'equity' is that of a mild and liberal tribunal, tempering the austerity of the law. The correct legal notion, with reference to the subject before us, is that of a judicature peculiar in its constitution, searching the conscience, and acting against the person of the individual intrusted with the keeping of the land, as distinguished from a judicature consulting the common law and awarding possession of the land itself.

This state of things was found to be attended with evils. As the use was the creature of conscience, and incapable of *tenure*, the king and his subjects were defrauded. It could be disposed of by a secret conveyance or by word of mouth only. The famous statute of '*uses*' was past—27 Hen. VIII. The object of the statute was to abolish uses, by turning them into legal estates ; to marry the 'use' to the land indissolubly, and thereby, restore the simplicity of the common law. The Legislature intended to extirpate and extinguish 'uses' altogether.

The statute, failed of its object. It, however, led to important results. It gave to the legal ownership the flexible and popular qualities of the 'use.' It annexed to the 'use' the actual possession. It did not prevent the creation of uses, but only operated upon them when created.

The courts avoided the statute in a very singular manner. They determined that if the legal owner of the land, was directed to hold the land for the use of B.—who was at the same time directed, or who contracted to hold it for the use of C. the statute would carry the land to B. at law, but no farther, leaving C. to enforce his right against B. with whom the land rested, to a conveyance and account of the profits, by a suit in equity. This ultimate use was said to be a 'use *upon* a use,' which the statute did not reach.

The statute only added three words ('to the use') to the conveyance. A conveyed land to B. —to the use of (or as it is now expressed '*in trust for*') C. This secondary '*use*' was called a 'trust.'

As the use had by the statute become, in effect, the legal estate in the land, it was no longer the mere creature of equity, but fell under the cognizance of the common law Courts.

The 'trust' then became like the 'use' before the statute. The characteristics of the latter were transferred to the former.

The statute having turned the 'use' into the legal estate, the owner could, after this statute deal with the land as he could before with the use. The stubborn qualities of the legal dominion were, therefore, in some measure, subdued to the convenience of the owner. The power of disposing of land, held by a particular tenure, by will, was now given by the legislature (32 Hen. VIII.) and afterwards (12 Charles II.) all freehold lands were reduced to that tenure.

The modes of conveyance were also considerably changed by this statute. Whatever would have created the use now operated to convey the land. Land could be conveyed by a mere note of hand, without any solemnities. To remedy this evil, the *statute of Enrolments* was passed, (27 Hen. VIII.) requiring such instruments to be sealed, indented and enrolled within six months after the execution. Such a contract was called a 'bargain and sale enrolled.' The lawyers soon found means by which to avoid the effects of this statute.

It did not extend to *terms for years.* 'If therefore, *A.* wished to make a conveyance of the inheritance of land to *B.* he first contracted for say, five shillings, to sell it to B. for a year. This contract entitled B. to the 'Use' for one year ; which 'use' the Statute of uses, immediately turned into a legal estate in the land for a year ; so that B. became tenant in possession. He being in possession, by the ancient law, A. might release his 'reversion' the next moment. The first Instrument was called a 'bargain and sale for a year'—or 'a lease for a year ;' the second 'a release ;' they together formed the conveyance now so much in use under the name of a '*Lease and Release.*'

But the lease of an estate for a thousand years, might be conveyed, as well as for one, and by the joint result of the two, an estate of freehold or Inheritance granted, without entry, delivery of possession or enrolment.

But a small part of the law of real property in England, it will be perceived, is the result of design. 'Institutions stern and oppressive in their original, have been gradually humanised by the progress of opinion, accident favoring and the judicature abetting, the diffusion of a more grateful policy. While fear and fraud, the rapacity of monks, and the turbulence of Barons, seeking shelter, the one from the penalties of mortmain, the other from the forfeiture of treason, laid the foundation, the growing spirit of freedom, availing itself of two ill starred acts of Parliament, a whimsical construction of the first and a palpable oversight in the second, reared the superstructure of that system of legal and equitable ownership,—"uses" and "trusts"—with the mode of conveyance adapted to each, which, however, perplexed with subtleties and encumbered by forms—has been deemed adequate, as well to satisfy the wants, as to indulge the wishes, of a highly cultivated people.'

To be continued.

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The uses of cross-examination were rather unmercifully exposed lately by Judge Parke, upon trial of some rioters, when a Learned Gentleman, concerned for one of the prisoners, asked some questions affecting another man who had no Counsel employed. 'He is not your client,' said the Judge. 'He is mine—do not hang my client, whatever you may do to your own.' This was *passing sentence* upon the unfortunate pleader at all events.

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## NEW PUBLICATIONS.

Suggestions for some Alterations of the present state of the Bankrupt Law. By Francis Gregg, Esq., Barrister at Law, one of the Commissioners of Bankrupts.

The Practice on the Plea Side of the Court of Exchequer ; to which is added, an Appendix of Forms in General Use ; and, also, a Table of Costs as at present allowed on Taxation. By Thomas Dax, Esq., Master of the said Court.

A Dissertation on the Nature of the various Proceedings in the Masters' Office in the Court of Chancery, with Directions for carrying the most useful References to a Master into effect ; to which are added, a few Observations illustrative of the Practice in the Office of the Accountant General, with an Appendix of Precedents of the different Proceedings, taken from actual Practice. By W. H. Burnett, Esq. of the Middle Temple. 8vo.

The Horseman's Manual ; being a Treatise on Soundness, the Law of Warrany, and generally on the Laws relating to Horses. By R. S. Surtees, Gent. 12mo.

ESSAY ON JUNIUS. This day published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

These volumes, by the author of Peter Parley, will complete a series of Tales for Children, designed to interest them in History and Geography. Those previously published are Parley's Tales about America, Europe, Asia, Africa, and Sun, Moon, and Stars. April 9.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

Peter Parley's Tales about Europe.

Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰών. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. I. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

> 'I have no trinkets, cakes, or toys,
> As gifts for little girls and boys,
> But look within, and you will find
> Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII. Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

II. Economy of Athens. 1. Die Staatshaushaltung der Athener, vier Bücher. Von August Boeckh. Mit einundzwanzig Inschriften. 2. The Public Economy of the Athenians. Four books; by Augustus Boeckh.

IV. Character and Abuses of the Medical Profession. Rules and Regulations of the Boston Medical Association.

V. Waverly Novels. Parley's edition.

VI. British and American Shipping. 1. The Merchant, Ship-Owner, and Ship-Master's Import and Export Guide; by Charles Pope. 2. Speech of Right Honorable William Huskisson in the House of Commons.—May, 1827.

VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, APRIL 23, 1831. NO. XXXIX.

## LORD MANSFIELD.

Continued.

Lord Mansfield, then, surely deserves commendation, instead of censure for making this, as he did, his constant object. Thus, where an attempt was made (Hart v. Weston, Burrow, 2586,) to impugn the validity of a writ, because it was inadvertently recited in the declaration as if it had been issued in vacation, the lawyer, we think, must have had more pedantry than sense who could have refused to agree with him that it was an odious objection, and an endeavor to make the practice of the court a means of eluding justice, rather than obtaining it. He was, however, by no means inclined to depart from the very strictest rules of law, whenever they could, by possibility, be made subservient to the administration of substantial equity and right. In most cases, where technical objections or mere formal impediments stood in the way of justice, he did, indeed, openly express his wish that the merits should have a fair trial; but this was brought about by such means as the practice of the court had long sanctioned. An example may be found during the first week he presided in the King's Bench, when a case of this description was tried, and decided wholly on a point of form, but he afterwards left it to counsel to devise their own plan for bringing it a second time under the notice of the court, so that the real question in dispute might be discussed. So, too, in the case of the King v. Mayor of Caermarthen, (Burrow, 293,) where, a swearing-in under a mandamus having been inadvertently laid in the plea on a wrong day, the judge at Nisi Prius had refused to let the jury receive evidence of a swearing-in on a different day, and a new trial was moved for in the King's Bench, on the ground of misdirection, Lord Mansfield, conceiving the direction to be, in point of law, strictly correct, very properly refused to make the rule absolute: but at the same time, in order that the merits might have a trial, he suggested to counsel, that an application should be made to set aside the verdict, and award a repleader. It would be easy to make out a long list of similar cases, wherein he reconciled rigid law with true equity, and converted the forms of legal practice to their proper purpose and object, the administration of right. 'General rules,' he remarked, on delivering final judgment in this very case, 'are wisely established for attaining justice, with ease certainty, and despatch. But the great end of them being to do justice, the court are to see that it be really attained. This seems to be the true way to come at justice, and what we ought therefore to do; for the true text is "*boni judicis est ampliare justitiam*," not "*jurisdictionem*," as ithas been often cited. This is what I would wish to do, if we can do it.'

And this his favorite object of enlarging as it were, the boundaries of justice, he had opportunities of achieving by other means besides his spirited interpretation and equitable administration of the laws already established. As no body of laws, however excellent and however copious, can possibly foresee or provide for the countless variety of circumstances that are made the occasion of ligitation, every judge must of necessity be more or less frequently obliged to take upon himself, in some degree, the office of a legislator; and this duty Lord Mansfield, was called upon to perform far oftener than any magistrate who has ever presided in our courts. The length of time during which he sat on the bench, would of itself be sufficient to account for such a peculiarity as this in his career. But there were also other causes that increased it beyond all proportion to the mere difference in point of duration of judicial authority between himself and other judges. During the latter half of the eighteenth century, the rapid growth and extension of our foreign commerce gave birth to a host of novel sources of ligitation connected, for the most part, with matters which had not only been entirely overlooked by the legislature, but had been very little brought before the notice of the courts, or when they had been referred to them, had been decided with reference not so much to any settled principles as merely to the facts of each particular case. Lord Mansfield treated them in a very different mode. 'Within these thirty years,' said Judge Buller, on giving judgment in the case of Lickbarrow v. Mason, (2 T. R. 63) 'the commercial law of this country has taken a very different turn from what it did before. We find in Ince and Prescott, (1 Atkyns), that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period, we find that, in courts of law, all the evidence in mercantile cases was thrown together: they were left generally to a jury, and they produced no general principle. From that time, we all know, the great study has been to find some certain general principle which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the understanding. And I should be very sorry to find myself under a necessity of differing from any case upon this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.'

The fact that there were no precedents or authorities to control the exercise of his judgment in this department of law, as it must add considerably to our admiration of the wisdom that dictated his decisions upon it, so it has also materially contributed to enhance their utility, and to widen the application of them. Not being here, as elsewhere, under the necessity of reasoning on principles that, though they still hold good their footing in Westminster Hall, are virtually obsolete elsewhere, and are totally at variance with the actual customs and exigencies of society; having no occasion, for instance, as in some real property cases, to frame a judgment at the close of the eighteenth century on the same grounds that Glanvil might have done in the reign of Henry the second, he was enabled to indulge without restraint his favorite wish of accommodating the administration of justice to the spirit and the wants of his own time. Among other obvious advantages which this has imparted to his decisions in mercantile cases, it is by no means a trifling one, that they are of equal authority in courts of law and in courts of equity. 'During the fifteen years I have sat on this bench,' said, on one occasion, the distinguished judge whose testimony we have just quoted, (Tooke v. Hollingworth, 5 T. R. 215,) 'I have never known any case which established a distinction between courts of equity and courts of law, on subjects of this kind. I have always thought it highly injurious to the public, that different rules should prevail in different courts on the same mercantile case. My opinion has been uniform upon that subject. It sometimes, indeed, happens that in questions of real property courts of law find themselves fettered with rules, from which they cannot depart, because they are fixed and established rules; though equity may interpose, not to contradict, but to correct, the strict and rigid rules of law. But in mercantile cases, no distinction ought to prevail.' Nor is it in English courts alone, whether of law or equity, that this uniformity subsists with respect to Lord Mansfield's decisions on matters of commercial jurisprudence. As they were invariably framed in conformity with those broad principles of justice and policy which, having received the unanimous assent and sanction of all civilized communities, form the groundwork of what (for want of a more correct term) is called the law of nations, it may safely be affirmed, that there are very few tribunals in Europe where they might not be quoted as authorities.

To all those who are conversant with these judgments it would be superfluous, and to those who are not so, impossible (at least within such space as we could here afford) to point out how much of their intrinsic merit, and of their extended application is attributable to Lord Mansfield's knowledge of the civil law. This splendid monument of human wisdom was to him a well filled storehouse of reasoning, from which a ready supply of principles and of rules might always be drawn to guide him in the decision of cases unprovided for by our own jurisprudence. And it was not only in such cases as these that he derived advantage from it. There are very few departments of our own law on which some light may not be thrown by it, in the way of analogical illustration; and, with respect to very many, as he has frequently had occasion to show, it is of more direct application, being, in fact, the source from which they have been either partially or entirely deduced. The happy facility with which, in each of these points of view, he so often brought it to bear on the legal questions submitted to his notice, must excite the admiration of every one who is competent to appreciate the merits of a judge: that the same quality should ever have been made the ground of censure or invective by any one, would, doubtless, seem little less than incredible, but for the jealousy of the civil law notoriously prevalent among the vulgar of this country. This most unfounded prejudice, we

might almost say superstition (and, like all other superstitions, it is the offspring of folly and ignorance), has been turned to account by Junius in a manner that proves the writer either to have been strongly imbued with it himself, or at least to have been perfectly conscious of its prevalence, and, consequently, well aware of the effect he might produce by humoring it. 'In contempt or ignorance of the common law of England,' he writes, addressing himself to Lord Mansfield, 'you have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinion of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Charta, or the Bill of Rights, with approbation or respect? By such treacherous arts, the noble simplicity and free spirit of our Saxon laws were first corrupted. The Norman conquest was not complete, until Norman lawyers had introduced their laws, and reduced slavery to a system.' This is quite as well calculated to catch the attention of the mob of readers, and to excite the contempt of sensible men, as the charges so often repeated by the same powerful libeller against Lord Mansfield, that he was a Scotchman, that he had once drunk the health of King James, and that he had a brother who had been in the service of the Pretender. The insinuation, that the spirit of the civil law is incompatible with the spirit of freedom, is, in truth, as admirably adapted to find favor with those who, having no knowledge of the subject, cannot detect the utter falsehood of it, as the assertion concerning the Saxon laws and the Norman lawyers to pass current with such as, exercising no reflection of their own, cannot at once detect it to be worse than irrelevant as connected with the matter under consideration, and do not instantly perceive that whatever principles, and maxims, and statutes the Norman lawyers may have introduced, those very principles and maxims and statutes it is the duty of an English judge to interpret and to administer. But the accusations of Junius cannot always bear, nor, indeed, were they originally intended to meet, calm and impartial investigation. They were addressed to the passions much more than to the reason. They were levelled against men in power at a time when any charge against men in power was sure to find abundance of willing believers in its truth; at a period when there existed a predisposition to condemn, that lent every advantage to the accuser; in a word during a season of political excitement, when the majority of the public never fails to honor at sight the most extravagant drafts upon their credulity, provided they be presented to them by the demagogues or the agitators to whom they may have, for the time, surrendered the use of their senses and their judgment.

What first gave occasion to the direct attack of Junius upon Lord Mansfield, and certainly constituted the most weighty of all the accusations with which he was charged, was his mode of directing the juries, in the various prosecutions for libel which were instituted (1770) by the government against Woodfall, and the other persons concerned in the publication of the letters previously written by the same author. The doctrine delivered in each of these cases, and in others of the like nature, was substantially the same; namely, that it was the province of the jury to decide, not on the legality or illegality of the writings alleged to be libellous, but merely on the fact of their publication, and on the meaning intended to be conveyed by the writer. In the two cases of the King v. Woodfall, which are reported in Lofft. 778, part of the chief justice's charge is thus worded: 'The evidence is very clear; Mr Hardinge has rightly argued that you must see the author *meant* what was imputed to him. It is not that he is accurate as to dates and facts: you must see what ideas the author meant to convey, according to your sense of what he has written.' Thus the verdict not guilty would negative the fact of the defendant's having published a paper of the tenor and meaning set forth in the indictment; and the verdict of guilty, on the other hand, would affirm both the fact of his having published the paper, and of its bearing, by the intention of the writer, the meaning ascribed to it; the question as to the legality or illegality of that meaning (in other words, as to whether the paper was or was not a libel) remaining a point of law to be determined by the court. That this doctrine was a highly dangerous one, and one that tended to undermine the great constitutional bulwark of the trial by jury, in a quarter where it affords the best barrier against the encroachments of arbitrary power, we certainly are very ready to admit; but to infer therefrom, without any further evidence to warrant the supposition, that Lord Mansfield propounded it merely from an anxiety to extend the authority of the crown, or (what some may think much the same thing) of the judges, is certainly unjust and unreasonable. Even had he been the original inventor of it, we should be fully justified in demanding some evidence to support the charge that he invented it for such a purpose. But this view of the law of libel was one that had been frequently taken by his predecessors on the bench, and had guided them in their administration of it; nor, would it be a very difficult matter to show, that (whatever its effects) it is strictly reconcileable with principle. Indeed the fact, that an act of parliament was considered necessary to place the rights of a jury in cases of libel on the footing they at present hold, is an acknowledgment on the part of the legislature, that the doctrine acted upon by Lord Mansfield was so well established, that it could not be overruled without their interference. Doubtless, the thanks of every friend of liberty are due to Charles Fox for bringing forward the bill that did so overrule it; but Charles Fox acted in the capacity of a legislator, Lord Mansfield fulfilled the duties of a judge; Fox introduced a new law, Mansfield expounded the law as it existed, or at least as he understood it. Some authorities, it is true, leaned the other way; but the general current of precedents, particularly in later times, fully justified his doctrine; and though we do not mean to say, that this was not a case which might have excused, or justified, a disregard of legal authority; yet it must be admitted, that the same persons who blame him for ever having taken upon himself to depart from precedent, cannot, with much show of consistency, also censure him for adhering to it in this instance.

Of the purity of his motives we think there can be no question. Though he never enlisted himself among the advocates of the popular party, he was equally far from being an uncompromising supporter of prerogative. To steer a middle course between the opposite extremes, was in politics his favorite object. Except, however, in so much as every judge must necessarily bring to the bench the same cast of mind which leads him to adopt a particular line of conduct or of opinion elsewhere, he certainly never suffered political considerations of any kind to influence his judicial decisions. But so far was he from entertaining in his own person, or endeavoring to encourage among his colleagues, any feelings of subservience towards government, that it is to him we owe the earliest and most popular act of George the third's reign, which entirely emancipated the judges from the control of the crown, and secured their independence in such a manner as to place them, as far as possible, beyond the reach of temptation to swerve from their duty. Even had he not been himself the author of this measure, the very fact of its having been adopted at all, is quite sufficient to prove, that no motives of self-interest could by possibility have had any undue influence over his conduct. Had he been only a puisne judge, it might have been said that he courted promotion. But he had already attained the summit of his ambition. He was Chief Justice of the King's Bench: the chancellorship he had more than once refused; and the crown had no preferment to offer, of which the prospect could have induced him to feel anxious about cultivating its favor.

Were all these considerations to be entirely neglected, the general integrity and nobility of Lord Mansfield's character ought of itself to exonerate him from all suspicion of ever having introduced corruption into the seats of justice. A strong presumption, to say nothing more, that his opinions on the law of libel were the result of honest and sincere conviction, is afforded by his anxiety to submit them to revisal, and even to correct them himself if it could be shown they were erroneous. This he frequently professed his readiness to do. We quote one instance out of several: (Rex v. Woodfall, Burrow, 2668.) 'That the law, as to the subject matter of the verdict, is as I have stated, has been so often unanimously agreed by the whole court, upon every report I have made of a trial for libel, that it would be improper to make it a question now, in this place. Among those that concurred, the bar will recollect the dead and the living not now here. And we will again declare our opinion, that the direction is right and according to law. This direction, though often given with an express request from me, that if there was the least doubt they would move the court, has never been complained of in court. And yet, if it had been wrong, a new trial would have been of course. It is not now complained of.'

The occasion on which he thus expressed himself, was, when the verdict of the jury in the trial of Woodfall for having published Junius' letter to the King, was brought under the consideration of the court of King's Bench, (November 20, 1770,) in consequence of two cross motions, the one made on behalf of the crown, the other of the defendants. The jury, after deliberating for many hours, had been conveyed in hackney coaches to Lord Mansfield's house in Bloomsbury Square, (the objection of its being out of the county being cured by consent,) and had there delivered to his Lordship their verdict, that the defendant was guilty of printing and publishing only. Nothing further had passed at the time, and the verdict had been entered word for word on the record. Upon this the defendant's counsel moved, either that it should be considered tantamount to an acquittal, or that at all events a new *venire* should be awarded, on the ground that it did not pronounce him guilty of all the charges contained in the information. The counsel for the crown, on the other hand, applied for a rule to show cause why the verdict should not be entered ac-

cording to the legal import of the finding of the jury. The opinion of the court, as delivered by Lord Mansfield, was in favor of a *venire de novo*. It is well worth while to quote another passage from the report, to show how plainly he acknowledged the right of the jury to decide on the meaning and intent of a libel, that is, whether or not it corresponded with the meaning and intent imputed to it in the declaration or indictment. 'If,' he said, 'by "only," they meant to say they did not find the meaning put upon the paper by the information, they should have acquitted the defendant. If they had expressed this to be their meaning, the verdict would have been inconsistent and repugnant; for they ought not to find the defendant guilty, unless they find the meaning put upon the paper by the information: and judgment of acquittal ought to have been entered up. If they had expressed their meaning, in any of the other ways, the verdict would not have been affected; and judgment ought to be entered upon it. It is impossible to say, with certainty, what the jury really did mean. Probably, they had different meanings. If they could possibly mean that which, if expressed, would acquit the defendant, he ought not to be concluded by this verdict. It is possible, some of them might mean not to find the whole sense and explanation put upon the paper by the innuendos in the information. If a doubt arises from an ambiguous and unusual word in the verdict, the court ought to lean in favor of a *venire de novo*. We are under the less difficulty; because, in favor of a defendant, though the verdict be full, the court may grant a new trial. And we are of opinion, upon the whole of the case, that there should be a *venire de novo*.'

With this mode of disposing of the case, one would think it impossible to find fault. And yet even for this decision, Lord Mansfield was abundantly visited with the scurrility of the popular press, which ever since the institution of the proceedings against Wilkes, some years previous, (1764,) had plentifully poured out the vials of its wrath against the Chief Justice for the part he had taken in them. Abuse, and calumny, and invective had been all along doing their utmost to impugn the justice of his decisions, to misrepresent his motives, in short to blacken in every way his character as a judge. Every topic of accusation dwelt on by Junius, and many more to boot, had been previously expatiated upon with a degree of rancor and unfairness not often to be met with in the annals even of political hostility; and indeed Junius himself professed to do nothing more than collect, as he phrases it, these scattered sweets, till their united virtue should torture the sense. In the opinion of men of sense and calm reflection, these aspersions on such a character as that of Mansfield were like nothing more than the tinkling of Priam's feeble weapon against the shield of Pyrrhus. But with the multitude they had their effect. Wilkes and liberty, (or as his Lordship's old schoolfellow, Bishop Newton chooses to expound it, 'in plain English, the devil and licentiousness') had set the whole nation in a ferment; and it fell to the lot of very few to preserve, amid the universal turbulence and excitement of party feelings, anything like cool consideration or dispassionate judgment. Under these circumstances, it is hardly surprising that Lord Mansfield should, for some years of his life, have been in reality, as his enemies did not fail to remind him, the most unpopular man in England. How far the fact of his having incurred so much odium is a proof of his having deserved it, will be best understood by those who have been in the habit of observing by what sort of impulses the veerings of the weathercock of popularity are most commonly guided. We shall presently have an opportunity of showing what degree of importance he himself attached to them.

(To be continued.)

## RECENT AMERICAN DECISIONS.

### PRESUMPTION.

1. Whether a fact which is unknown, *is to be presumed*, from its usual connexion with other facts which are known, *it seems*, is properly, in all cases, a question for the jury. The modern practice, however, of taking verdicts, subject to the opinion of the court, has led to adjudications upon matters of fact as questions of law, and questions of fact, which formerly were determined by the jury alone, have now become questions of law, and the jury is said tobe concluded by them, as in the case of the presumption of payment of a bond, the legal presumption of fraud, &c. Where, however, the presumption is not urged as a rule of law binding upon the jury, but by way of evidence, to which the jury may give such credit as it deserves, whether a fact shall be presumed or not, is ordinarily a question for the jury. By Stebbins, *senator*. *Schauber vs. Jackson*, 2 Wend. 15.

2. After a lapse of 32 years, a release to a *cestui que trust* will be presumed against the heirs at law of a trustee. *Moore vs. Jackson*, 4 Wend. 58.

### PRINCIPAL AND AGENT.

1. Where the course of business between a merchant in the country and a merchant in town is such, that the country merchant transmits to his correspondent in town his produce and such other articles as he has *to sell*, and the merchant in town, in return, supplies him with such articles of merchandise as he deals in, and fills up his orders by procuring from other merchants on credit such articles as he does not deal in, and charges them to the merchant in the country, the latter is not liable to the seller for any articles thus procured, although he directs the purchase of an article which he knows the merchant in town does not deal in, and the seller is informed for whom the purchase is made, if the merchant in the country has funds in the hands of the merchant in the city, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognised such act. *Jaques vs. Todd*, 3 Wend. 83.

2. The *agency* in such case is special, without authority to pledge the credit of the principal. *Ib.*

3. Where a person for a series of years *forged* the name of his friend as the indorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executions issued against him in suits on such *forged* indorsements, never disavowed such acts until the person committing the forgeries had absconded and fled from justice, it was *held*, in a case where the indorser was sued and suffered a default, and attempted no defence until after the escape of the maker of the notes, that proof of these facts was admissible in evidence, and that from it the jury might imply an authority from the indorser to the maker thus to use his name. *Weed vs. Carpenter*, 4 Wend. 219.

### PRINCIPAL AND SURETY.

A surety extinguishing a debt by the payment of only *one half* its amount, is not entitled to recover more from his principal than the amount *actually paid*. *Bonney vs. Seely*, 2 Wend. 481.

### PRIVILEGE FROM ARREST.

A party attending a reference is entitled to privilege from arrest; but it extends only to a reasonable time after the hearing. *Clark vs. Grant*, 2 Wend. 257.

### REFERENCE.

Referees will not be ordered in the first instance to return the proceedings and testimony before them, nor their decisions upon the admission or rejection of evidence, nor their reasons for their final report. They will not be required to do so unless in the opinion of the court, after the coming in of papers on both sides, such proceeding should be necessary. *Curtis vs. Staring*, 4 Wend. 198.

### SALE.

1. A sale of chattels where the possession is continued in the vendor without any agreement as to such continuance, is equally fraudulent and void against creditors as if such agreement existed, except in special cases and for special reasons to be shown to and approved of by the court. *Jennings vs. Carter*, 2 Wend. 446.

2. The facts that a vendee *had not a farm or forage to keep cattle on*, is not a sufficient reason to justify the continuance of the possession of cattle in a vendor. The evidence in relation to an excuse offered for the continuance of such possession being uncontradicted, it belongs to the court, and not to the jury, to decide the question of fraud. *Ib.*

3. A contract made in the city of New York for the sale of 500 bales of cotton, to be delivered *on its arrival* at New York from New Orleans, at any time between the date of the contract, which was the ninth day of February, and the first day of June thereafter, to be paid for in cash on delivery, the cotton to be weighed and two per cent tare to be allowed, is an executory contract, and the title to the cotton does not pass. The vendors are not chargeable for the non-delivery of the cotton *until its arrival* at New York; and the specification of the time is only a limitation fixing the period beyond which neither of the parties are bound by the contract, and not an agreement that the cotton shall at all events be delivered by the specified day. *Russell vs. Nicoll*, 3 Wend. 112.

4. A party contracting for the sale and delivery of a large quantity of any particular item of merchandize, (for instance, 500 bales of cotton,) *on its arrival* at a particular port, is not bound to deliver a portion only of the article, the whole not having arrived. The vendee not being bound to *receive*, the vendor is not obliged to *deliver* a quantity less than the whole; the obligation being reciprocal. *Ib.*

5. A *warranty* of the quality of an article in the sale of chattels when made, is an essential part of a bargain, and should be stated in the note or memorandum; the omission of it renders the contract void, and *parol* evidence is inadmissible to take the case out of the operation of the statute of frauds. *Peltier vs. Collins*, 3 Wend. 459

6. There is no contract, if there be a material difference between the note of the bargain delivered by a broker to the vendee and that delivered to the vendor.

7. In an action of *assumpsit* for the recovery of the price of an article sold at a stipulated sum, a defendant may give evidence showing the *true value* of the article sold in case of a *breach of warranty*, in reduction of the amount of the recovery claimed, as well in case of a *sale of warranty* as in *cases of fraud;* such evidence being allowed to avoid circuity of action, and to prevent further litigation upon the same matter. And it *seems* that a defendant would be allowed to give such evidence in a case of warranty, although the article sold was not returned to the vendor. *M'Allister vs. Reab*, 4 Wend. 483.

8. Where a *bill of sale* was made by a tavern keeper of all his household furniture, &c, and on the same day the vendee executed a lease of the same property to a brother of the vendor, who at the time resided with the vendor as a hired man, and the vendor and the lessee continued to reside together, and the business of tavern keeping was continued, it was *held*, that the judge ought to have instructed the jury that if they believed the *lease* was real, and bona fide intended to put the lessee in possession of the property, and that he actually took possession of the same, and conducted the public house in which they were, then the sale to the vendee was valid, and he was entitled to recover damages against a sheriff who took the same by virtue of an execution against the vendor; but that if they believed that the lease was colorable, and that it was intended by the parties that the *vendor* should continue in the possession and enjoyment of the property, then the whole transaction was void, and the defendant was entitled to a verdict. *Archer vs. Hubbell*, 4 Wend. 514.

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SENTENCE OF ADMIRALTY COURT.

1. The sentence of an *instance* court of admiralty, proceeding *in rem*, condemning property seized as forfeited, is final and conclusive to change the property, and the question of forfeiture cannot be inquired into collaterally in any other court of the *same country* where such condemnation takes place. The same rule prevails as to the decisions of admiralty courts proceeding as prize courts agreeably to the law of nations. In *England*, the sentence of such courts is held final and conclusive against all the world, not only as changing the property, but as precluding an inquiry into the facts of the case, either directly or collaterally, by the courts of *any other country*. So also the law has been holden to be by the Supreme Court of the United States, and by some of the states; in New York, however, it is otherwise. The rule there is, that the sentence of a foreign court of admiralty, condemning property as good and lawful prize according to the law of nations, is *conclusive* to change the property, but is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; and in a collateral action, such evidence may be rebutted by showing that no such facts did in reality exist. By Walworth, Ch. *Ocean Insurance Company vs. Francis*, 2 Wend. 64.

2. The judgment or decree of a court having jurisdiction of the subject matter, is evidence of the grounds upon which it is rendered; but from the terms of the proposition two things must appear: 1. That the court had jurisdiction; 2. The grounds of the decree. A decree pronouncing a vessel forfeited, 'for a breach of some or one of the laws relating to trade and navigation,' amounts to no more than saying that the vessel is condemned 'for some cause or other,' and will not be recognised as a judgment. The sentence should establish a violation of some precise law; and where in itself it is insufficient, it is unnecessary to inquire whether it has been successfully impeached by the facts of the case. By Spencer, *senator*. *Ib.*

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SET OFF.

Compensation for the *part performance* of a contract by a defendant cannot be *set off* against the damages of the plaintiff occasioned by the *non-performance* of the residue; and it was accordingly holden, where one party agreed to saw by a given time 300,000 feet of boards, at a stipulated price per 1000 feet, and failed to saw the whole quantity, that though he had sawed 144,000 feet, which had been received by the other party, that a compensation for the quantity sawed could not be set off against the claim for damages for the omission to saw the residue. *Stephens vs. Beard*, 4 Wend. 604.

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SLANDER.

1. In an action of *slander*, proof of the character of the plaintiff subsequent to the speaking of the words, is not admissible, although the character offered to be proved is of such a description that it could not have been caused by the speaking of the words, i. e. the defendant will not be permitted to prove that the plaintiff is reputed a *common prostitute*, when the words charged are that she is a *thief*. *Douglass vs. Tousey*, 2 Wend. 352.

2. General character is the estimation in which a person is held in the community where he has resided, and, ordinarily, the members of that community are the only proper witnesses to testify as to such character. *Ib.*

3. A witness who goes to the place of the former residence of a party to learn his character, will not be allowed to testify as to the result of his inquiries. *Ib.*

4. Words spoken by a person who has preferred a criminal complaint against another in the presence of a magistrate, on the defendant's being brought before him on warrant, averring the truth of his complaint, are not actionable. *Allen vs. Crofoot*, 2 Wend. 515.

5. An action of slander may be brought for the charge of a crime, though not couched in direct and positive terms; the imputation of a crime may be as effectually made by way of interrogation as by an affirmative allegation. *Gorham vs. Iver*, 2 Wend. 534.

6. If the words spoken, in connexion with the circumstances of the case leave no reasonable doubt that it was the intention of the defendant to impress upon the minds of the hearers the belief that a forgery had been committed by the plaintiff, an action *lies*. *Ib.*

7. In an action of *slander*, it is unnecessary to preface each count with all the inducements and allegations contained in the first; a reference in the second count to the allegations in the first is sufficient. *Loomis vs. Swick*, 3 Wend. 205.

8. Where, in the first count of a declaration in slander, it was alleged, in the introductory part of it, that the plaintiff was a *merchant*, which was omitted in the second and third counts, but the words were alleged to have been spoken in another discourse of and concerning the plaintiff 'in his business of a merchant, and of and concerning his said books of account which he kept with his customers and others, as such merchant as aforesaid,' it was *held*, that the reference to the first count was sufficient to cure the defect. *Ib.*

9. A plaintiff is not bound to prove all the words as laid in the declaration; if he proves some which are laid and which are actionable, it is enough. *Ib.*

10. Where, in answer to an inquiry, 'Were there any failures yesterday?' it was said, 'Not that I know of, but I understand that there is trouble with the Messrs S.' it was holden that such words being spoken of the plaintiffs as merchants were actionable in themselves. *Sewall vs. Catlin*, 3 Wend. 291.

11. Any words which in common acceptation imply a want of credit or responsibility, when spoken of a merchant, are actionable. Where such words were spoken by a defendant, evidence that another person heard the report that the plaintiffs had failed, and in consequence withdrew from them business to a large amount, is inadmissible in support of a charge for *special damage*, unless the report thus acted upon is traced to the defendant. *Ib.*

12. A bank director is not justified in making a communication to a co-director in the public streets, affecting the credit or responsibility of a merchant, where there is no evidence of such communication being confidential. At a meeting of the board of directors, he would be justified in communicating to his associates any report which he might have heard in relation to the solvency or circumstances of the customers of the bank, or probably of any other person. His motive in such case would be presumed to be innocent, which presumption could only be repelled by proof of express malice. *Ib.*

13. In *slander*, where the words are spoken in a foreign language, the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English, and that they were understood by those who heard them. *Wormouth vs. Cramer*, 3 Wend. 394.

14. In an action of *slander*, particular facts which might form links in the chain of circumstantial evidence against the plaintiff, cannot be received under the general issue in mitigation of damages; and it was accordingly *held*, that proof that the plaintiff was in possession of the property alleged to have been stolen, and returned it to the owner about the time of the prosecution of another person for the stealing of another article alleged to have been taken at the same time, it was inadmissible under the general issue. *Wormouth vs. Cramer*, 3 Wend. 395.

15. In *slander*, where the plaintiff in his declaration after setting forth the words spoken, *avers* that the defendant by means of the words, insinuated, and meant to be understood as charging the *plaintiff* with the crime imputed, and that the defendant was so understood by the hearers; whether or not such was the intention of the defendant, is a question of fact, to be determined by the jury upon the evidence adduced in support of the averment. *Gibson vs. Williams*, 4 Wend. 320.

16. A defendant who couches his slander in

ambiguous terms, in the hope of blasting the reputation of his neighbor without incurring legal responsibility, is not entitled to an indulgent construction of his words either from the court or the jury. *Ib.*

17. The understanding and opinions of witnesses are not received in evidence, except in matters of science and a few special cases resting upon peculiar circumstances. It is the business of witnesses to state facts, and it is the province of the jury, under the direction of the court, to draw the necessary inferences or conclusions. *Ib.*

18. *Slander* will not lie for charging a witness with perjury whilst testifying before arbitrators, if, *after* the oath is administered to him, *new parties* are added to the arbitration and *new matters in controversy* are submitted to be passed upon, and the charge be made in reference to what is said by the witness after such addition of parties and matters in controversy. *Bullock vs. Koon*, 4 Wend. 251.

19. *It seems* that in testing the materiality of testimony charged to be false, reference must be had to the issue as it existed when the oath was administered to the witness. *Ib.*

20. *Slander* will not lie for saying that a *particular article* manufactured by another, or in which he deals, is *not good*, or in other words, is *bad;* or for saying that the articles manufactured by him, or in which he deals, are *bad;* or that they are not *as good* as articles of a similar kind manufactured by another, or are *inferior* to articles manufactured by such other, unless *special damage* is alleged. *Tobias vs. Harland*, 4 Wend. 537.

21. Where the words are spoken not of the *trader* or *manufacturer*, but of the *quality of the articles* made or dealt in, to render them actionable, *per se*, they must import that the plaintiff is guilty of a deceit or mal-practice in the making or vending, or of a want of skill in the manufacturing of the articles. *Ib.*

22. In *slander*, evidence that the defendant had been told by a third person that the plaintiff was guilty of the crime imputed to him, is inadmissible. *Mapes vs. Weeks*, 4 Wend. 659.

23. So evidence of *general reports* that the defendant is guilty of the imputed offence is inadmissible, as well in mitigation, as in justification. *Ib.*

24. *It seems*, however, that such reports would be received in evidence in mitigation, under circumstances showing an absence of malice and an admission of the falsity of the charge. *Ib.*

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STAYING PROCEEDING.

Where judgments rendered by the Supreme Court have been reversed in the Court of Errors with costs, and *venires de novo* awarded, the proceedings of the plaintiff will be stayed until the payment of the costs in error. *Jackson vs. Schauber*, 4 Wend. 216.

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STRUCK JURY.

The testing the genuineness of a signature to a note, is a not question of *intricacy* demanding a *struck jury;* nor is a controversy between parties, exciting much speculation and interest in a county, so *important* as to induce the granting of such jury. *Poncher vs. Livingston*, 2 Wend. 296.

SURETY.

A *surety* for the payment of rent to a landlord, who engages, in case of default by the tenant to make up the deficiency, and fully satisfy the conditions and agreements of the tenant, without requiring notice of non-payment or proof of a demand being made of the tenant, has no right to call upon the landlord to *distrain* the tenant's goods, and is not exonerated from his covenant, though the landlord, on request, refuses so to do. *Ruggles vs. Holden*, 3 Wend. 216.

2. Where application was made to A to lend his name as a maker to a negotiable note for the benefit of B, upon being told that B could procure C and D to sign a note with him for the amount wanted, and A accordingly signed such note, after the same had been signed by B, C, and D, and when the same fell due was compelled to pay the note, it was *held*, in an action brought by A against the three others to recover the money thus paid that the same could not be maintained; that C and D were co-sureties with A, and were liable only for their aliquot proportion of the money paid, to be recovered in a separate action against each. *Beaman vs. Blanchard*, 4 Wend. 432.

2. An indemnity given to A, under the circumstances of this case, by a *third person*, would have been no bar to a recovery upon the implied promise, had the defendants all been principals. *Ib.*

4. The omission of the comptroller, for *eight years*, to prosecute the bond of a *commissioner of loans*, forfeited by the non-payment of interest, constitutes no defence to the *surety*, although for three years subsequent to the default, the principal was solvent and able to pay, and at the time of the commencement of the suit was insolvent and unable to indemnify his surety. The case of The People *v.* Janson, (7 Johns. Rep. 332.) is in this respect overruled. *The People vs. Russell*, 4 Wend. 570.

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TRIAL.

1. A party is entitled to poll the jury, where a sealed verdict is brought in, unless he has expressly assented to waive the right. *Jackson vs. Hawks*, 3 Wend. 619.

2. *It seems*, that a party has a right to call and examine witnesses who have arrived in court, after the proofs are closed, and before the opposite party has summed up the cause to the jury. *Leggett vs. Boyd*, 3 Wend. 376.

3. Where the principal and interest due on a bond exceed the penalty, the jury, on the trial of a cause, ought to give the excess in *damages*. If, however, nominal damages only are assessed by a jury, the excess cannot subsequently be taxed by the taxing office and included in the costs, as is the practice where the judgment goes by default or confession. *Cook vs. Tousey*, 3 Wend. 444.

4. Where the nature of the proceeding or the form of action or pleadings gives the opposite party notice to be prepared to produce a writing or instrument, if necessary to falsify his adversary's evidence, no other notice to produce it is requisite. *Story vs. Patten*, 3 Wend. 486.

5. According it was *held*, that notice to produce an execution was not necessary in an action against a *constable* for not returning the process and paying over the money, where, in the declaration, the execution and the judgment on which it issued were fully described. *Ib.*

6. Notice on the trial to a party to produce a written instrument, where there was no evidence that it was in his possession, and where his residence was shown to be fifteen miles from the place of trial, *it seems*, would have been adjudged insufficient had the notice been necessary. *Ib.*

7. If it is apparent that the witness is in the interest of the adverse party, it is proper to permit the *direct* examination to take the character of a *cross examination*. *The People vs. Mather*, 5 Wend. 229.

8. If the question relate to introductory matter, and be designed only to lead the witness with the more expedition to what is material to the issue, it may be put, though it be leading. *Ib.*

9. Putting a question in the *alternative* form as *whether or not* a party did a certain act, specifying it, does not remove the objection to its being leading. *Ib.*

10. It is not allowable to put a question which *assumes* a fact proved which is not proved, even on cross examination. *Ib.*

11. It rests in the discretion of the court before whom a trial is had, whether or not to permit the *re-examination* of a witness after the lapse of a day, and after the examination of other witnesses; the Supreme Court will not interfere with the exercise of such discretion but in a very flagrant case. *Ib.*

12. In a trial for a conspiracy to kidnap a person, who was actually carried off, and whom it was believed was murdered, the prosecutor asked a witness, whether on a certain evening he was at the house of a certain person? and whether on that evening a hack or covered carriage arrived there, in which carriage it was alleged the person kidnapped was? the witness declined answering, alleging that his answer might implicate him in the transaction respecting the person kidnapped, and might expose him to infamy, it was *held*, that the witness was not bound to answer. *Ib.*

13. When the direct answer to a question will disgrace a witness, and fix a stain of infamy upon his character, he is not bound to answer; and that whether the question be material or not to the merits of the cause in which he is examined. It is not enough, however, for the witness to allege that his answer will have a *tendency* to expose him to infamy or disgrace; the question must be such that the answer to it, which he may be required by the obligation of his oath to give, will *directly* show his infamy, and the court will see that such must be the case before they will allow the excuse to prevail. *Ib.*

14. Where the answer to a question will have a tendency to implicate the witness in a crime of misdemeanor, or will expose him to a fine or forfeiture, he is not bound to answer; and when he claims to be excused from answering, the court are to determine whether the answer he may give to the question can criminate him directly or indirectly, by furnishing evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer *may* in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give. *Ib.*

15. The proper question to be put to a witness called to impeach another, is, whether he would

believed him on oath. The opposite party may then go into a cross-examination to ascertain the ground of the unfavorable opinion, the means of knowledge of the character of the witness impeached, and the source, extent, and the duration of the unfavorable reports. *Ib.*

16. Counsel entrusted by his client with papers relating to the action depending in court, is not obliged to produce them, nor can he be compelled as a witness to state their contents. *Jackson vs. Denison*, 4 Wend. 558.

17. Notice to produce in evidence, on the trial of a cause, a written document, given in a suit before a justice, is good and operative in the Common Pleas, if such suit is subsequently removed into such court by appeal. *Wilson vs. Gale*, 4 Wend. 623.

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EVIDENCE.

1. Persons who do not believe in the existence of a God, or in a future state of existence, are not competent witnesses. *Wakefield vs. Ross*, 5 Mason, 16.

2. The ordinary presumption is, that all the partners have access to the partnership books, and know the entries therein; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances, which lead to a contrary presumption. *U. S. Bank vs. Binney*, 176.

3. Where goods are seized, and claimed as forfeited as part of the cargo, the *onus probandi* is on the government to prove, that such goods were part of the cargo on board at the time of the offence.

The claimant may file a special defence on that point, if he chooses; but it is also in issue on the general denial of the allegations of the libel. *United States vs. an open boat*, 232.

4. Where certain merchants had entered into a written contract to subscribe certain sums for a voyage to *Africa*, &c, and authorized their agent to draw bills for the amount if he fitted out the expedition, and he drew a bill on one of the subscribers for the amount subscribed by him, to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill; it was *held*, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber, upon a *constructive* acceptance of the bill, it having been dishonored, when presented for acceptance. *Lowber vs. Shaw*, 241.

5. If a bill admits the defendant to be a purchaser of the legal title, and the plaintiff sets up an equitable title, and demands a conveyance of the legal title to himself, he must aver and prove all the material facts to entitle him to such conveyance. If he relies on notice in the purchaser, he must aver it in his bill, and if not admitted by the answer, he must prove the notice before he can have relief.

A purchaser, who chooses to answer the bill generally, need not aver, that he is a purchaser without notice. The plaintiff must prove notice.

Notice, if denied by the answer, must be proved by two witnesses, or by one witness and circumstances. *McNeil vs. Magee*, 244.

6. Notwithstanding an order of the Court, closing all testimony in a cause, after a limited time, under a commission, the Court will enlarge it, upon proof of newly discovered evidence, which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof. *Schooner Ruby*, 451.

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THE JURISPRUDENT.

BOSTON, SATURDAY, APRIL 23, 1831.

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*Hayes' popular View of the Law of Real property.*

(Continued)

The faults of the English System of Real property Law are its insecurity, dilatoriness and expense.

The insecurity has not been such as to affect very materially the value of land in the market. Moneyed men have in seasons of difficulty and danger fled for safety to the soil. 'Purchasers and mortgagees repose soundly on their "*parchment couches*," though often liable to be aroused from their territorial visions by some latent legal or equitable claimant.'

Besides the minor risks occasioned by the unrecorded state of the evidence of title, the tedious and expensive searches and inquiries and the dispersed condition of the muniments of title,—the purchaser must always incur the hazard of ascertaining whether he has obtained the *legal title*, It is difficult for him to know whether or not, he is affected with knowledge, of some other existing right. Here the doctrines of 'notice' and 'constructive notice' apply. What is meant by 'actual notice' does not seem difficult to understand. But the other species of notice, ('constructive notice')—is not so clear. It may exist in law, and yet the purchaser be entirely innocent of it. Where he has some knowledge of a fact or circumstance (as possession or the exercise of an act of ownership) which, if investigated, would have conducted him immediately or through a long train of facts and circumstances, to a knowledge of the existing right or claim, he is said to have constructive notice.

So constructive notice to an agent is constructively imputed to the principal, although never communicated.

To acquire land with either of these kinds of notice, is in law, to acquire it dishonestly.

The *legal Estate* may, therefore, be obtained without any advantage to the Purchaser.

The history of attendant Terms, 'a mysterious name,' in the law, is briefly given and some strictures offered on them.

If the rule were, that a purchaser possessing himself of land, without knowledge of the trust affecting it, is entitled to keep it, would be intillible.

As it now is, the apparent owner is never safe; because the prior *legal* title may exist under some suppressed deed, and because the owner may be made a *Trustee* by having '*notice*' of some *Equitable* right fastened upon him.

The remedy for some of these defects which has been proposed is a *General Register* to be established in London for the registration of Instruments affecting the title to real Estate in England and Wales.

John Tyrrell of Lincoln's Inn, has the merit of leading in this plan. The term, real Estate, for this purpose, embraces all interests in money to arise from the sale of land or secured upon it, and to other subjects falling within the description of personal estate, but connected with the title to real property.

The author discusses at some length the principles upon which such register ought to be founded, which would be uninteresting to our readers.

One of the great difficulties to be encountered in establishing this system lies in the question, to what extent the equitable principles as to 'notice' shall be introduced. It seems to be admitted that these principles must be limited in their operation.

'If on the ground of "notice" or want of "notice," a registered legal title may be destroyed by an unregistered *Equitable* interest, and a registered equitable interest excluded by an unregistered legal title, the flood-gate is at once opened to all the difficulties and uncertainties, in point of law, as to what constitutes notice, and, in point of evidence, as to the fact of notice, with the attendant evils, litigation and perjury. Besides, the machinery of legal estates and terms of years, now employed to fence round a title, would, in that state of things, be still retained.'

The arguments for and against the exclusion of notice are then stated at large.

One of the arguments is grounded on the uncertainty of any definition of 'notice' which can be given, so as to define where 'constructive notice' ends, and 'actual notice' begins. There is a difficulty in the practical application of the principles to the circumstance of every case. It is contended that the only safe way is to throw the matter upon the judicature.

A majority of the commissioners appointed to consider this subject reported that it was, on the whole, expedient, *that actual notice of the unregistered deed should not affect the priority of a registered deed for a valuable consideration.*

The Report holds the following language on this subject:—

'The reasons against expressly denying effect to notice, seems to be in substance as follows:—One of the chief ultimate objects of law is to protect against fraud. Now it is necessary for the guidance of men in the ordinary conduct of their affairs, that the rules of law should be clear and strict; but to defeat contrivances, in whatever form they may be devised, for taking unfair advantages of the strict rule, the jurisdiction to relieve against fraud should not be strict, but large. The principal object of a register is, to protect fair purchasers against prior secret deeds; this protection is not wanted against a deed which is known. The man who assists a fraudulent seller or mortgagor in defeating a fair purchaser, is not himself a fair purchaser, and a law which should assist him against a fair purchaser, would be a law in favor of fraud; the fraud, indeed, would be of an aggravated nature, as it would have the character of conspiracy. Although no person might be induced to pay the full value for an estate under such circumstances or actually to advance money upon it is a security on lawful terms, advantages might be held out to a purchaser, and especially the property might be given in discharge of an existing debt, or made a security for it; in which case the temptation to the debtor to release himself from immediate pressure might be irresistible, and the creditor might take without scruple whatever he could get from the debtor to satisfy a just demand. Ignorance, forgetfulness, improvidence, and hurry, frequently occasion the neglect of forms, though simple and of the utmost importance, such as enrolments of bargains and sales, surrenders and admittances in case of copyholds, presentments of customary deeds the forms of execution of wills of land, and o.

powers, and many other forms; and such neglect is peculiarly liable to happen in small transactions, which are entitled to the protection of the law no less, and perhaps require it more, than those of magnitude. The registration of deeds, too, must be entrusted by parties to their professional agents, who, it is to be expected, would be sometimes careless or forgetful, and sometimes wilfully or corruptly negligent; so that whatever care were taken to make known the new law, and to facilitate compliance with its provisions, neglect of registration would occasionlly happen, and every instance in which a person with full notice should by means of the new law defeat a just purchaser, would be considered as a proof of the unjust rigor of the law, and tend to render it odious. Again, as dealings on confidence would still be carried on without registration, a dangerous temptation to the abuse of such confidence would be created. Besides, there must be some form, however simple, essential to validity of registration, and mistakes in this respect must be liable to happen, however rarely. Again, even although reasonable diligence were used, and especially if delay occurred in registering a deed, there might be an interval in which superior activity might gain priority for a subsequent deed. This, if done in order to defeat a just right acquired, would be fraud. On such grounds it is, that the Courts of Equity in this country, and also in Ireland, have determined that actual notice of an unregistered purchase deed shall deprive a purchaser of the benefit of his registry, fraud being by some of the judges expressly stated as the grounds of these decisions; and the same rule prevails generally in the United States of America.

'As fraud is the ground on which it is proposed to give effect to actual notice against registry, it appears to be generally agreed, that no such effect ought to be given to notice by construction of law, which is no proof of knowledge, nor even raises a fair presumption of it; and it is contended by those who think that the effect of actual notice should not be taken away, that sufficient guard would be provided against effect being given to constructive notice, if the preference to be given to deeds according to priority of registration were enacted in strong terms, with an express saving of the jurisdiction of equity in cases of fraud; or if there were a provision, that notice simply, or notice by construction of law, should not affect the rule of priority without actual fraud; and further, that there are many cases of fraud, of which notice is an ingredient, which must escape the jurisdiction of equity, if, in consequence of an express enactment that notice should not have the proposed effect, it came to be considered as not an ingredient towards constituting a case of fraud.

'It is contended on the same side, that a statement which has been brought forward, that the effect given to notice has materially impaired the benefits of the registers actually established, is not founded in fact; that cases in this country and in Ireland, in which an unregistered deed has prevailed against a registered deed, by aid of the doctrine of notice, are not so numerous as to have had much effect in producing neglect of registration, and that very few, if any of them, have worked injustice in the particular instance: and that other means beside the hope of obtaining protection from notice, have probably occasioned neglect of registering in Yorkshire, and Middlesex, and in Ireland. That the same neglect is not likely to happen when registering shall be universal, and shall be put ou an improved footing, and its benefits shall be fully understood; that in fact the hope of escaping from the loss of an estate through the means of a Chancery suit, and only in case knowledge of the deed shall be brought home to another party, is not likely to lead to many cases of neglect of registration; and further, that should such inconvenience be found to exist, the remedy will be easy by increasing the rigor of the law; but that if the rigor of the law now to be established shall be found to work injustice and mischief, there will be no remedy for the time past, and there may be danger that the remedy applied for the future may be to abrogate or to annul by gradual disuse the whole law of registration.

'The reasons in favor of excluding the interference of Courts of Equity on the ground of notice, may be thus stated:—

'If the public good require that a purchaser, to have the protection of the law, should comply with a form, and that form be made simple and easy, a purchaser omitting the form has no just ground of complaint that the protection is not given. If the omission were not wilful, he should still blame only his own want of care, or that of his agents. It is greatly for the public good, that civil rights should be capable of being ascertained without difficulty; and for this purpose the law on which they depend should, as far as possible, be general, and not varying in different circumstances, which would lead to mistakes; they should be supported by evidence, not open to doubt, and as little as possible exposed to falsification. For these reasons, it has been thought necessary, in most countries, to require the title of land to be proved by written documents, and thereby prevent attempts to enforce pretended claims by parol testimony or circumstantial evidence. A registered title possesses the advantages of certainty and security in a high degree; but they will be impaired, if preference be given to an unregistered over a registered deed, on the ground of notice. The fact of notice will in every case be possible, and in many probable; there will be a temptation therefore to the unregistered claimant to commence a suit, in the hope that the other claimant may confess notice, or circumstances from which it may be implied; and there may also be a temptation to support the suit so commenced by false evidence.

To be continued.

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A Fat Case.—A case arising out of the transactions of the British Iron Company came before the Court of Exchequer last week, the briefs to Counsel on which consisted of about *seventeen reams* of paper; the statement of the bill, the answers, and pleadings, occupied about 13,000 folios and eightyeight large skins of parchment were filled with the plaintiff's interrogatories. The examination of witnesses cost 1,500*l.* a side, and 2,000*l.* expended in procuring office copies of the evidence. The suit which has caused this enormous expense was instituted by three gentlemen, named Small, Shears, and Taylor, to set aside a contract which they entered into in 1825, to purchase some mines in Staffordshire of Mr Attwood, for 550,000*l.* which the allege were not worth more than 160,000*l.*

The cause came before the Court with the view of procuring further evidence, so that there is no prospect of the suit being brought to a conclusion.

Lord Lyndhurst has been sitting, for some days past, in the little Hall of Gray's Inn, where his Lordship's Court presented a marked contrast with that over which he lately presided did. His Lordship is seated at a table on the floor of the Hall, with the officers of the Court near him; the rest of the family party (for it really looks like one), being composed of some half-dozen barristers, an equal number of attorneys, two or three attorneys' clerks, and, perhaps, a solitary spectator! There are no noisy interruptions, no calls for silence; indeed, Gray's Inn Hall appears to be a perfect *terra incognita* to those worthy gossips whose 'sweet voices,' have proved a source of so much annoyance to Lord Brougham, at Lincoln's Inn.

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Lord Thurlow's Resignation.—When it was resolved to deprive Lord Thurlow of the Seals, none of the Ministers seemed willing to be the person to demand them (which it was desirable should be done personally), from the ungracious reception which it was supposed he would meet with. At last Lord Melville was prevailed upon to undertake the task. He adopted the following for that purpose:—The evening before he sent a note to the Chancellor, informing him that he proposed having the honor of breakfasting with his Lordship next day, and that *he had some very particular business to settle with him.* On his coming next morning Lord Thurlow said to him, 'I know the business on which you have come. You shall have the bag (purse) and seals. *There they are,*' pointing to a table on which he had placed them, 'and there is your breakfast,' of which they partook very sociably together. Lord Melville said that he never saw Lord Thurlow in better humor, and they parted apparently very good friends.—*The Correspondence of the Right Honorable Sir John Sinclair.*

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## NEW PUBLICATIONS.

A letter to the Right Hon. Henry, Baron Brougham and Vaux, Lord High Chancellor of Great Britain, on the expediency of establishing a General Registry of Births. By Richard Matthews, Esq. of the Middle Temple, Barrister at Law.

A Dissertation on the Nature of the various Proceedings in the Masters' Office in the Court of Chancery, with Directions for carrying the most useful References to a Master into effect; to which are added, a few Observations illustrative of the Practice in the Office of the Accountant General, with an Appendix of Precedents of the different Proceedings, taken from actual Practice. By W. H. Bennett, Esq. of the Middle Temple. 8vo.

The Horseman's Manual; being a Treatise on Soundness, the Law of Warranty, and generally on the Laws relating to Horses. By R. S. Surtees, Gent. 12mo.

Observations on the Causes of the Evils resulting from the Tithe System, with Suggestions for a Remedy. By a Barrister.

An Address to the King, the Lords and Commons, on the Representative Constitution of England. By H. A. Mereweather, Esq., Serjeant at Law.

Some Observations on the necessity of reforming the House of Lords, considered as the Court of ulti mate Appeal in the Administration of Justice.

A Review of the Objections taken by an 'Observer,' and by Mr Raines, on the Lord Chancellor's Bill for the establishment of Courts of Local Jurisdiction, with a brief Account of the Local Courts of France; and an Appendix, containing a Copy of the Bill. By M. J. Quin, Esq., of Lincoln's Inn, Barrister at Law.

ESSAY ON JUNIUS. This day published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

These volumes, by the author of Peter Parley, will complete a series of Tales for Children, designed to interest them in History and Geography. Those previously published are Parley's Tales about America, Europe, Asia, Africa, and Sun, Moon, and Stars. April 9.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

Peter Parley's Tales about Europe.

Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰων. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. I. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII. Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

II. Economy of Athens. 1. Die Staatshaushaltung der Athener, vier Bücher. Von August Boeckh. Mit einundzwanzig Inschriften. 2. The Public Economy of the Athenians. Four books; by Augustus Boeckh.

IV. Character and Abuses of the Medical Profession. Rules and Regulations of the Boston Medical Association.

V. Waverly Novels. Parley's edition.

VI. British and American Shipping. 1. The Merchant, Ship-Owner, and Ship-Master's Import and Export Guide; by Charles Pope. 2. Speech of Right Honorable William Huskisson in the House of Commons.—May, 1827.

VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

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THE JURISPRUDENT

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, APRIL 30, 1831. NO. XL.

## LORD MANSFIELD.

Continued.

After the records had been made up for trial in the two informations filed by the government against Wilkes, for the libels contained in No. 45 of the North Briton, and the Essay on Woman, an application had been made to the court on the part of the crown, for leave to amend them, by striking out the word 'purport,' and substituting the word 'tenor' in both the informations. A summons was accordingly granted, in the usual way, and no cause being shown why the alteration should not be allowed, it was made as a matter of course. Wilkes not appearing at the trial and no objection being offered by his counsel in respect of this amendment of the records, he was found guilty in each cause. Writs of capias were then issued, the usual forms of proclamations and exigents were gone through, and the defendant, who still remained abroad, was duly outlawed. Somewhat more than four years afterwards, (20th April, 1768,) he voluntarily made his appearance in the court of King's Bench, objected to the validity of the verdicts on the ground of alterations in the record, assigned errors in the outlawries, and demanded to be admitted to bail: the Attorney-general, on the other hand, moved that he should be committed to custody. The court refused to grant either application, as the defendant had not been regularly brought before it; and it was decided that the question as to the legality or illegality of the outlawry must be set at rest, before any proceedings could be taken upon the judgments. The Attorney-general then granted his fiat for writs of error on the outlawries, and Wilkes, having surrendered to the sheriff of Middlesex, was committed on the motion of the Attorney-general to the custody of the marshal. The errors were finally argued on the eighth of June following, and Lord Mansfield, at the close of a beautiful and luminous exposition of the law on the subject, delivered it as his opinion, in which the other judges concurred, that although the errors assigned could not be allowed, yet as the court found the outlawries to be deficient in a point of form, they should be reversed. It was in the course of this speech from the bench, that he thought proper to allude to the menaces by which it had been attempted to frighten him into a decision, which Wilkes and his party had rather hoped than anticipated. The annals of oratory can boast few more splendid specimens of calm and dignified eloquence.

'These are the errors which have been objected; and this the manner and form in which they are assigned. For the reasons I have given, I cannot allow any of them. It was our duty, as well as our inclination, sedulously to consider whether upon any other ground, or in any other light, we could find an informality which we might allow with satisfaction to our minds, and avow to the world. But here let me pause!—It is fit to take some notice of the various terrors being held out; the numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom by commotions and general confusion.

'Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error which will bear us out, to reverse the outlawry, it must be affirmed. The constitution does not allow reasons of state to influence our judgments. God forbid it should! We must not regard political consequences, how formidable soever they might be; if rebellion were the certain consequence, we are bound to say 'Fiat justitia, ruat cœlum.' The constitution trusts the king with reasons of state and policy; he may stop prosecutions; he may pardon offences; it is his to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted: none of us had any hand in his being prosecuted. As to myself, I took no part (in another place), in the addresses for that prosecution. We did not advise or assist the defendant to fly from justice: it was his own act, and he must take the consequence. None of us have been consulted, or had anything to do with the present prosecution. It is not in our power to stop it; it was not in our power to bring it on. We cannot pardon. We are to say, what we take the law to be; if we do not speak our real opinions, we prevaricate with God and our own consciences.

'I pass over many anonymous letters I have received. Those in print are public; and some of them have been brought judicially before the court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust, that my temper of mind, and the color and conduct of my life, have given me a suit of armor against these arrows. If, during this king's reign, I have ever supported his government, and assisted his measures, I have done it without any other reward, than the consciousness of doing what I thought right. If I have ever opposed, I have done it upon the points themselves; without mixing in party or faction, and without any collateral views. I honor the king, and respect the people; but, many things acquired by the favor of either, are, in my account, objects not worth ambition. I wish popularity: but it is that popularity, which follows, not that which is run after; it is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion, and under circumstances not unlike, "Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem."

'The threats go further than abuse: personal violence is denounced. I do not believe it; it is not the genius of the worst of men of this country, in the worst of times. But I have set my mind at rest. The last end that can happen to any man, never comes too soon, if he falls in support of the law and liberty of his country: (for liberty is synonymous to law and government). Such a shock, too, might be productive of public good; it might awake the better part of the kingdom out of that lethargy which seems to have benumbed them; and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.

'Once for all, let it be understood, that no endeavors of this kind will influence any man who at present sits here. If they had any effect, it would be contrary to their intent: leaning against their impression, might give a bias the other way. But I hope, and I know, that I have fortitude enough to resist even that weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is entitled to from substantial law and justice, but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection. The only effect I feel, is an anxiety to be able to explain the grounds upon which we proceed; so as to satisfy all mankind that a flaw of form given way to in this case, could not have been got over in any other.'

As to the alteration made by Lord Mansfield in the record, for which so much senseless clamor had been raised against him, it was afterwards clearly shown by the court, when the validity of the judgments in the two informations was disputed, that nothing had been done in this respect which was not clearly warranted, as well by abundance of written precedents, as by the traditionary recollections of practice preserved among the officers of the court. It was, moreover, explained that Wilkes could not possibly have been, in any way, injured by the allowance of the amendment; because, had the advisers of the crown considered the records imperfect as they originally stood, they would have been at liberty to file fresh informations, the only effect of which must have been to burden the defendant with additional expense. Other objections had been taken against the judgments, but they were equally overruled; and the idol of the mob was accordingly sentenced to fine and imprisonment. An appeal to the House of Lords was afterwards tried, but without effect. Lord Camden and the rest of the judges were unanimous in their opinion as to all the points whereon error was assigned; and the decision of the King's Bench was accordingly affirmed.

It was not always that the opinions of Lord

Camden on legal subjects coincided with those of his illustrious contemporary. His elaborate argument in the case of Doe d. Hudson et al. v. Kersey, wherein he overruled the decision relative to the construction of the statute of wills, given by Lord Mansfield in Wyndham v. Chetwynd, will probably occur to the recollection of many of our readers. The difference of their sentiments with respect to the power of juries in cases of libel is no doubt known to all. It stands on record in many pages of the parliamentary history, where the chancellor appears more than once as an impugner, not only of the doctrine of the chief justice, but of his motives for propounding and upholding it. In the strain of accusation he always thought fit to assume when this topic was brought forward in the House of Lords, he was constantly seconded by his ally Lord Chatham. As the ties of party which united these two great men were drawn closer by those of private friendship, so the political hostility which both professed against Lord Mansfield seems to have derived additional poignancy from a common feeling of personal dislike. We have already intimated our opinion of that probability that jealousy may have done much towards engendering this feeling in the mind of Pitt; and although the fact, that a similar one grew up in the breast of Lord Camden may be sufficiently accounted for by the facility with which we often involuntarily adopt the very prejudices of our friends, yet this same infirmity of jealousy is one from which even the noblest natures are so seldom entirely exempt, that we are warranted in suggesting at least the possibility of its having exercised some influence over the one as well as the other. Many more causes, no doubt, may have had their share either in kindling the first sparks of such sentiments of animosity, or afterwards fanning them into flame. Giving credit to both Chatham and Camden for a sincere devotion to the political opinions they professed, we consider it far from unlikely they may have fallen into the very common error of supposing that all those who differed from them did so from unworthy motives, and not from honest conviction. That most persons who interest themselves warmly in politics, in times of violent party disputes, do adopt this sort of prejudice against their opponents, is likely, we think, to be contested by no one who has accustomed himself to mark the tone of the public press, and even of private conversation, during such seasons, when tories appear to look upon whigs as factious promoters of sedition, while whigs are apt to regard tories as little better than unflinching advocates and supporters of downright despotism. We by no means mean to say it is probable, that men like Chatham or Camden, could ever go such lengths as this; but as we have no right to suppose them altogether superior to a weakness so generally prevalent, we certainly do think it likely, that something of it may have contributed to bias their judgments, with respect to the principles and conduct of one who generally thought and acted in opposition to them.

These causes, and perhaps many others, (for the motives of every man's thoughts and actions are mixed and complicated in a wonderful degree,) probably combined to generate and to foster the repugnance of these two eminent men against Lord Mansfield, and will account for the general asperity of their tone whenever allusion was made to his conduct. From what we have already said of the timidity of his character, it may be upposed that, with every requisite of an orator except confidence, he did not always appear to advantage on these occasions. Sometimes, indeed, he rose manifestly superior to his antagonists; and not only vindicated himself with success, but ventured to leave the defensive, and attack in his turn: as, for example, when he dwelt upon the gross ignorance displayed in the assertion of Lord Chatham, that an action might be brought against the House for the expulsion of Wilkes, and deduced from it the very plausible inference, that not much reliance ought to be placed on his lordship's legal opinions. But for the most part, he endured too patiently their tone of superiority, or even of scornful sarcasm; and instead of replying in the same strain, meeting invective with invective, and defiance with defiance, he would often plead not guilty to their accusations, and exculpate himself from the charges made against him, with reasoning and language, indeed, that might have made the reputation of an advocate at the the bar defending a client arraigned by the laws, but had far less effect in the mouth of a peer of parliament rebutting, in the presence of his fellow peers, the aspersions cast on himself. This (if the accounts given in the parliamentary history be correct) was fully exemplified during some of the debates in which his opinions on subjects of constitutional law, and particularly his charges to juries in cases of libel, were visited with the censure of his opponents. After the house of Lords had refused to listen to Lord Lansdowne's proposition for the institution of an inquiry into the state of the courts, and the administration of justice, and the house of Commons had negatived by a majority of more than two to one, a similar motion brought forward by Sergeant Glynn, Lord Mansfield thought fit to summon the peers (7th Dec. 1770), and inform them that he had deposited with the clerk of the house a copy of the judgment given by the court of King's Bench in the case of the King v. Woodfall, in order that they might have an opportunity of reading or copying it. This was, in some measure, provoking an inquiry, and showing that he thought he had nothing to fear from the result of it. The mode of proceeding was, indeed, much less direct than it might have been; and the house certainly had reason to be disappointed in their expectation of what was to ensue after they were thus specially assembled, when they found that their attendance had been required merely to inform them they could procure a sight of a report which had proviously been the round of the newspapers. This course certainly was not the most manly or dignified one that might have been adopted; but had the design of bringing on the discussion been plainly manifested and boldly persisted in, the mode of doing so would have been immaterial. However, if he had originally conceived such a design, he eventually wanted the resolution to carry it into effect. He refused, at the time, to have the paper entered on the journals; and a few days afterwards (Dec. 11th), when Lord Camden announced his intention of taking up the gauntlet he had thrown down, and boldly proclaimed his readiness to maintain that the doctrine of the chief justice was contrary to the law of the land, Lord Mansfield, instead of accepting the challenge, evidently shrank from the encounter. Instead of affording every facility in his power for bringing on the investigation with despatch, his object evidently was to procrastinate or prevent the discussion. With much difficulty a promise was drawn from him, that the matter should not be suffered to drop; but on the Duke of Richmond's congratulating the house that he had thus pledged himself, he again rose, disclaimed anything like a pledge, and merely said that he intended to take a future opportunity of giving his opinion. He was pressed to name a day; but even this he declined, and as we find no further notice of the subject, it is to be presumed no debate afterwards took place upon it.

We mention these circumstances as they are related in the Parliamentary History (vol. 16.), because, in the first place, being mere matters of fact, they are not so liable as matters of doctrine and opinion to the suspicion of being either wilfully or undesignedly misrepresented by the writers who have recorded them; and secondly, because they agree so well with what we know from other sources of Lord Mansfield's timidity and indecision, that they carry with them internal evidence of probability. It is right, however, to mention, that a great majority of the periodical publications which have furnished most of the materials of this compilation, were enlisted in the cause of the party opposed to that of which Lord Mansfield was an adherent. There is, therefore, some probability that (considering the imperfections of the system of parliamentary reporting at that time, when no publication professed to follow every speaker closely through the debates, and the aid of imagination was often called in to fill up the blanks left by memory) some of the writers unconsciously, and others by design, may have endeavored to throw the weight of argument into the scale of the party whose opinions they themselves espoused. An example of this may be found in the case of Lord Mansfield himself, on that memorable occasion when Lord Chatham and Lord Camden, in general the champions of popular privileges, undertook (being at the time ministers) to defend the cause of arbitrary prerogative; and the chief justice, who was usually considered a staunch supporter of the crown, ably combatted its right to intrench on the privileges of parliament, by issuing proclamations.

The discussion arose on the proposition of the bill of indemnity (Dec. 1766), for those who had been concerned in advising the measure of the embargo laid by the sole authority of the king, during the recess, on the exportation of wheat. The circumstances will probably be in the recollection of many of our readers, from the fact of their having been dwelt on at some length by Mr Canning, when, anticipating the necessity of some similar restrictions, he adopted the more constitutional course of applying to parliament beforehand, for authority to impose them. The speech on the suspending and dispensing prerogative (as it is entitled) which was printed in Almon's Register as the report of what had been delivered by Lord Mansfield, contains, we are assured by one who was present at the debate, more than three times as much matter as the speech he actually did make. It was, in fact, a digest of all the principal arguments that had been employed on the same side of the question. Now, if much was intentionally added to the record of what he was supposed to have spoken on the popular side; it may be presumed that, on the other hand, something was occasionally taken away of the reasoning with which he supported opinions or measures of a different tendency. We have, therefore, cause to mistrust even the good faith o some of the reporters of that time. Their opportunties of gaining full and correct information were not always very great; and when they did

contrive to obtain genuine accounts, they were not always disposed to impart them unalloyed.

We can only repeat our regret that nothing but so imperfect and meagre a record should exist of those powers of eloquence which for so many years astonished and delighted both houses of parliament. Some few of the speeches we know to be authentic, as, for instance, that celebrated one in which he supported (3d Feb. 1766) the right to tax the American colonies, in answer to Lord Camden, who had denied it: and that on the appeal of the dissenter Evans, which we shall presently mention more particularly. Both of these were revised by himself, and made public with his sanction. The speech also (8th May, 1770) against the exemption of peers' servants from arrest, seems to have been touched either by his own hand, or by that of no ordinary reporter. But these specimens may be said to give us a glimpse rather than a view of his talent as a parliamentory debater. A much better idea may be formed of his judicial oratory, from the specimens of it which have been preserved in the reports of Burrow, Wilson, Lofft, Cowper, Douglas, and Durnford and East, particularly the first. Sir James Burrow was not in the habit of taking short-hand notes in court, and he professes to give rather the substance than the exact words of what was spoken by the Chief Justice; but Lord Mansfield, it is well known, looked over and corrected the greater part of his proofs before they were published, so that if this work does not contain all he actually said, it at least conveys his arguments as nearly as possible in his own language. The eloquent passage we have already transcribed from the judgment in Wilkes' case, bears evident marks of having been carefully revised by the orator himself; and there are several others that carry with them the same stamp of authenticity. Even these, however, convey an inadequate idea of the peculiarities of his style as a speaker. In common with many eminent orators, he often disregarded the niceties of grammatical accuracy. The construction of his sentences, too, was frequently what in writing might have been called slovenly, abounding in parentheses and inversions. But such was the consummate art with which he modulated his voice, that by its inflexions the exact bearing and relation of every member of a long sentence was distinctly marked; so that passages which on paper would have appeared intricate and obscure, left on the mind of those who heard them from the lips of Lord Mansfield, a clear and vivid impression of their meaning. Indeed, perfect clearness and intelligibility were the leading characteristics of his speeches, notwithstanding these peculiarities, (we will not call them defects), partly, perhaps, in consequence of them; for they imparted to what he said a sort of colloquial air, which sometimes has more effect than any particular forms of language, in enabling an auditory to catch a just apprehension of the sense intended to be conveyed.

This manner he most commonly adopted when delivering his opinions on obscure or difficult questions of law, the intricacies of which he unravelled with a facility that not only showed how fully he himself was master of the subject, but materially aided his hearers in comprehending it. In parliament, he could soar into a higher region of eloquence; and when the occasion called for it in court, he never failed to rise to the level of his matter. We may instance the different opportunities afforded him while he sat on the bench, of exposing his views on the subject of religious toleration. Such, among others, was the case of the catholic priest, Webb, who was prosecuted at the suit of a common informer, for saying mass. The penal statutes which had disgraced the reign of king William, were still in force, and the judge had no alternative but to obey them: but, with very justifiable latitude of interpretation, he contrived to reconcile the performance of this duty with strict adherence to his own principle of troubling no man for conscience' sake, by explaining to the jury, that the reasons of policy which produced the acts in question had ceased to exist; that the pope no longer possessed the power he then had, or was supposed to have; that the influence of the jesuits had decreased still more; and that even during the reign of William the Third, when the penal laws were enacted, the legislature had no intention of putting them in force, unless some urgent necessity might call for the execution of them. This charge to the jury is printed at length, from the notes of a short-hand writer, in Barnard's Life of Dr Challoner. Another case, which occurred not long before that of Webb (1767), furnished him with an occasion of upholding the same great principles of religious liberty in the House of Lords. This was the case of Evans, a dissenter, who had been called upon to serve the office of sheriff in the city of London, and had refused to do so, because he could not conscientiously submit to the religious test required by the corporation. For this refusal, he was subjected, as a matter of course, to the usual fine, which, however, he determined not to pay. From the decision of the Chamberlain's court, he appealed to the court of Hustings, and, finding no redress there, he carried his cause before the Delegates, who decided in his favor. A writ of error was afterwards brought in the House of Lords, and it was then that Lord Mansfield had an opportunity of expressing his sentiments on the particular question before the House, and generally on the broad principles of toleration, by which he contended that the decision of it ought to be governed. The masterly speech he delivered has fortunately been preserved to us in a much more perfect state than any other of his parliamentary discourses. Dr Furneaux, a man of much reputation among the dissenters, was present throughout the whole discussion, and took copious notes of all that passed: the draft of Lord Mansfield's speech he submitted to the orator himself for revisal; and his Lordship, after correcting and retouching it, authorised him to publish it as an authentic report.

To be continued.

## RECENT AMERICAN DECISIONS.

### TROVER.

1. *Trover* will not lie against a *common carrier* for not delivering goods entrusted to him for transportation, if the goods are *not* in his possession at the time of the demand and have either been lost or stolen. The action should be *case* and not trover. *Packard vs. Getman*, 4 Wend. 613.

2. If, however, they be in his *possession*, or if he has *delivered* them to a third person, though by mistake, trover lies. *Ib.*

### TRUST.

*Cestuis que trust* who have paid the consideration of lands conveyed, may claim the benefit of a resulting trust, and will be considered as holding the legal estate so far as to enable them to defend or maintain an action of ejectment for lands thus held. *North Hempstead vs. Hempstead*, 2 Wend. 109.

### VARIANCE.

1. In an action of debt, on recognizance of bail, a variance of *six cents* in the amount of the judgment against the principal, between the declaration and the record produced, is fatal on a plea of *nul tiel record*. *Bibbins vs. Noxon*, 4 Wend. 207.

2. A variance in the amount of recovery between an execution and the judgment on which it issues, will not affect the sale, the execution being amendable as well after, as before the sale. *Jackson vs. Anderson*, 4 Wend. 474.

### VENDOR AND VENDEE.

1. A *bona fide* vendor, believing he has title, covenanting to convey land, and discovering, before any part of the consideration money is paid, a defect in his title, is not liable to damages for refusing to convey. If, however, he acts *mala fide*, and refuses to convey because the property has increased in value, and with a view of putting the enhanced value into his own pocket, he is liable to an action for damages. *Baldwin vs. Munn*, 2 Wend. 399.

2. A purchaser for a valuable consideration of chattels levied upon by an execution, and suffered to remain in the possession of the defendant under orders from the plaintiff to the sheriff to suspend proceedings until further direction, acquires title to the same, and may maintain *trespass* against the sheriff for dispossessing him of the property. *Hicox vs. Coates*, 2 Wend. 419.

3. A person entering into the possession of wild, uncultivated land, under a contract of sale, giving him a right of *entry* and *occupancy*, and reserving to the landlord the land as security until the payment of the consideration money by withholding the deed has a right to enter and enjoy the land for *agricultural* purposes. *Moores vs. Wait*, 3 Wend. 104.

4. If such person cuts timber for any purpose other than the cultivation, improvement and enjoyment of the land as a farm, the timber thus separated from the freehold becomes the personal property of the owner of the inheritance, who may maintain an action of *trover* for it against any one in possession, though a *bona fide* purchaser under the occupant. *Ib.*

### VERDICT.

1. A verdict will not be set aside for irregularity, where the jury have separated after agreeing to a sealed verdict, and on coming into court, one of the jurors dissents to it, who subsequently, on the jury being sent out again agrees to the verdict as originally rendered. *Douglas vs. Tousey*, 2 Wend. 352.

2. Where a judge directs a jury to bring in a sealed verdict, and gives them permission to separate after agreeing on the same, if no objection is made by the parties to such direction, they will be deemed to have assented to it. *Ib.*

### WITNESS.

1. Where a person, who is directly interested in favor of the plaintiff in a cause, is called by the defendant to prove a particular fact, and is sworn as a witness, the plaintiff has a right to ex-

amine him generally as to the merits of the cause. *Varick vs. Jackson*, 2 Wend. 166.

2. A plaintiff who has called and had the benefit of the testimony of a witness, cannot afterwards object to him on the ground of interest; and the witness having been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but may examine as to any matter embraced in the issue. *Fulton Bank vs. Stafford*, 2 Wend. 483.

3. A release by one to the other of two parties jointly liable to the payment of a sum of money, and in a case where contribution might be enforced by one against the other, renders the party released a competent witness for the releasor in a suit against him alone by the creditor, although without such release the witness would be directly interested in the event of the suit. *Bagley vs. Osborn*, 2 Wend. 527.

4. Evidence that a witness has been indicted for perjury and forgery, he not having been tried and convicted, is inadmissible to impeach his credibility. *Jackson vs. Osborn*, 2 Wend. 555.

5. It is no objection to the competency of a witness in an action by a moneyed institution that a few days before the trial he had sold out his stock, although he stated that he supposed he could purchase it back if he chose; he testifying the transfer by him was without any agreement, either express or implied, that the stock should be re-conveyed. *Utica Ins. Co. vs. Cadwell*, 3 Wend. 296.

6. A *co-obligor* not sued is a competent witness to prove the terms and conditions on which a *joint* and *several* bond has been executed, where the suit is commenced against only some of the obligors. *Lovett vs. Adams*, 3 Wend. 380.

7. A person having no *fixed legal interest* in the event of a cause, is a competent witness, although he declares himself *bound in honor* to share in the loss which may be incurred by the party calling him. *Moore vs. Hitchcock*, 4 Wend. 292.

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## LAW OF PARTNERSHIP.

Under this branch of our subject it is proper to consider *when*, at what *moment*, a partnership is to be regarded as established for the benefit of third persons. The principle which rules this point is, that persons cannot be jointly liable upon a contract as partners, unless their interest was joint *at the time* when the contract is made. A contract is made between two individuals: a third person afterwards takes from one of these individuals an interest in that contract: such third person will not be liable to the other contracting party, whatever his arrangements may be with him under whom he takes the interest. Thus an individual purchased goods on credit, to be shipped to a foreign port: he then sold a share in the adventure to a third person: the seller of the goods not being paid, sued the individual and this third person, under the belief that he had by partaking in the adventure, become a partner in the original contract: but the seller failed in the attempt to recover from the third person. His contract was with the original purchaser, who then stood alone: the contract was completed with him; it could not by any subsequent act to which he was not a party, be altered either to his disadvantage or in his favor. The partnership in the adventure did not commence until after he had sold his goods, and he was consequently held to have no claim upon the third person. But* for all debts incurred in the prosecution of that adventure, the third person would however, be undoubtedly liable; for from the moment of his purchase of an interest in the concern, he became a partner. So too, if several persons agree to form a partnership, and that each shall contribute a certain share of the capital, and any of the persons borrow or purchase the share, which he afterwards brings into the common stock, the liability to the lender or vender is not joint, but personal. So if a contract be made by one person for the purchase of goods and a subcontract be made by him with others for taking a particular share of them, these subcontractors do not become liable with him to the seller. There is here no community of profit; each person receives his own share, and enjoys his own profit, or sustain his own loss: nor was there a joint interest in the goods.

The preceding are some of the modes in which this peculiar association may be formed.

It is important to know, when it is formed, in what manner, and to what extent, one partner may influence the fortunes and bind the property and fate of his copartners. The general and broad rule upon this subject is, that partners are bound universally by the acts of each other, done in the course of the partnership business. Each partner may so contract as to bind all the others; all of course, are liable for the contracts of any and each of the association. The most unbounded confidence, therefore, is the corner stone of the edifice; the superstructure can be preserved only by untainted fidelity and truth.

The most usual form in which engagements are created binding the firm, is that of negotiable paper. This, however, is only an instance. Every contract, every act done, by one partner in or connected with a transaction relating to the partnership, binds all the others. Thus a partner travelling on the business of the firm had occasion to borrow money to meet his expenses: an action was brought against the house to recover it back; the defence relied upon was, that the money was lent to one of the house individually; but a recovery took place upon the principles just stated: and it matters not if the act done be in direct opposition to the express provisions of the articles of partnership. If it be one which apparently is connected with the partnership, and these provisions are unknown to the person with whom the contract is made, his claim under it will be valid against all.

Over the partnership stock each partner may exercise absolute dominion, and dispose of it at his will; a sale made by one is the sale of all, and transfers the property of all: he is regarded as the authorized agent of the others. In the same manner, he may purchase in the name of the firm, and all will be held liable to make payment. In selling or in purchasing, it is of no importance that his objects are fraudulent: that the proceeds in the one case and the goods in the other do not come into the partnership stock. Provided the person with whom he deals is not a party to the fraud, and has no knowledge of it direct, or indirect, the transaction will bind his partners. And this power of disposal seems to be without limit; it may extend to the whole of the joint stock, if the circumstances are not of such a character as to beget suspicion in the mind of a man of ordinary intelligence. The contracting party in general has a right to suppose that the partner is acting with good conscience, and fairly exercising the power inherent in him as a member of the firm. It has, however, been doubted whether a guarantee of the debt of a third person by one of a firm shall bind his co-partners, unless a similar course of dealing had previously taken place from which an authority might be implied. But if this guarantee relates to business transacted by the firm itself, it will bind all. It would be in vain to attempt an enumeration of the various engagements, contracts and arrangements which come under the principle we are examining; they are as various as are the operations of commerce itself, as changeable as the dispositions of the votaries of commerce.

There is one class, however, which cannot be passed without further notice; because the facility with which the engagement is formed, and the extent to which it may be carried, gives it a character of the first importance. It will be perceived that negotiable paper is the class here referred to. In an instant the pen of an imprudent or an unfaithful partner may distil a drop as fatal to the prosperity of his associates, as deadly to their commercial as would be a drop of the prussic acid to their physical existence. A promissory note issued by one partner in the name of the firm, a bill of exchange drawn, or accepted in the same manner, creates an obligation imperative on them all, from which there is no release, no escape, but payment, or protest. It has this effect in the hands of the original holder, if it is created in a transaction relating to the partnership business; and in the hands of a third person to whom it has been transferred for value, it will have this effect, whatever may have been its origin, however fraudulent its concoction, if he has received it without information of the fraud, or just cause to suspect it. It is necessary to the existence of partnership business that partnership paper should carry its own sanction with it; and its credit be unimpeachable in the hands of those who hold it in good faith and upon valuable consideration; and in such hands its demands cannot be refused. But in the hands of the original holder it is liable to resistance and refusal, if he has unduly or unfairly become its possessor. Thus if an individual partner being indebted, should, with the knowledge of his creditor create paper under the name of the partnership, and deliver it in payment, the creditor could not recover upon it, it would be a gross misapplication of the partnership name of which the creditor who permitted himself to be a party to the act could not avail himself: but if he should transfer it to a third person, it would pass into the hands of that third person cleansed of its impurity, and relieved from the stain of fraud. Or if the creditor of the individual partner should receive from him a partnership security without knowledge that it had been manufactured for the occasion, and without reason to suspect that it was not fairly the property of his debtor, he would be entitled to demand and receive its amount from each and all the firm; he would be justified in believing that the partnership security had become fairly the property of the individual partner, and as a consequence, that his transfer would convey a title to whomsoever it might be made. Having once *fairly* received from a partner the partnership paper, the holder's title becomes by that act perfect and complete; any subsequent discovery by him, or communication to him that the transaction was fraudulent on the part of the partner, will not deteriorate the

* Young v. Hunter, 4 Taunton, 582.

value of the security in his hands, or render his remedy upon it less efficient.

The power which one partner thus possesses to influence the fate and dispose of the fortunes of his associates, cannot be controlled by any agreement between themselves; their articles of copartnership may contain provisions intended to guard against the danger, carefully worded, expressed in the clearest and strongest terms which the conveyancer's art may supply to him. But to all this the world are strangers; with the private arrangements of the partners they are unconnected. In *their* course they are guided by the beacon erected, and the chart held out by the partners themselves: that beacon directs them to the fortunes of the firm, and that chart points out the individual members as the channels of communication. When the association is formed, the individuals who compose it proclaim their unbounded confidence in each other; they declare to the world, these are the men upon whose integrity we rely as upon a rock; winds cannot move, nor waves shake it; and the principles which declare they must submit to the results which flow from these their own acts, need not be looked for in the books of the law; they are found deeply engraven on the human heart.

There are, however, limits to the power of the partner, prescribed by that same good faith which compels submission to all occurrences within the circle of these limits.

The declaration to the world is, we repose confidence without bounds in all matters connected with partnership business; in all that is necessary to its successful prosecution, or connected naturally with its progress. Beyond that the pledge of faith does not go, and shall not bind. Hence it is that a partnership in one particular transaction will not authorize the annexation of the names of the partners to paper, or to contracts unconnected with that transaction; and that the holder of such paper cannot recover upon it. He has not been beguiled by false lights, he had not been misled by the declaration of a general partnership; he takes at his own risk, and and he must abide the loss. Hence also the general rule, that one partner cannot bind another by deed: commercial operations do not require the introvention of instruments of so solemn and technical a character. The spirit of commerce is volatile; its vitality is in frequent and rapid exchanges; its payments are made in the transfer of credits, or delivery of goods; the power to execute deeds is not essential to its operations; it is not, therefore, a power incident to, or growing out of a contract of partnership; and does not, therefore, follow the person of a partner. It is obvious that if it did, it would exceed those authorities which have been already touched upon. They extend no farther than to the disposal of partnership goods, part of the joint stock, and to the creation of liabilities which may affect the whole fortunes of the partners, real and personal, by their consequences; but not to the creation of direct liens upon the property of the individual partners, which might be the result of a power to bind by deed. The term 'deed' must not, however, be understood to mean only and merely a conveyance of real estate; its signification is much more comprehensive, and includes all instruments under seal; assignments, covenants, agreements, bonds. The partner cannot by an *act under seal* bind his copartners, whether he put that seal opposite to their names signed by himself, to the name of the firm written by himself, or to his own name, for himself and on behalf of his partners: a transfer by such an instrument of the personal property of the firm would, therefore, be of no avail, although that very property might be transferred by the same partner without seal. A *bond* so executed, even for a partnership debt, would probably be of no avail, although the same partner might give an effectual security by a bill of exchange, or promissory note. It may, perhaps, be difficult to give a reason entirely satisfactory for the limit, it would in some degree be merely technical, and not within the scope of a familiar essay. But it is apparent without referring to technicalities, that the power being permitted would lead to consequences difficult to be foreseen, and not necessary to the conduct of commercial affairs. It is necessary, therefore, at all times to uphold and assert the principle, just as the Hollander would resist the first and apparrently innocent influx of the gentle stream, which if unopposed would gradually undermine and sweep away the mounds and barriers which defend him from the raging ocean. But the other partners may specially authorize such an act, or they may stand by and authorize it, or subsequently adopt it; and in those cases they will be bound by the act; and the partner who executes it cannot be permitted, so far as it affects his interests, to deny its validity. There is one exception to this rule, for the convenience of commerce: a partner may release a debt—a release is a sealed instrument —and this release will be conclusive on the whole firm, if it be without fraud. In practice it is often given under assignments made for the benefit of creditors.

In another particular, modern decisions have restrained the power of a partner. It was long the opinion that even after the dissolution of the firm the declarations and acknowledgments of any one of its members in relation to its former transactions would be conclusive against the others; and claims against the partnership have been revived by such admissions after they had been permitted to sleep during a length of time, which would effectually bar a recovery. It was a dangerous power; it protracted the period of rest to an indefinite time: ancient transactions were resuscitated from the tomb of oblivion to haunt and harass the perplexed and wearied merchant: the hope of repose became a hope deferred, and made the heart sick. A better and a sounder doctrine now prevails; acknowledgments after a partnership has ceased, no longer bind the interests of any but those who make them. The statute of limitations is restored to its legitimate rights, and is once more a harbinger of peace of rest.

We shall now offer a few observations upon the manner in which the association we have been considering may be dissolved.

Whether the partnership be for a limited or an unlimited period of time, it is always dissolved by the inexorable destroyer of all human ties—death. The representatives of the deceased partner do not occupy his place, and succeed to his rights; the association is broken up and ended; and it only remains to wind up the concerns and divide the fruits of past transactions: yet by the original articles of agreement the partnership *may* be made to continue, and the rights and interests of a deceased partner to pass to such persons as in that agreement may be designated: and in England, the great commercial centre, such dispositions are frequent, and the duration of the partnership is sometimes made to exceed by many years the ordinary duration of human life. This, however, must be always matter of special agreement: if the articles of co-partnership are silent, the blow which prostrates the partner destroys the bond of union.

If the association is originally formed without any limit of time, it may be dissolved by the mutual agreement of the partners: and if the original articles were under seal, the dissolution should also be under seal: or it may be dissolved at the mere will of either party, at a moment's notice. He may select his own time, and put an end to the association: and although in particular cases this may operate hardly, the rule is well settled. The security that the right will not be abused is found in the operations of self interest, which will generally be sufficient to prevent such an act from being done at an unfortunate or improper period. It is often necessary to exercise this right, to prevent ruin from the conduct of a faithless partner: and in such cases it should be resorted to unhesitatingly and boldly.

If the articles designate a time, the copartnership will of course expire at that time, and cannot sooner be defeated by the act of one partner; and if they point out a *manner*, that manner must be carefully observed and pursued, or the party dissolving will involve himself in the consequences of a breach of contract.

Although the articles of partnership may designate the period of its duration, or point out a special manner of dissolution, yet extreme misconduct on the part of a partner, gross abuse of faith among the parties, or the existence of circumstances rendering it impossible to conduct the business, would induce a court of chancery to dissolve the tie: and *here* where we have no such courts, it is believed would authorize a partner to declare a dissolution, and render that declaration effectual.

The same effect is produced by insolvency, and by confirmed lunacy or insanity; though in the latter case some doubt may be entertained as to the proper course to be pursued.

The partnership being dissolved in any of the preceding modes, the duty arises of winding up its concerns and disposing of its effects; and for these purposes in a degree the association continues, and the power of the partners remains over the joint property for all purposes connected with this one object. The joint stock, or partnership effects, must be applied to payment of partnership debts; and either partner may insist upon the whole being sold and converted into money.

If, instead of a general dissolution, one partner retires, he has the same right; but usually, he conveys his interest in the firm, and takes an indemnity against its debts, if he has confidence in those with whom he deals.

It is of primary importance upon the dissolution of a firm, or when retiring from it, to give full and unequivocal notice of that fact to all the world. And in this country it is prudent to give special notice do all those persons and institutions with which the firm has been in the habit of transacting business. Unless this be done, *new* liabilities may be created, and the retiring partner, or all the partners when the dissolntion is general, be involved in engagements created in the name of the firm with persons ignorant of the dissolution.

We are afraid to proceed further with those branches of the subject connected with the doctrine of dissolution: the manner, the consequences, the duties resulting from it, the division of the

property, the continuance of liability, are all topics of importance and of interest; but we feel that we have reached the limits of a familiar essay, and the bounds of our readers' patience. The aim has been merely to open the portals of the edifice; none but the midnight student or experienced merchant can hope to explore its secret places.—*Journal of Law.*

THE JURISPRUDENT.

BOSTON, SATURDAY, APRIL 30, 1831.

*Hayes' popular View of the Law of Real property.*

(Concluded.)

'The mischiefs of letting in constructive notice have been so strongly felt, that some Equity Judges have held it excluded under the present Registry Acts. But no provision which can be made for denying effect to constructive notice will be effectual, because the distinction between actual and constructive notice cannot be defined, and must, therefore, often fail to be justly drawn either by a Court or a Jury; and cases of individual hardships might lead to a course of decisions which would encroach on the spirit of the act, and impair its benefits. Among other cases, a great difficulty would arise as to notice to the agent. Frequently the principal, being out of the way, could receive notice only though his agent, and under some circumstances such notice ought to bind him in the fullest manner. Under other circumstances, there would be great injustice in affecting the principal with notice given to the agent. There would perhaps be much liability to mistake on the part of Courts and Juries in individual cases under this head. Between actual notice and the highest degree of constructive notice, there is no substantial difference; indeed the latter, as resting oftener on written evidence is frequently more clear and satisfactory; and the deference to moral feeling, which affords perhaps the strongest reasons for giving effect to actual notice, would be violated in no less degree by denying the same effect to a strong and clear case of constructive notice. The line between such cases, and cases more slight and doubtful, can be drawn with no certainty; what should excite suspicion in a reasonable mind, may be thought equivalent to information; no one can predict how far the want of inquiry into circumstances, which inquiry would have led to actual notice, may be held fraudulent, or how far a presumption of actual notice may be inferred either by a Judge or a Jury from the knowledge of circumstances.

'The doctrine of notice, which frequently depends upon presumption, arising from evidence liable to suspicion, leaves a wide opening for conjecture, and may be a most fruitful source of litigation. Although the cases of notice which have arisen under the Local Register Acts in this country have not been numerous, questions respecting the same doctrine have frequently been discussed in the different Courts in America.

'The rule of Equity, which gives priority to an unregistered deed on the ground of notice, has, since it was settled, been regarded with dissatisfaction by several of the Equity judges. Lord *Hardwicke* said, 'the meaning of it (the Register Act) was to prevent parol proofs of notice or no notice.' Lord *Alvanley* expressed his regret that the statute had been broken in upon by parol evidence; and Sir *William Grant* said, that 'limited as the law on the subject is (to actual notice) the security derived from the register is considerably lessened, as no one can with certainly tell what circumstances may truly or falsely be given in evidence, or what judgment a Court will form as to the effect of the evidence in any particular case.' The inconvenience of giving effect to notice has led to the adoption of a contrary rule in other countries. When the Chancellor *D'Aguesseau*, among other questions which he proposed to all the Parliaments of France, asked whether a creditor or purchaser, having notice of the substitution before his contract or purchase, should be admitted to plead the want of registration—the answer returned by all of them except one was, that to 'admit the contrary doctrine would make it always open to argument, whether a purchaser or creditor had or had not notice; and that this would lead to endless uncertainty, confusion, and perjury.' And it is provided by the Code Napoleon, t. 3 tit. 2, c. 6, art. 1071—'*Le defaut de transcription ne pourra être supplée, ni regardé comme couvert par la connoissance que les créanciers, ou les tiers acquéreurs, pourraient avoir eu de la disposition par d'autres voies que celle de la transcription.*' The same rigorous adherence to the strict law of registration has prevailed in Scotland, without any inconvenience. Both our own and other laws afford strong examples of enforcing rigid rules of law against just claimants who have been wanting in vigilance. A stronger case could not be cited than that of our Statute of Frauds which annuls, even as between the parties, all contracts relating to land, unless evidenced by writing. This statute has often the most rigorous operation against a careless, in favor of an unjust person, and sanctions the violation of the most solemn engagements, when they cannot be proved otherwise than by parol evidence. Yet its effects are acknowledged to have been highly beneficial; it secures an extensive public good, of infinitely greater importance than the few individual interests which are sacrificed by its provisions; and some important exceptions to it, which a regard to moral justice in the individual case, or compassion for the suffering party, has induced our Courts of Equity to establish, are now generally considered to be unwise.

'The statute 27th Elizabeth, against fraudulent conveyances, takes effect both at Law and in Equity, even when a purchaser has the fullest knowledge of a settlement, which is defeated by his conveyance; and Courts of Equity have not attempted, on the ground of notice, to interfere with the acts for the registry of life annuities or shipping.

'The exclusion of interference on the ground of notice will very rarely prevent the jurisdiction of a Court of Equity, in case of actual fraud. In all cases in which priority may be given to a registered over an unregistered deed by means of fraud, although notice must be one of the ingredients to prove the existence of the fraud, there will usually be other circumstances by which, independently of the notice, a fraudulent intention will be manifested. Any conspiracy or improper conduct, for preventing or impeding the registration of one deed in order to give effect to another, may always be avoided as fraudulent; and, in other cases, fraud will be shewn by inadequacy of price, or the circumstances under which the subsequent deed was executed. Where a party suffers from his own negligence, or from not requiring a *caveat*, which would have protected him against any superior activity in another, he will have relied upon confidence in the parties instead of the protection afforded by the law, and will have no just cause of complaint.

'It may be further urged, that little apprehension is to be entertained of failure in the registration of an instrument; and that the cases, where this failure and the existence of a fraudulent intention to take advantage of it by the vendor or mortgagor concur, must be so rare, that they may safely be disregarded. It is only in such cases that the proposed rule of letting in notice would be beneficial to the purchaser or mortgagee, and then only in case he should succeed in establishing, by a suit in Equity or an action at Law, notice against the subsequent purchaser; and that it appears a conclusive argument, that in a prospective law, made for the security of all future purchasers, it would be unwise to introduce a rule necessarily detracting from the security of every purchaser, for the purpose of giving a very uncertain chance to individuals, in cases of rare occurrence, to repair the effects of their own misfortune or carelessness.

'If all persons about to become purchasers or mortgagees could be consulted on the subject, little doubt can be entertained that the great majority would prefer the rule, by which their own diligence would insure their perfect security, to one by which they might have a chance given them of obviating the consequences of failure, but upon the terms of being exposed to the chance of having the consequences of another person's failure fixed upon them by evidence which they might not be able to rebut.

'Upon the whole, the question of giving or denying effect to actual notice against the register, appears to be a question of balance of evils; it is therefore material to consider, how far and in what cases evil is likely to arise from the rule denying effect to notice, and whether sufficient remedies consistently with the rule can be provided.'

## JURIDICAL LETTERS.

*Addressed to the Right Hon. Sir Robert Peel, in reference to the present crisis of Law Reform. Letters* II. III. By EUNOMUS.

On the appearance of the first of these letters, we warmly recommended the series as likely to afford much interesting information of a kind particularly required. The writer has since amply justified the confidence we placed in him by the general conduct of his work; but more particularly so by the concluding portion of his third epistle. This really comprises a very valuable discovery—discovery, we mean, so far as England is concerned—which, with as much brevity as possible, we shall endeavor to make generally known. We begin by an explanation rather more formal than that given by Juridicus, who introduces the subject by a recapitulation of cases from the English reports.

'Independently of the difficulties which every law may present, as expressing obscurely or imperfectly the nature of the events or circumstances which are to create the duties imposed by it, or the extent of such duties, new laws present, as such,—that is to say by the mere circumstance of their changing the established law,—a peculiar class of difficulties. The question in short, is, whether from the moment the new law is held to be known, the anterior law, (which it modifies,) loses all its power, so that each person's rights

and duties may be thenceforward regulated exclusively by the new law, even should they have relation to events which took place under the old law. To resolve this question, it is to be remarked, in the first place, that every new law encounters, at its birth, expectancies formed conformably to the ancient law.'

Thus we expect to exercise all rights whatever, which the law or private convention has bestowed on us: the minor who knows that at a certain age he shall attain his majority, expects to have at this epoch the free administration of his property; the individual whom the law has once recognised as filling any social relation, has conceived the hope of being always considered as invested with the same privileges in respect of it, and of being called upon for no additional proof in support of them; subject only to be deprived of them by the means, or on the happening of the contingencies, pointed out by the law under which they were required. He, again, who has seen an event come to pass, from which, according to the dispositions of the law then in force, some beneficial right should result to him, has formed an expectation that the event will have the effect such law has assigned to it. 'Whenever,' adds the writer from whom we translate this explanation, 'an expectancy has been thus established in conformity to the laws, whether it be in accordance with the formal dispositions or the mere silence of the legislator, this expectancy merits attention, and cannot be justly set aside.'* Accordingly, these expectancies, under the name of *attentes*, have long occupied the attention of the continental jurists: from the code Napoleon in particular, innumerable cases of the description arose, and took both judges and legislators by surprise. 'The importance of the questions was only exceeded by their difficulty. It was soon seen that if *all* the *expectations*, all the *hopes* which had come into existence under the old laws were to be respected, a new law could only govern the individuals who came into life, or at least arrived at the age to form such expectations or hopes, subsequently to it. But how were they to distinguish between the expectations and the hopes that were to be judicially respected, and those which were not? How to draw the line between those results of contracts and events antecedent to the new laws which were to be sacred, and those which were to be sacrificed?'†

The Roman law was first resorted to, but its foundations being laid in times when innovations in law were rare, was resorted to in vain. The French lawyers were reduced to depend upon their own invention for remedies, which they have ever since been laboring to perfect. M. Chabot de l'Allier led the van with two quarto volumes, entitled, *Questions Transitoires sur le Code Napoleon.* Then came Professor Blondeau with the Essay before-mentioned, published originally in the Bibliothéque du Barreau. These were followed by MM. Meyer and Merlin; and the subject has also given rise to much learned disquisition in Germany. It were but natural to suppose that some rumor of these things might have reached England, despite her insular situation; or, on entering on our present wide and long career of reform, we might even have instituted some trifling inquiry as to the results of innovating on a comprehensive scale abroad. That nothing of the sort has been done, it is quite unnecessary to say; that it was the duty of those on whom the revisal of our system has devolved,—that we have already suffered greatly, and are likely to suffer more, from their ignorance, we shall now demonstrate by some examples from Juridicus:

'In the session, Sir, of 1825, was passed one of the most important and extensive pieces of civil legislation which English lawyers have yet produced. I speak of the new Bankrupt Act. An unusual amount of skill and labor was bestowed upon that work. The Act may perhaps be said, in a general sense, to have met all the difficulties but one—that structural difficulty which was precisely the most appalling, and the most important; but which, if we may pronounce from the contents of the Act itself, never presented itself to the minds of lawyers either in or out of the House: the discovery of principles or propositions which should determine for a large body of new rules of civil law their retrospective or non-retrospective application to transactions, or the results of transactions, which originated under the old law. What, Sir, has been the consequence? Why that which every continental jurist would have foreseen from the moment the act was before the public. That it has been necessary to obtain a judicial decision upon almost every case which has occurred, in which the provisions of the new Act have come in contact with the combinations produced under the old law, to determine the applicability or non-applicability of the former. And how, Sir, have English judges great and talented as many of them are, dealt with this difficulty? Were they prepared with any scientific principles for resolving it? Sir, I hardly dare betray to the lawyers of the Continent, to M. Merlin, M. Chapot, M. Meyer, and M. Blondeau, what they have said and done. I shrink with English pride from this exposure of the nakedness of the land. But our Term Reports, Sir, have already begun to travel to Paris, and the truth will out. Let us profit then by the knowledge of it.

'In Bell v. Bilton (4 Bing. 615.) the court of Common Pleas held that where the words were capable of a retrospective construction, they should be so construed, unless the contrary were expressed.

'In ex parte Grun ly, (3 Russ. 423. n.) the Vice Chancellor thought it was going too far, to say that every section in the new Bankrupt Act was to have a retrospective effect, except such sections as were expressed in words positively confining them to a prospective operation.

'In Churchill v. Crease (5 Bing. 177.) the Court of Common Pleas held that the 82d section of the Act was retrospective, because it contains the expressions "payments made, or which hereafter shall be made."

'In Terrington v. Hargreaves (5 Bing. 492.) Chief Justice Best agreed that the provisions of a statute cannot be retrospective unless declared to be so by express words.

To be concluded.

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*Plan for construction of Statutes.*—The Bill to prevent the misconstruction of Statute Law by the Judges of his majesty's Court of King's Bench, has been read a first time, and ordered for a second reading. The object of the bill is to confine the Judges within the proper sphere of their duty. As things are now, the Law is exactly what any two Judges may fancy it to be; so that, in fact, they are the law *makers*, and every new Judge may make an old Statute a new Law. This Bill is meant to apply a remedy, and provide that the Judges sitting in bank on a reserved point of law, shall not decide the case unless they be unanimous, and in case of a disagreement in opinion, the whole are to submit their opinions, and the authorities on which they are founded, in writing to the Governor, in order to their being laid before Parliament at the next ensuing session who are to settle the question by a declaratory act. Who so proper to explain the ambiguities of the Law as those who made it? It is hoped that when the Bill makes its appearance, it will excite the energies of acute reasoners to confirm or explode the principles it aims to establish—that the Legislature should be the only Law makers, and that any other power attempting to fill that office, however benevolent the intention, is an undue and insufferable assumption.—*Canada paper.*

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*Instructions to be given by the Court to a Jury.*—It is, doubtless, within the province of a Court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken in all such cases to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province, *per Mr J. Story, in M'Kanahan* v. *Universal Insurance Co.* 1 Peters' R. 182.

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APPOINTMENTS BY THE PRESIDENT.

*Baltimore*—Beale Rendall, McClintock Young, and Alexander Cheves. *Philadelphia*—Daniel H. Miller, James M. Brown, and Edward D. Ingraham. *New York*—Hector Crag, Charles G. Dewitt, and John W. Mulligan—to be Commissioners of Insolvency under the act of Congress of the last session for the relief of certain *insolvent debtors*, &c.

Thomas B. Monroe, of Ky. Attorney of the U. S. for the District of Kentucky, in the place of John Speed Smith, resigned.

Daniel Le Roy, District Attorney, Michigan.

Nathaniel S. Benton, Attorney, Northern District of N. Y. vice Samuel Beardsley, elected to Congress.

David E. Baker, of Il. District Attorney, State of Illinois vice Samuel McRoberts.

Thomas E. Burfoot, of Virginia District, Attorney, Eastern District of Virginia, Vice Robert Stannard, resigned.

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The Governor and Council have appointed Hon. Charles Jackson, Hon. Samuel Hubbard and John Brazier Davis, Esq. to be Commissioners 'to revise the existing Laws in relation to Debtor and Creditor, and to provide for the equal distribution of the estate of Insolvent Debtors,' agreeably to the provision of a Resolve of March 18, 1831.

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Judge Putman at Worcester in his charge to the Grand Jury in defining and explaining perjury is said to have remarked that perjury was the violation of an oath lawfully administered—and added, to constitute perjury, it is not necessary that the oath should have been lawfully administered, and not as is sometimes improperly done—unlawfully or extrajudically.

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* Essai sur ce qu'on appelle *Effet Rétroactif* des Lois. Par M. le Professeur Blondeau (Themis, Tome. viii. p. 289.), now said to be engaged on an elaborate treatise on the subject.

† Letter 3.

ESSAY ON JUNIUS. This day published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

These volumes, by the author of Peter Parley, will complete a series of Tales for Children, designed to interest them in History and Geography. Those previously published are Parley's Tales about America, Europe, Asia, Africa, and Sun, Moon, and Stars. April 9.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

Peter Parley's Tales about Europe.

Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰων. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. I. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

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Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

II. Economy of Athens. 1. Die Staatshaushaltung der Athener, vier Bücher. Von August Boeckh. Mit einundzwanzig Inschriften. 2. The Public Economy of the Athenians. Four books; by Augustus Boeckh.

IV. Character and Abuses of the Medical Profession. Rules and Regulations of the Boston Medical Association.

V. Waverly Novels. Parley's edition.

VI. British and American Shipping. 1. The Merchant, Ship-Owner, and Ship-Master's Import and Export Guide; by Charles Pope. 2. Speech of Right Honorable William Huskisson in the House of Commons.—May, 1827.

VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, MAY 7, 1831. NO. XLI.

## LORD MANSFIELD.

Continued.

In accordance with the principles of religious toleration, of which, both on the bench and in parliament, Lord Mansfield thus always professed himself the advocate, he was, of course, among the supporters of the bill passed in 18 Geo. 3. for the removal of a portion of the disabilities imposed on the catholics by the too famous 'act for preventing the growth of popery,' 11 & 12 W. 3. He was not immediately concerned in bringing forward the bill, which originated in the commons; and as it met with very little opposition in either house, he had no opportunity, on this occasion, of signalizing his zeal for the cause of religious liberty. But his sentiments on the subject had long been well known; and he was, accordingly, one of the many marked out for the vengeance of the 'no popery' mob. Friday, the 2nd of June, 1780, witnessed the beginning of those disgraceful outrages which, for a whole week, filled the inhabitants of London with consternation and dismay. On that day, the wretched leader of the faction, Lord George Gordon, proceeded to the House of Commons for the purpose of petitioning, as he chose to call it, for the repeal of the obnoxious act. In pursuance of his real design, which was to extort by intimidation, what he knew there was little chance of obtaining by legal means, he had previously given out that he would not proceed thither unless he found full twenty thousand persons assembled to accompany him. A greater number had congregated together; and the government, though fully warned, having neglected to take reasonable precaution against the disturbances that could not but be anticipated, the fury of lawless multitudes was checked with nothing that deserved the name of opposition. The obnoxious members of either house met with little mercy at their hands. As they drove down to Westminster, many of them were dragged out of their carriages, pelted, hustled, and otherwise maltreated. The equipage of Lord Mansfield's nephew, Lord Stormont, who was at that time secretary of state, was literally knocked to pieces by the mob, and he remained nearly half an hour in their power, when they were prevailed upon to let him retire. The windows of Lord Mansfield's own carriage were smashed with stones, the pannels stove in, and he himself had great difficulty in making his way into the lobby of the House of Lords, before they could proceed to wreak their utmost rage on his person. The Chancellor, Lord Thurlow, not being present, the duties of Speaker devolved upon him; and he remained in his place while the rest of the peers were contriving, each for himself, to make good their departure under the cover of darkness and disguises. It certainly redounds little to the credit of these noble lords that their venerable president, then in his seventysixth year, should have been thus at length left entirely alone and without any protection, but such as his own servants, or the officers of the house, could afford him. The dangers that threatened him on his return, he luckily contrived to evade. But he was not long left unmolested.

After four whole days more of pillage, havoc, and devastation, on the evening of the following Tuesday (June 7th) an immense body of the mob took their way towards his house in Bloomsbury Square, with the avowed design of burning it to the ground. This intention had been made so public that Lord Mansfield had time to take measures for thwarting the accomplishment of it; and had he possessed that firmness of character which nature had unfortunately denied him, there is little doubt but he might have succeeded in repelling the meditated attack, or even in preventing it from being attempted. At least his neighbor, Lord Thurlow, who was nearly as much the object of popular resentment as himself, contrived effectually to intimidate the rioters by making a stout show of resistance at his house in Great Ormond Street, though provided with no greater force than a sergeant's guard of soldiers. Lord Mansfield, in his dread of consequences, resolutely persisted in his refusal to post the military in the same manner. A detachment of the guards was sent for by Sir John Hawkins, who, with two other police magistrates, had hastened to the spot on the first intimation of the approaching danger; but no persuasion could induce Lord Mansfield to have them stationed beneath his own roof. By his desire they were marched to the vestry room of St George's church in Hart Street; and from that distance, had their numbers been trebled, there was little chance of their being able to make their way through the dense phalanx of the mob in time to afford any effectual resistance against an attack upon a house in Bloomsbury Square. They had not long been despatched to this post, when the shouts of the advancing multitude were heard. Many persons had previously assembled in the square to witness the spectacle of the threatened conflagration. The incendiaries did not keep them long waiting in expectation. The front entrance of the house was instantly forced, and Lord Mansfield and his lady had barely time to save themselves by a precipitate retreat through a back door, before the leaders of the mob were seen at the upper windows, tearing down and throwing below curtains, hangings, pictures, books, in short everything they could lay their hands on likely to serve as fuel for the burning. So intent were these ruffians on their work of destruction, that no time was lost in pillaging; and one of them, it is said, by way of setting an example against any such digressions from their main object, threw into the pile, which was already blazing underneath, a valuable piece of plate, and a large sum of money in gold. In a very short time the whole building was enveloped in flames; and as no attempt was or could be made to arrest their progress, long before morning nothing of it was left standing but the bare and blackened skeleton of the walls.

The loss thus sustained by Lord Mansfield, must have been very considerable, even leaving out of the calculation, all that to himself must have had a value entirely beyond any pecuniary estimate. The house itself, the furniture, the paintings, all were of a kind befitting the establishment of a wealthy English peer; and all this was destroyed. This, however, money might have replaced: but no sums would restore the cherished memorials of early friendship with the great and the illustrious,—the volumes inscribed to him by Pope or by Bolingbroke; the remarks noted down on the margin of others in the handwriting of the poet or the statesman; not the records of his own thoughts during the greater part of a life spent in constant intercourse and collision with the learned, the witty, and the wise.

'And Murray sighs o'er Pope and Swift,
And many a treasure more,
The well-judged purchase, and the gift,
That graced his letter'd store.

'Their pages mangled, burnt, and torn,
The loss was his alone;
But ages yet to come shall mourn
The burning of his own.'

*Lines written by Cowper on the burning of Lord Mansfield's Library.*

Independent of such precious relics as these, there are associations connected with the books of every man who is fond of literature, which make him look upon them with a feeling almost of affection. Surrounded by them, he feels himself in the presence of old friends; he recollects the date of his first acquaintance with each individual volume;—what motive first led him to make himself master of it;—what new train of thoughts or of emotions was awakened by the perusal of it; and merely by casting his eye along the backs of them as they stand ranged on the shelves, he can read the history of his own mind, and of his own actions which that mind has governed, perhaps, almost from the earliest infancy of his reason. We have no fear of subjecting ourselves to the ridicule of those who have experienced such feelings, and can appreciate the force, as well as the delicacy of such associations, when we say that no other than the very identical volumes that have first created them, can call them up again in the imagination with anything like the same vividness or reality. We may purchase the self-same works—better editions of them, in handsomer bindings; but the fine thread has been snapped; the charm is dissolved. This will doubtless appear very extravagant, and very absurd to those who consider books as nothing more than pretty furniture for the walls, and order them as they would hangings or papering—by the yard. To such persons we must despair of conveying any notion of the pang the destruction of his library must have inflicted on Lord Mansfield. 'I speak not from books,' he once said, in the house of Peers, after this event, 'for books I have none!' Those only who know what it is to feel a warm attachment, we had almost said friendship, for their books, can appreciate the full pathos of this simple sentence.

It was not till a week after the conflagration, that Lord Mansfield again appeared in his place in the King's Bench. A note in Douglas' Reports informs us, that a reverential silence, much more expressive than any set speech of condolence, could have been, was the greeting given him by the bar, on his first entry into court. This was on the 14th of June. In the course of the

following month, a vote of the House of Commons gave him an opportunity of showing that, however great his loss might be, he was above receiving any indemnification for it out of the public money.* And here we may remark, in further disproof of the insinuations we have already alluded to, as to his supporting the measures of government from corrupt or interested motives, that he never, during the whole course of his life, took advantage of his influence with ministers to make himself or any of his family or dependents a charge to the nation. The only person, as he himself once stated in the House of Lords, for whom he ever solicited the slightest provision out of the funds of the public, was the unfortunate Lady Jane Douglas, who had no claims to interest him in her behalf, but her distress. For her he obtained a pension of 150*l.*; and assuredly, if the admitted privilege of the crown to provide by such means against the utter decay and ruin of ancient families had never been exerted but in cases of such extreme urgency as this, the people of England would never have felt inclined to murmur as they now very naturally do, at the abuses of the pension-list. It may doubtless be said, that small praise is due to a man who, being himself in the possession of great wealth, chooses to refrain from quartering on the public purse, those he is bound, and is well able to provide for, himself. This is incontestably true. Such conduct is only entitled to the negative praise, that it is not unworthy. But we have only to cast our eyes around us, and we shall unfortunately be compelled to allow that it has also, if not the merit, at least the peculiarity, of being extremely rare. That it has not been at all more common among chancellors and chief justices, than with ministers, secretaries, and lords of the bedchamber, may be demonstrated by a very cursory inspection of the list of sinecure offices, wherein by no means a small or an unconspicuous space is occupied by the posterity of deceased judges, and the relatives or connexions of the living.

On Lord Camden's resignation in the beginning of 1770, the Great Seal had been again offered to Lord Mansfield, and again he had declined it. After the death of Charles Yorke, it was once more tendered to his acceptance, and it was only on his positive refusal that it was finally committed (January 23d, 1771,) to Lord Bathurst. A higher dignity in the peerage was also at his command; but having no children of his own, nor for some time, indeed, any prospect of male heirs in his family, he declined for himself the honors of a more elevated hereditary rank. The king had already conferred upon him the personal honor of creating him a knight of the Thistle. At length, however, on hearing that the lady of his nephew, Lord Stormont, was about to become a mother, he felt a very natural anxiety that his own should be taken as the first title in his family, and he accordingly expressed his desire to exchange his baron's coronet for an earldom. From his own account, given in a letter to Bishop Newton, the manner in which this dignity was conferred was such as to give him great pleasure. The patent of his creation bears date October 31st, 1776. He was therein designated as Earl Mansfield of Mansfield, in the county of Nottingham. The title was granted to himself and his heirs male, or in default of such to Louisa Viscountess Stormont, and her heirs by Lord Stormont. The patent was thus drawn out, because it was held at the time that an English peerage could not be limited even in remainder to one who was already a peer of Scotland. Some years afterward (1792,) when it has been decided that this could be done, a new patent was granted, in which he is styled Earl Mansfield of Caen Wood, in the county of Middlesex, with remainder to Viscount Stormont, and the heirs male of his body. The latter of these patents not having the effect of superseding the other, it happens that, at this time, a son of the then Lord Stormont bears the title of Earl Mansfield of Caen Wood, in the county of Middlesex, while the then Lady Stormont, who is still living, is, in her own right, Countess Mansfield of Mansfield, in the county of Nottingham.

Caen Wood, the place named in the latest patent, is a villa and small estate so called, in the neighborhood of Highgate. This, which had only been his occasional residence, before the destruction of his town mansion in Bloomsbury square, afterwards became his more constant abode. The death of his lady, which happened four years afterwards (1784), deprived him of an affectionate companion, with whom he had enjoyed nearly fortysix years of uninterrupted domestic happiness. The loss must been to him irreparable; but his friends and acquaintances found her place supplied, and the honors of his hospitable board equally well performed by his two nieces, who had, for some time before, been constant inmates of his house, and continued so as long as he lived. The same elegance and propriety for which his domestic establishment had always been remarkable, still continued to distinguish it. We are assured by some who have had good opportunity for observation, that in no situation did Lord Mansfield appear to greater advantage than at his own table. The dignified manner of the judge was there laid aside for the affability and the ease of the polished gentleman. Nor did he ever suffer the pride of genius, or of great acquirements, to seduce him into the habit of displaying his intellectual superiority in the moments of social intercourse. If, as Johnson said of his friend Burke, the man of genius could be detected even by an ostler to whom he might give directions about his horse, or by a stranger who might take refuge from a shower under the same gateway with him, we may suppose it is not very likely any one should pass several hours in the society of such a man as Lord Mansfield without making the same discovery. But there never was on his part any studied or voluntary exhibition of his powers. Indeed, he was generally averse from introducing any topic of conversation that might call for much exertion of thought. His public duties gave sufficient occupation to the severer faculties of his mind; and as (to make use of Coke's favorite phrase,) the bow cannot be kept always bent, he was glad to avail himself of opportunity to relax its tension.

An anecdote is related of him, which shows that, even much earlier in life, he not only enjoyed but felt the necessity of granting himself this indulgence, and which at the same time displays his character in a very favorable light. He had reason to feel himself under considerable obligation to Lord Foley, who, if report speaks true, had persuaded his family to let him make the law his profession, instead of the church, for which they had originally designed him; and had obviated all objections as to pecuniary matters, by volunteering to defray the additional expenses of his legal education out of his own purse. The debt of gratitude thus incurred by the young lawyer was never afterwards forgotten. When he had risen to eminence at the bar, he was in the constant habit of spending his Saturday afternoons and Sundays at the old nobleman's country mansion; and upon some of his acquaintance expressing their surprise that he should forego all the social pleasures at his command to pay his accustomed visit at so dull a house, he assured them that he thereby enjoyed the double gratification of giving pleasure to a tried friend, and of allowing his mind an interval of complete repose.

Probably many persons were in the habit of winding up to the highest pitch their expectations of the instruction they were to derive from the conversation of one, whose reputation for wisdom and eloquence ranked so deservedly high; and in that case it was not at all unlikely they should experience a feeling of disappointment when they found him merely bear his part, like an ordinary guest, in the familiar chit-chat of the dinner table. In the same manner, we have no doubt, many an idler who had consumed his morning in doing nothing, and would fain have babbled of books when he found himself, towards evening, in the same room with such a man as Gibbon, must have been surprised to see the philosophic historian sit down to the card-table, and bestow as much apparent attention upon the kings and the knaves in his hand, as he had been giving during the previous part of the day to the kings and the knaves who make a figure in the affairs of the lower empire. But we venture to say, any one who had known what it was to keep all the faculties of his mind for a long time together on the stretch, would be as little likely to participate in this astonishment or disappointment, as a sportsman to wonder at seeing a brother fox-hunter fast asleep in his chair after a hard run. Only the indolent or the unemployed are apt commit the common injustice (common as indolence and the want of occupation) of estimating the mental powers of a hard-working lawyer, or author, by such a display of them as he may choose to make in private society, when he is, perhaps, making an effort to keep them, as much as possible, in a state of inaction.

It is not every chief justice of the King's Bench, who has the same multiplicity of public duties to burthen his mind that fell to the share of Lord Mansfield. There has never been one, for example, among those who have had a seat in the house of peers, who took such a prominent part

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* The following is a copy of the letter sent by him to Mr Keene, the government surveyor, who had been directed to apply to him for an estimate of the amount of his loss:—

'21*st August*, 1780.

'Sir—I am extremely obliged to you for your attention in calling upon me before I went the circuit, and last Friday again since my return, and in now communicating to me by your letter of Saturday the unanimous vote of the house of Commons, and the reference of the lords of the treasury of the 18th July to your board, desiring me to enable you to comply with the order of the lords of the treasury; and so far as I am concerned, I return you my thanks for your great civility. Besides what is irreparable, my pecuniary loss is great. I apprehended no danger, and therefore took no precaution. But how great soever that loss may be, I think it does not become me to claim or expect reparation from the state. I have made up my mind to my misfortune as I ought, with this consolation, that it came from those whose object manifestly was general confusion and destruction at home, in addition to a dangerous and complicated war abroad. If I should lay before you any account or computation of the pecuniary damage I have sustained, it might seem a claim or expectation of being indemnified. Therefore you will have no further trouble on this subject from

'Your most obedient and humble servant,
MANSFIELD.'

in the debates; and the weight attached to his opinions on all questions of foreign as well as of domestic policy, entailed upon him the necessity of bestowing deep consideration, thought, and sometimes also research, before he uttered them. Then his duties as a privy councillor were not to be performed without much labor. For many years, government relied almost solely upon him for the decision of appeals from the colonies; and these were much more numerous at that time than they have been since the separation of America from the mother country. Perhaps it may be needless to add, that his attendance in court by no means constituted the whole of what he was called upon to do in his capacity of chief justice alone. Besides the customary attendance at chambers, many of the decisions pronounced by the bench required study that occasionally occupied the evenings not spent in attendance at the House of Lords. In a note to one of his fellow judges, at the time he was preparing his elaborate argument in the case of Taylor v. Horde, he gives an account of the time he chose for putting his materials together. 'I am very impatient,' he writes, 'to discharge myself entirely of it. While the company is at cards, I play my rubbers at this work, not the pleasantest in the world; but what must be done I love to do, and have it over.' Now when the mind is thus continually kept on active duty, occasional relaxation is as necessary to recruit its strength, as cessation from bodily toil to repair the animal forces. In both cases, too, repose is a positive enjoyment, and like most other enjoyments, is better appreciated in proportion as it is more seldom tasted. Another of his letters, giving an account of the zest with which he indulged in complete idleness, during a long vacation, he concludes by quoting the very just remark: 'Liber esse mihi non videtur qui non aliquando nihil agit.'

Perhaps it was partly in consequence of Lord Mansfield's general abstinence from any severe exertion of his mental faculties, except such as the duties of his station demanded, that he contrived to keep them unimpaired up to the latest period of a long life. Little more than a week before his decease, his nephew, Lord Stormont, on asking his opinion concerning a law case in which he was concerned, found that he still retained the same clearness and quickness of perception, for which he had been always remarkable, and that his powers of reasoning remained also entirely unimpaired. About three years before this, one of his nieces was reading Burke's work on the French Revolution, which formed at that time the general topic of conversation, and happening to meet with the word *psephismata*, she applied to a gentleman near her for an explanation of its meaning. His answer was, that he had considered it to be a misprint for *sophismata;* but Lord Mansfield immediately corrected this error, and after a short pause, recited from memory a tolerably long passage from Demosthenes, wherein the word in question was employed, and explained by the context. He was then in his eightysixth year. His bodily strength did not last so long. His increasing infirmities prevented him from taking his place in court after Michaelmas Term, 1787. Probably he then anticipated a return of health, that might enable him to resume his seat there, for he did not immediately resign his situation; but finding his expectations on this score disappointed, he gave in his dismission on the 4th of June, in the next year; having thus held the situation of chief justice within a few months of thirtytwo years. As soon as his resignation was made known, the bar came to the resolution of deputing Mr Erskine, then one of the leading counsel in the court of King's Bench, to convey to him an address of farewell in their name; and accordingly, about a fortnight afterwards, (June 18,) the following letter was sent to him at Caen Wood. In less than five minutes from the receipt of it, his answer, which we shall also subjoin, was delivered to the bearer.

'My Lord—It was our wish to have waited personally upon your lordship in a body, to have taken our public leave of you, on your retiring from the office of chief justice of England; but judging of your lordship's feelings upon such an occasion by our own, and considering, besides, that our numbers might be inconvenient, we desire, in this manner, affectionately to assure your lordship, that we regret, with a just sensibility, the loss of a magistrate whose conspicuous and exalted talents conferred dignity upon the profession, whose enlightened and regular administration of justice made its duties less difficult and laborious, and whose manners rendered them pleasant and respectable. But, while we lament our loss, we remember with peculiar satisfaction, that your lordship is not cut off from us by the sudden stroke of painful distemper, or the more distressing ebb of those extraordinary faculties which have so long distinguished you among men; but that it has pleased God to allow to the evening of a useful and illustrious life the purest enjoyments which Nature has ever allotted to it—the unclouded reflections of a superior and unfading mind over its varied events; and the happy consciousness that it has been faithfully and eminently devoted to the highest duties of human society, in the most distinguished nation upon earth. May the season of this high satisfaction bear its proportion to the lengthened days of your activity and strength!'

'Dear Sir—I cannot but be extremely flattered by the letter which I this moment have the honor to receive. If I have given satisfaction, it is owing to the learning and candor of the bar: the liberality and integrity of their practice freed the judicial investigation of truth and justice from difficulties. The memory of the assistance I have received from them, and the deep impression which the extraordinary mark they have now given me of their approbation and affection has made upon my mind, will be a source of perpetual consolation in my decline of life, under the pressure of bodily infirmities, which made it my duty to retire.—I am, dear Sir,

With gratitude to you and the other gentlemen,
Your most affectionate and obliged humble servant, Mansfield.'

*Caen Wood, June* 13, 1788.

There was nothing of exaggeration or of insincerity in the language of affection and attachment towards the venerable chief justice, thus eloquently expressed by Erskine on behalf of the bar. The affability and kindness of his manner towards the whole of the profession had always in reality been such as to convert into a pleasure those duties which are certainly as irksome as can well be, when such qualities are not to be found on the bench. And they were displayed too, with perfect impartiality towards every member of the bar. The differences of silk gown and stuff gown, of large or small practice, of a seat in the front or in the back row, never caused the slightest distinction in the uniform urbanity of Lord Mansfield's address and demeanor. That sort of undue influence with the bench, which, every one who attends the courts will admit, has sometimes been painfully conspicuous in the case of particular counsel, whether acquired by favoritism, or by the assumption of superior knowledge, or eminently successful practice, was never to be remarked in the King's Bench while Lord Mansfield presided there; although like most other judges he had his private friends among them, and although the bar could boast of such men as Mingay, and Bearcroft, and Dunning, and Erskine, and many others whose names will long continue to live in the recollection of their successors. The junior barristers had particular reason to feel gratified by his attention to them. He would often relieve the timidity or the embarrassment of of an inexperienced young man, by a few words of encouragement, or an observation that would throw a sudden ray of light upon his case. He also instituted a custom, for which not only the younger members of the profession, but the public in general ought still to hold themselves indebted to him; one, that does as much towards facilitating the despatch of the term business in court, as equalizing the distribution of a considerable portion of it among counsel of different standing. This was the going through the bar. Previous to his time, it had scarcely ever happened that in one day motions were heard from more than the two or three first rows of benches; and when on the following day the hour would arrive for moving the court, it had been usual to commence again with the attorney-general, or senior king's counsel, and go on as before, according to the established form of precedence. Thus, a junior on one of the back rows might wait for a term or more without having an opportunity afforded him of moving; the necessary consequence of which was, that clients, rather than incur the certainty of great delay in the progress of a cause, never thought of entrusting this sort of business to any but those who claimed the right of preaudience. Lord Mansfield's practice was to go entirely through the bar, if possible, every day, in the same manner as now is done; but if time pressed, and he could only call on a portion of the barristers, he began the next day precisely where he had left off, and heard those who had previously missed their opportunity, before he began again within the bar. The benefits of this method are obvious; and it is to be regretted that it is not still adhered to, so far as regards the alternative adopted whenever the court could take but part of the motions at one sitting.

The only fault ever found by the bar with Lord Mansfield's demeanor on the bench, was the habit he sometimes indulged in of reading the newspaper, or writing letters, while counsel were addressing the court or the jury. This is a custom we certainly shall not attempt to defend. But it must be remarked, that this neglect of the speaker was always more apparent than real, for in summing up the evidence, or delivering his opinion, as the case might be, it was evident that nothing of importance had escaped him; and it is to be supposed, that those who were convinced by constant experience how fully he possessed the power of thus dividing his attention, were ready to pardon the mere semblance of bestowing it altogether upon matters foreign to the business in hand. Casual frequenters of the court, who were not daily accustomed to witness the display of his astonishing memory, would occa-

sionally expect nothing less than to find him embarrassed and confused, when he began the recapitulation of evidence or arguments, of which he had not only taken no note, but had been to all appearance a very inattentive auditor; so that when, on laying down his newspaper, he went minutely through the whole, not forgetting or mis-stating so much as the name of a single case or a single witness, their wonder knew no bounds. But there was much more to admire than the mere display of memory. There was the statement of the case, in itself worth an argument, the clear arrangement of facts, the acute deduction of inferences, the ready replies to objections, and the conclusion so plainly suggested to the hearers, long before it was announced, that the least able reasoners might be betrayed into a high opinion of their own discernment, for perceiving what the consummate art of the speaker had made it quite impossible they should not perceive.

During the whole period of his chief justiceship, the court seldom or ever failed to be crowded in term time with a concourse of students, who frequented it as the best school of legal instruction they could attend. Indeed, previous to Judge Buller's rapid rise at the bar, and early promotion at the bench, which induced young men to pursue the same course of study he had so ably profited by, and first rendered general the practice of passing the greater part of their noviciate in the chambers of a special pleader, a constant attendance upon the courts had been the most usual method adopted for the acquirement of practical knowledge of the law. Lord Mansfield always appears to have taken quite a fatherly interest in their progress, and to have made it a part of his duty to afford them every facility of acquiring solid and correct information. Whenever he was about to pronounce the decision of the court, in a cause that had been argued some time before, he generally called upon one of the counsel concerned, to give a statement of the case, for the benefit of the students, before he began to deliver the judgment; and numerous instances are recorded in Burrow's Reports, of his stopping to explain obscure points of law or of history connected with the case, to give his opinion upon the character of particular books, or to refute some erroneous doctrines supported by strong authority; all, as he expressly used to state, that the students might not be misled. We know not what finer, or more instructive lectures they could have listened to than the elaborate arguments, rich with historical illustration, and judicious comment, by which he explained the grounds of the decisions in such cases as Taylor v. Horde, or Millar v. Taylor, or Wyndham v. Chetwynd, or a host of others we might quote.

To be continued.

## RECENT AMERICAN DECISIONS.

### ACTION.

If A's personal property is attached in a suit against B, and A sells and assigns his property to a third person while it is under attachment, an action of trespass for the benefit of the vendee, against the attaching officer, is properly brought in the name of A. *Holley vs. Huggeford*, 8 Pick. 73.

### ACTION ON THE CASE.

Where real property is in the possession of a lessee, other then a tenant at will, case, and not trespass, is the proper form of action to be brought by the landlord for an injury by a stranger affecting the inheritance, even where trespass would be the proper remedy if the landlord were himself in the possession. *Lienow vs. Ritchie*, 8 Pick. 235.

### ADMIRALTY.

1. The admiralty has jurisdiction over petitory, as well as possessory suits, to reinstate owners of ships, who have been wrongfully displaced from their possession. *Schooner Tilton*, 5 Mason, 465.

2. The admiralty has jurisdiction in case of a wrecked ship, to decree a sale upon application of the master. *Ib.*

### AMENDMENT.

1. A verdict may be amended by the judge's notes, after error brought and joinder in error. *Clark vs. Lamb*, 8 Pick. 415.

2. A special verdict cannot be amended by the minutes of the judge, without the consent of both parties. *Walker vs. Dewey*, 8 Pick. 520.

3. If the infancy of the plaintiff is pleaded in abatement, the court may allow him to amend by inserting in the writ, that he sues by A, his next friend. *Blood vs. Harrington*, 8 Pick. 552.

### ASSIGNEE.

1. The assignee of a bond takes it subject to all the equities which existed against it in the hands of the original obligee; and a fraud in obtaining the bond by the obligee, may be set up in an action at law, as a defence against the assignee, though he purchased it for a valuable consideration,, and without notice of the fraud. *Barrow vs. Bispham*, 6 Halst. 110.

2. The assignee of a rent charge may take advantage of the clause of re-entry. *Fairley vs. Craig*, 6 Halst. 263.

3. Whether an ejectment may be brought by the assignee of the rent charge against a tenant of the demised premises, on a refusal by him to pay rent according to the terms of the lease, and the clause of re-entry contained therein. *Quære.* *Ib.*

### ASSIGNMENT.

In an indenture of assignment and release between a debtor and his creditors, the property assigned was described as a quantity of certain kinds of goods in the hands of divers persons named, and it was provided that a schedule of the property should be made out and annexed to the instrument 'as soon as may be.' *Held*, that annexing a schedule was not a condition precedent to the operation of the release: and that omitting to annex it did not make the assignment void or defeat the release; though the provision might amount to a covenant that the debtor would, whenever it should be required, make out and annex such schedule. *Emerson vs. Knower*, 8 Pick. 63.

2. Where goods on consignment at Boston were, on the failure of the owners, assigned for the benefit of creditors, and before notice to the consignees of the assignment could be reasonably given, another creditor of the debtor's attached them by a trustee process in Boston, the debtor and the creditors being citizens of the state of Pennsylvania; it was *held*, that the assignment, if bona fide, was a sufficient title to pass the goods to the assignees, and to overreach the trustee process. *Bholen vs. Cleaveland*, 5 Mason, 174.

### ASSUMPSIT.

1. A tax imposed by a municipal corporation, cannot be recovered on a count for money paid, laid out, and expended: although such corporation has paid the costs of the improvement, for which the tax was created. *Mayor and City Council of Baltimore vs. Hughes*, 1 Gill & Johns. 480.

2. Nor can the cost of such an improvement, or any part thereof, be recovered from a defendant liable to pay tax therefor, on a count for work and labor, where the ordinance under which the work was done, has not been properly pursued, so as to create a legal liability in the defendant. *Ib.*

### ATTACHMENT.

Butter made from the milk of a debtor's only cow, is exempt from attachment and execution. *Leavitt vs. Metcalf*, 2 Vermont Cases, 342.

### ATTORNEY.

An attorney who is employed to collect a debt is liable to his client if he neglect, without fresh instructions, to pursue the bail of the debtor in due time. And though the bail be insolvent, yet if there be reasonable ground to believe that the officer will be liable upon a failure to collect of the bail, the bail should be pursued for that purpose. *Crooker vs. Hutchinson*, 1 Vermont Cases, 73.

### AUDITA QUERELA.

*Audita querela* will not lie where a *writ of error* is the proper remedy, though such writ is taken away by statute. *Dodge vs. Hubbell*, 1 Vermont Cases, 491.

### BAIL.

A person having become bail in one state in the Union, may take the principal in another state. *Commonwealth vs. Brickett*, 8 Pick. 138.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The endorsee of a note void in its creation, may recover of the endorser without proving a demand of the maker. *Chandler vs. Mason*, 2 Vermont Cases, 193.

2. When a bill exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest, he alone is qualified to maintain an action on such bill. He cannot use the name of the payee, because the payee having transferred his interest, can have no competency to maintain an action. *Bowie, use of Ladd vs. Duvall*, 1 Gill & Johns. 175.

3. So where it appeared that the note of the defendant, payable to B. or order, had been endorsed as follows, 'I assign the within for value rereceived, to L;' signed B., but which endorsement was erased just before the jury was sworn; it was *held* that an action in the name of B., originally instituted for the use of L., could not be maintained upon the note as there was no evidence from which the jury could infer that the payee and plaintiff was the holder of the note; neither could an action be maintained on the money counts, although there was proof of an express promise

to pay the sum demanded in such suit, as that must be considered as enuring to the benefit of him who had a right to the note. *Ib.*

4. The endorsement of T., on the promissory note of E. payable to A., as follows: 'I hereby guarantee the ultimate payment of the within note,' is void for want of consideration; and under the plea of *non assumpsit* to a declaration founded upon that guaranty, the objection to the want of consideration may be taken. *Aldridge vs. Turner*, 1 Gill & Johns. 427.

5. Where I., an endorser of a protested bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest, and notice, promised M., a subsequent endorser, who had taken up the bill, to repay him, afterwards received the bill from M., proved it in his own name against the estate of the drawees who had failed, and received a dividend upon it, and retained the bill; it was *held*, that I. was liable on this promise to repay M., unless he could prove that his promise was made under a mistake of the facts. *Martin vs. Ingersoll*, 8 Pick. 1.

6. During the Christmas holydays vessels are not allowed to clear out at the Havana; *it seems*, therefore, that during the continuance of the holydays, it is not necessary to write a notice of the dishonor of a bill, to be sent to a foreign port. *Ib.*

7. The maker of a note, who has been committed to jail on execution on a judgment in favor of the holder, but has not paid the note, is still liable to be sued by an endorser who pays the amount of the note to the holder; and the suit of the endorser may be brought while the maker is still in jail in the prior suit. *Cole vs. Cushing*, 8 Pick. 48.

8. An action for money had and received may be maintained by the endorsee of a note against the maker, although the note was signed by the maker, merely for the accommodation of the payee, and the maker never received either money or any other consideration for signing it. *Ib.*

9. Where the holder of a note with several endorsers in blank, sues the maker and writes over the name of the first endorser an order to pay it to himself, the holder, but without striking out the names of the subsequent endorsers, he does not thereby discharge them; and therefore one of them who pays the amount of the note to the holder, may sue any of the prior parties. *Ib.*

10. A bill of exchange, which was endorsed by C. of New Orleans, and was payable in Boston, was owned by T. of New York. The bill was dishonored by non-acceptance, August 11, and H., who was T.'s agent at Boston, wrote to T. by mail the same day, informing him of the dishonor of the bill. T., by an answer dated August 13, requested H. to give the notices. H. accordingly had the notice to C. put into the mail at Boston, August 19. *Held*, that the notice was not seasonable, even if T. was justifiable in sending to H., instead of sending notice himself directly from New York to New Orleans. *Talbot vs. Clark*, 8 Pick. 51.

11. In an action by the holder of a bill of exchange against the endorser, a subsequent endorser is not a competent witness to charge the defendant, without a release from the plaintiff. *Ib.*

12. The defendant, a merchant in this country, directs the plaintiff, his correspondent in England, to purchase goods and to draw for the price on a banker in London; who also authorizes the plaintiff to draw. The plaintiff, having similar orders from other persons purchases goods in his own name for them and for the defendant indiscriminately. On the 30th of July he draws a bill in his own name three months payable on account of the defendant. The bill is drawn on account generally, in payment for several parcels of goods and not in payment for goods purchased for the defendant; the defendant however being indebted to the plaintiff to the amount of the bill for goods already sent to him. The banker accepts the bill, having then in his hands only a small balance due to the defendant, but in September he receives funds beyond the amount of the bill. A few days before the 2d of November when the bill falls due, the acceptor becomes a bankrupt. On the 26th of November a stranger, through mistake, pays the bill for the honor of a person not a party, claiming, however, to hold the plaintiff and all the other parties, but no notice of the dishonor is given to the plaintiff. Afterwards the person who paid the bill recovers judgment against the plaintiff upon a default by consent. In an action by the plaintiff, against the defendant to recover the price of the goods, it was *held*, that the plaintiff, having had good reason to expect that the bill would be paid by the drawee, was entitled to notice of its dishonor; that he could not waive notice to the prejudice of the defendant; and that the action could not be maintained. *Grosvenor vs. Stone*, 8 Pick. 79.

13. A judgment in an action against the endorser of a note in his favor, on a verdict which was rendered on the ground that the action had been brought before notice was given, is no bar to another action commenced after notice was given; and consequently such judgment is no bar to a suit in equity brought against the endorser and his assignees in order to enable the plaintiff to obtain the benefit of the assignment. *New England Bank vs. Lewis*, 8 Pick. 113.

14. Where a note is made by A payable to B, and endorsed by C at the time it is made, C becomes a promiser on the note, and may be declared against as such. *Baker vs. Briggs*, 8 Pick. 122.

15. In an action by B against C as a promiser of such a note, the declarations and admisssions of A are not admissible against C, for A himself is a competent witness. *Ib.*

16. A bill of exchange was drawn in Boston by J. R. B. on H. & Co. of Richmond, who accepted it for the accommodation of the drawer, and on his engagement to place funds in New York, where the bill was payable to meet it at its maturity. The bill was endorsed by the plaintiff, also for the accommodation of the drawer with a knowledge of all the circumstances, and he advised the drawer to adopt this mode of raising money. The drawer having failed and assigned his property for the benefit of his creditors, before the bill became payable, it was dishonored and returned to Boston, where it had been discounted for the drawer, and where the plaintiff took it up as endorser. The assignment provided for idemnifying the plaintiff against all endorsements made by him on account of the drawer, and there were funds in the hands of the assignees to which he could resort for the payment of the bill. *Held*, that the acceptors were exonerated, and that the holders must resort to the funds in the hands of the assignee, for pay of the bill. *Bradford vs. Hubbard*, 8 Pick. 155.

17. A covenant by the payee of a promissory note not to sue the maker within a limited time, cannot be pleaded in bar to an action brought within the time by a person to whom the note was endorsed after it became due. *Perkins vs. Gilman*, 8 Pick. 229.

18. Two notes dated in October, and falling due in January and February following, were endorsed by the defendant who was an Englishman, a master mariner and unmarried man, having no home in this country, and when in England, residing in Liverpool. On the 12th of December he wrote from Boston to the holder at Providence, that he should leave Boston in a day or two for Liverpool, but in fact he remained in Boston till the middle of March. The holder did not know of this fact nor of his residing in Liverpool and sent no notice to him of the dishonor of the bill; neither did it appear that the holder made any inquires for his residence. *Held*, that due diligence had not been used to give notice to the endorser. *Hodges vs. Galt*, 8 Pick. 251.

19. Assuming that a foreign bill of exchange, payable after *sight*, ought to be presented within a reasonable time, that time must be judged of with reference to the usage among merchants as to delays in the negotiation and transmission of such bills. *Wallace vs. Agry*, 5 Mason, 118.

20. Where certain merchants had entered into a written contract to subscribe certain sums for a voyage to Africa, &c, and authorized their agent to draw bills for the amount if he fitted out the expedition, and he drew a bill on one of the subscribers for the amount subscribed by him to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill; it was *held*, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber, upon a *constructive* acceptance of the bill, it having been dishonored, when presented for acceptance. *Lowber vs. Shaw*, 5 Mason, 241.

21. Where a note is made payable at a particular place, and the endorser resides there; if the holder remits it to his agent at such place, for payment, and it is dishonored; the agent is not bound to give notice of the dishonor to the endorser; but his duty is to give notice to his principal, who may then give notice to the endorser, and if given in due time after the principal has received notice, the endorser is bound. *U. S. Bank vs. Goddard*, 5 Mason, 366.

22. If due notice is given by a holder to his immediate endorser, of the dishonor of a note, and the latter gives due notice to a prior endorser, the holder may recover against the latter, although he has never given him any notice, for due notice given by any party on the bill, is notice to charge in favor of all subsequent parties. *Ib.*

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### CONDITION.

The demandant being owner of a parcel of land with a dwellinghouse thereon, adjoining on the north to land with a dwellinghouse thereon belonging to his sister, facing to the south, conveys to the tenant's grantor in fee simple, 'provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof.' After the sister has conveyed her land to a stranger, the tenant mortgages by a deed reciting the foregoing provision, and after-

ward, while remaining in possession, makes windows in the north wall. *Held*, that the above clause was a condition, not a covenant; that it was a valid condition; and that such a breach of it worked a forfeiture of the estate, and gave the demandant a right to re-enter. *Gray vs. Blanchard*, 8 Pick. 284.

COMMON CARRIER.

1. A person delivering a package to a common carrier to be transported, is under no obligation to state the value of the articles it contains, unless an inquiry is made on the subject. *Phillips vs. Earle*, 8 Pick. 182.

2. But it *seems*, that in case an inquiry should be made and a false answer given, or any fraudulent attempt be made to conceal the real value of the articles from the carrier, he would not be liable for the value, in case of loss without his default. *Ib.*

3. Where a package was delivered to the agent of a stage-coach company, at the post office where the stage was standing, and not at the office of the company, to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way bill, he having previously directed the person who had the care of the package to bring it to the post office; and the package was lost before reaching Hartford; it was *held*, that the owners of the coach were liable to the owner of the package for its value, the delivery at the post office being with the assent of their agent. *Ib.*

4. The package was directed to a person at Hartford, who was not there at the time when the coach arrived, nor for several days after; it was *held*, that as the package never in fact arrived, the absence of the person to whom it was directed, didnot exonerate the owners of the coach from their liability. *Ib.*

**THE JURISPRUDENT.**

BOSTON, SATURDAY, MAY 7, 1831.

## JURIDICAL LETTERS.

(Concluded.)

'Persons who are desirous of further tracing the mass of confusion and arbitrary decision—the worst possible species of jurisprudence—which has already accumulated on the transitive operation of the new Bankrupt Act, may also consult the cases mentioned below.*

'To these may be added another line of cases not mentioned by Juridicus; those relating to Lord Tenterden's act, 9 Geo. 4. c. 14. Under this comparatively trifling alteration, many cases like the following have arisen, and caused a great deal of costly litigation. A. has a demand on B. of more than six years' standing, revived by a verbal acknowledgment in 1828; he commences an action to enforce it, but the trial does not come on till after the 1st Jan. 1829, on which day the act began to operate. Under these circumstances it has been held that A, not being able to produce a written acknowledgment, must fail; and the decision would have been the same had he been merely suing as nominal plaintiff on the record for the benefit of a third party to whom the debt —being thus in commerce—had been assigned.* This strikes us to be glaringly unjust, but the noble and learned framer of the bill no more anticipated an effect of the sort, than the framers of the bankrupt act; nor even now are English legislators aware that the difficulties in question have any deeper source than the accidental inaccuracies of particular draftsmen. They have never yet attempted to generalize; they stop the holes their bad workmansnip has left, and leave just as many in their succeeding productions; like the boxer in Demosthenes, they are wholly engaged with the last blow they receive, but have not skill enough to anticipate the next, much less to plan a scientific defence. The First Report of the Real Property Commissioners is, in this respect, on a par with the statute book, and betrays a total ignorance of the above principle of legislation. On all the subjects comprised in it, on which transitive questions may arise, no sort of provision for such questions has been made. But that they will arise in crowds, is what no one who reads this Letter can doubt. What we have said already will enable the reader to judge of their close affinity to new rules of Limitation, and they may and will spring up under the heads of Inheritance, Dower, and Curtesy, as well.

'A new rule of descent is enacted: the ascending line, and the half blood are let in. It is easy enough to say the new law will only apply to the case of a descent after the act. But is that the only question that can arise? A man limits a remainder by will or settlement before the act, "to the right heirs of A. B." (a person then living,) having particular individuals in his eye. A. B. dies after the act. Are persons to take who at the time of the will or settlement never could have answered the description? It will perhaps be answered that "Nemo est hæres viventis," and that no individuals were in point of law indicated till the estate vested. Very well; so be it: but it would want a decision even for that. A man limits an estate before the act to A. for life, remainder to B. in fee, if he shall be living at the death of A., but if he shall be then dead to the right heirs of C., who is dead. This remainder does not vest till after the act. Is it to vest in the statutory, or the common-law heir? If the former, what becomes of the person to whom for a valuable consideration the common-law heir has passed his contingent interest by estoppel? In this case the decision would probably be the other way; but the decision must be had. The cases would occur too of heirs selling their descendible expectancies before the act.'

'Go on to Dower. The law we are told is to apply to every case of a person dying after the passing of the Act. If so, titles of Dower commenced before the Act would be defeated by a simple alienation by the husband; for "right to dower is to attach a law upon hereditaments to which the husband at the time of his death had a right for any estate," &c. (Prop. I.) and "every widow shall be entitled to dower in equity out of all such hereditaments, &c, which shall have belonged to her husband at the time of his death," &c. (Prop. II.) But then comes the question, must this alienation be after the Act, or will an alienation before the Act do, the husband not dying till after the Act?'

'Suppose it to be so decided; (and who can tell how it might?)—then might come the case of a man purchasing before the Act, expressly subject to the dower, (the wife separated, and refusing to join) and giving a price *minus* the estate in dower. Then comes the Act; and then comes a suit in Equity to see whether the purchaser is to have the estate of the doweress, contrary to his bargain, or whether the heir of the vendor is to have it, by way of resulting trust.'

Some other illustrations are given, and then a challenge is thrown out: 'Let the commissioners give a certain eminent conveyancer [meaning Mr Preston] whom I could name, a guinea a question for as many cases as he can put upon the transitive application of their own propositions, and see whether they or he will stop first.'

The writer does not illustrate the difficulty by suggesting cases under the Registration Report, but in the last page of the next article but one, the reader will find ample proof of its applicability.

Having no further view in this article than to give full warning of the difficulty and provoke the necessary inquiries, we shall here break off; referring those who desire further information to Juridicus. Indeed, it would hardly be fair to paraphrase or anticipate him; he has done good service, and should have the full and undivided honor with all the attendant advantages of his discovery. Already, however, his main point has been gained; he has now placed himself on the best possible vantage ground for encountering that narrow-minded tribe, who sneer at juridical science, make a boast of an ignorance at which they should blush, conceive the home-bred jurisprudence of England to be quite sufficient for her wants, and would exclude the law-books of Germany and France as zealously as their wines or their corn. In his next Letter, we trust, he will complete the demolition of the prejudice, by entering upon the subject at at large. He may not succeed better than the jurists of the Continent in framing any general law which shall dispense with the necessity of particular provisions; but he may point out the principles on which such provisions should be framed, or give a popular explanation of the manner in which the difficulty has been met by the French, and state the value they put upon the different classes of *attentes*. If he cannot do this in Letters, let him lay aside his incognito, and present us with a regular work. He may rest assured that the confidence in his learning and sagacity is now sufficiently high, to make this by no means an unprofitable and certainly a highly honorable course.—*Law Magazine.*

## MR DANE'S APPENDIX

TO VOL. IX. OF HIS ABRIDGEMENT.

This Appendix is wholly devoted to an exposition of constitutional law. The author comes out with a venerable authority in his old age, in vindication of those great and fundamental principles of a government, which he was a fellow-laborer, with his revolutionary contemporaries, to establish. The treatise, though not rigidly methodical, is rich in historical learning, and full of wisdom and deep reflection, and unanswerable in argument. The positions are indeed such as have already the assent of a great majority of the nation, but some of them have lately come into discussion, and accordingly, these expositions and elucidations are very opportunely presented to the public.

In regard to the doctrine which has not we be-

* Exp. Shepard, 1 Mont. & M. 67. Exp. Ruck, ib. 297. Key v. Cook, 2 Moore & Payne, 720. Phillips v. Hopwood, 10 Barn. & Cres. 39. Kay v. Goodwin, 6 Bing. 576. Cuming v. Welsford, ib. 502.

* Fowler v. Chatterton, 6 Bing. 258., and the cases there cited. It will there be seen that cases of the same sort arose upon the construction of the Statute of Frauds.

lieve, until very recently been questioned, that the states are not *sovereign* in the most extensive meaning of that expression, the author, with his usual sagacity, takes notice that the term is not applied to the states, execpting in two constitutions, and in these in a qualified sense only; and adds, that in its broadest sense it is not applicable to the general government, but only to the people themselves. Though this position is disputed in the political controversies, we presume that no statesman or lawyer will deliberately entertain a question respecting it. But the precise relation of the states to the Union, is a subject of very interesting inquiry, on which many things remain to be settled, and one on which Mr Dane in this treatise, has thrown much light.

His remarks upon the use of the term *compact*, in application to government, civil politics, or a constitution, are, we believe, original; at least they are not ordinarily met with in the popular treatises. His idea is, that a constitution, though it may originate in a compact, still, when once ordained and established, is not a *compact*, but strictly a *law*—a rule of conduct. At first view, this distinction may appear to be a matter of speculative theory, rather than of practical import; but on reflection, it will be found to be pregnant with important consequences. And if Mr Dane is right, much of the political philosophy drawn from Rousseau's *Social Compact*, will prove to be more visionary than solid, and the settling of this fundamental proposition will very clearly expose its fallacy.

The importance and necessity of an interpretation and application to individual rights and obligations, of the laws and constitution, is a subject that necessarily occupies a great deal of space in this Appendix. It seems a little astonishing that any set of men should, in our system of government, think of addressing themselves to popular partiality, by decrying the judiciary, or attempting to prostrate it to the legislative or executive power; for it is in fact the only direct safeguard the citizen has against those powers, so that making the judiciary a subservient, dependent appendage of the other powers of government, is in fact, a total destruction of personal liberty. This we take to be an undeniable proposition, the truth of which is palpable to any man of ordinary capacity. That any set of men, who find the judiciary standing in the way of some temporary views of their own, should feel a dissatisfaction with the judges, is not unnatural, and as judges are sometimes wrong, as well as other men, there are not wanting just occasions to dissent from their opinions. But that any person should go so far as to decry the judiciary itself, as a part of the government, and think that the people would even, for a moment, maintain the idea of crippling and prostrating the power, in the strength and independence of which their own personal liberty and all their social rights are involved, is a thing which, if it had never happened, would at once be pronounced incredible. The judiciary is not only the sole protector of individual liberty and rights, under every government where it is independent, (where it is not so there is no liberty,) but it is also, as Mr Dane remarks, in fact, by far the most unpopular branch of the government, where it is, as with us, connected with trial by jury.

'When we consider the numerous *judicial* magistrates, and especially two or three hundred thousand of jury men, the solid and select part of the people in the judiciary, exclusively, and others connected therewith, I hesitate not to affirm that there is more weight of character in the judiciary than in both of the other two departments.'

'In the following passage the author takes a very liberal and philosophical view of our parties, and draws from their history another argument in favor of the necessity that the citizens should have an independant tribunal to which to look for the protection of their persons and their rights.

*The varying notions of party men.*—If we would know how one of them construes the constitution and laws, we must inquire whether he is in the majority or minority. Men naturally enlarge powers, when in their own hands, or the hands of their friends, and limit them when in the hands of their adversaries, in the same degree. Majorities possess and exercise them. Their passions, feelings, and self-confidence ever influence them to extend them, and to make them bear hard on opposed minorities, whose passions and feelings are, by nature, against such extensions. We may cite thousands of cases to prove the facts. A few must suffice. When a respectable member of Congress, Mr B. was in the federal majority, he thought the citizens' right and power to sue a state, was the fairest feature in the federal constitution, and that, its specified powers must yield, so as to effect the common defence and general welfare. When in the minority, his object was to confine its powers to the plain meaning, and to limit them to the very letter of the specified powers. Instance of a state legislature. In 798, that of Virginia was in the minority in the general government; then it thought Congress had no power to enact the alien and sedition acts, and that the Supreme Court was not the common arbiter; and it strove hard to limit federal powers. In 1810, Virginia was in the majority in the general government; then her legislature unanimously held, that court was the common arbiter, as above, and then supported the very extended powers of the general government, exercised in creating and upholding the long embargo, and restrictive system; and more especially the despotic acts of Congress, enacted to enforce those measures. In 1829, Virginia, on the great subjects of the times, as tariffs, and internal improvements, was in the minority, and her legislature returned to its ground of 1798, denied the Supreme Court was the common arbiter, and limited the powers of the Union as much as possible. These facts cannot be disputed.

'Take the majorities in the three cases. The Virginia legislature has made that court the common arbiter, and once or twice, not such arbiter. Such changes have not been peculiar to Mr B. and Virginia, but a majority of party men, and of states, have conducted in a similar manner, during fiftyfour years, though the evidence of their changes may not be so well preserved on record. From all this we may infer, that the numerous speeches made in so long a time, to extend or limit constitutional powers and rights, state and federal, have not all grown out of the constitution, so much as they have out of party feeling and passion, self-love and self-confidence. Therefore, we find the same men, parties, and states, have been, at different times, and on different occasions, directly opposed to themselves. When some states supported the alien and sedition acts, their speeches and writings were framed to extend federal powers. When the same were opposed to embargoes, restrictions, and the war, all were framed to limit these powers. All these things prove the necessity there is of a common arbiter, to sit and hear parties, not to think and act like them; as exempt as possible from party spirit, party passions and feelings, to decide the numerous contests that daily arise among a free and active people, ever contending for their respective rights. In 1810, the Virginia legislature, *unanimously*, proclaimed very just and valuable opinions, declaring this Supreme Court was the common arbiter, and therein agreed, eight states, to wit, North Carolina, Maryland, Georgia, Tennessee, Kentucky, New Jersey, Vermont, and New Hampshire. No states appeared to dissent. (Johnson, p. 38, and Doings of Virginia, 38, 39.) The more we examine these subjects, the more we are induced to hold that the state legislatures are the most unfit to be the common arbiter, to judge and decide controversies, not only because, on sound American principles, they are only *law makers*, in number above twenty, and composed of numerous members, but because they are a *party* organized, not to hear parties, and stand between them to judge and decide uprightly, but to argue pro and con, and to be influenced to decide by argument and eloquence, rather than by evidence and truth, dispassionately, coolly, and impartially weighed. In contests with the general government, it is the duty of state legislatures *to claim* rights rather than to sit in judgment, and decide, finally, on the rights they claim as theirs. Experience proves members of Congress and of state legislatures, in general, argue pro and con, like parties, and not sit, hear, and decide, like judges. To think and decide what the law *ought to be*, is their proper business, and not *what it is*.'

The author, however, vindicates the state gevernments, and is in favor of strenuously maintaining them.

There are not wanting some repetitions in this treatise, and it presents occasional traces of political feelings which actuate the great mass of the community much less powerfully now than formerly; yet the reader's patience is by no means tried by the former, nor his confidence impaired by the latter. The work is written with more spirit and earnestness than is usually met with in a law book, and so may be read with greater interest, than is inspired by a string of naked propositions and references.

In a note Mr Dane clears up the question discussed in the Senate last winter, relating to his share in the authorship of the ordinance of 1787, for the government of the North-western Territory, and shows, very satisfactorily, that the public, in considering him to have been its author, has given him no more credit than belongs to him, and has done no injustice to the claims of any other person.—*Jurist.*

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*The Lord Chancellor and the Male Gossips.*—On Saturday the Lord Chancellor again complained of the gabble of the gossips in his Court, and, addressing the doorkeeper said,—'It seems to be of no use speaking to you and therefore, if the noise continue, I shall speak to *your successor*.'

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NEW PUBLICATIONS.

A Letter to the Right Hon. C. W. Williams Wynn, M. P, &c. on the Legal Right of the Dormant Parliamentary Boroughs. By F. Palgrave, Esq. of the Inner Temple, Barrister at Law.

Evidence and Arguments before the Committee for General Purposes, in support of the Elective Franchise of the resident Freemen of London. By J. Newell, Esq.

ESSAY ON JUNIUS. This day published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

These volumes, by the author of Peter Parley, will complete a series of Tales for Children, designed to interest them in History and Geography. Those previously published are Parley's Tales about America, Europe, Asia, Africa, and Sun, Moon, and Stars. April 9.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

Peter Parley's Tales about Europe.

Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

CONTENTS.

ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰων. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. 1. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

CONTENTS.

Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

'I have no trinkets, cakes, or toys,
As gifts for little girls and boys,
But look within, and you will find
Both food and playthings for the mind.'

The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII. Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

II. Economy of Athens. 1. Die Staatshaushaltung der Athener, vier Bücher. Von August Boeckh. Mit einundzwanzig Inschriften. 2. The Public Economy of the Athenians. Four books; by Augustus Boeckh.

IV. Character and Abuses of the Medical Profession. Rules and Regulations of the Boston Medical Association.

V. Waverly Novels. Parley's edition.

VI. British and American Shipping. 1. The Merchant, Ship-Owner, and Ship-Master's Import and Export Guide; by Charles Pope. 2. Speech of Right Honorable William Huskisson in the House of Commons.—May, 1827.

VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

THE JURISPRUDENT

IS PUBLISHED EVERY SATURDAY EVENING, AT THREE DOLLARS A YEAR.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, MAY 14, 1831. NO. XLII.

## LORD MANSFIELD.

(Concluded.)

Though his general deportment on the bench was characterized quite as much by dignity, as by courtesy and suavity of manner, he did not consider it incumbent upon him to preserve so much stateliness, but that he might occasionally relax the muscles of the court with a jest. When Macklin had recovered seven hundred pounds' damages in an action for a conspiracy to hiss him off the stage, and after the delivery of the verdict declared it was not his intention to demand the sum, he received for his generosity and forbearance a compliment from the chief justice, which he afterwards used to tell of with as much delight as of Pope's exclamation on seeing him play the part of Shylock. 'Mr Macklin,' said his lordship, 'I have many times witnessed your performances with great pleasure; but in my opinion you never acted so finely as upon this occasion.' A prisoner being once tried before him for stealing a watch, he was directing the jury to find the value of it under one shilling, with the view of avoiding the conviction for grand larceny, when the prosecutor interrupted him by calling out: 'A shilling, my lord! why the very fashion of it cost me more that five pounds!' 'Oh, sir,' said Lord Mansfield, 'we cannot think of hanging a man for fashion's sake.' The facetious Sergeant Davy had, one morning, been subjecting a Jew to a long cross-examination, in order to prove his incompetence to be received as bail. The amount required happened to be a very small one, and the Jew was dressed in a tawdry suit all bedizened with tarnished lace. His lordship at length interfered: 'Nay, brother Davy,' he said, 'you surely make too much of this trifle—don't you see the man would burn for a greater sum?' With another brother of the coif (Hill) he sometimes ventured upon a species of joke that, it must be owned, almost trespassed on the bounds of indecorum. The Sergeant was a man who possessed deep and varied stores of learning. He had been distinguished at Cambridge both as a classical scholar and mathematician, and had since acquired extensive reputation for the profundity of his legal knowledge, particularly on the subject of real property. Indeed there is no doubt he had more of mere legal learning than Lord Mansfield; but he was so wholly deficient in the art of turning it to account in public, that there was as much difference between the practical value of the knowledge possessed by them, as between that of a block of coal and a diamond, both of which are but different modifications of the self-same substance. Among his contemporaries at the bar he always went by the name of Sergeant Labyrinth; for he never attempted to argue a case without speedily involving himself in such a maze as bewildered himself no less than his hearers. On such occasions his intellect and his senses would seem alike enwrapped in a mist; he would stand motionless in one posture, his eyes half closed or dimly fixed on vacancy, and, wholly unconscious of the presence of the auditory, would roll forth sentence after sentence, heap tautology on tautology, and endeavoring to explain one obscurity, go on propounding others still more obscure, like a heavy-laden horse floundering in soft mire, and sinking the deeper the more he labors to extricate himself. It may be supposed the gravity of the bar was not altogether proof against so ridiculous an exhibition. By the time smiles had increased to tittering, and tittering was well nigh expanding into a most audible laugh, Lord Mansfield would generally interfere, and call upon the learned Sergeant by name. As he was rather deaf, and besides wholly wrapt up in his own speculations, the call was generally repeated three or four times before he stopped; and then some inquiry after the state of his health would often turn out to be the only matter for which the chief justice had interrupted him. We know not whether Sergeant Hill inwardly resented this sort of quizzing, but it certainly is sufficiently evident from the notes he was in the habit of writing on the margin of his copy of Burrow's Reports (which notes are inserted in the modern edition of that work), that he felt anything but a friendly disposition towards Lord Mansfield.

The long and eminently useful career of this illustrious man was finally closed on the 19th of March, 1793, he being then in his eightyninth year. Though not free from the infirmities of age during the latter part of his life, he underwent little or no bodily suffering. Nor was his death occasioned by any painful or violent disease. The first symptoms of illness were felt on Sunday, March 10th: he shortly afterwards fell into a kind of stupor, and this settled into a trance so complete, that no other mode could be devised to afford him the slightest sustenance, except that of occasionally wetting his lips with a feather dipped in wine or vinegar. On the 15th very little appearance of life could be detected; some appearance of mortification began already to be visible; and in this state he lingered on till the 19th, when he sank by an almost imperceptible transition into death. On the morning of the 28th of the same month his body was privately interred in the same tomb with the remains of his lady, in Westminster Abbey; according to a wish expressed in his will, that he might be suffered to show this mark of respect to the place of his early education. It had been the intention of the judges and members of the bar to testify their respect for his memory by assembling in full numbers to attend the funeral; but the design was abandoned on their being informed it had been his own desire that the ceremony should be as private as possible. A bequest of fifteen hundred pounds having been left some years previously, by a Mr Bailey, to defray the expense of a monument to his memory, Flaxman, who had then just returned from his studies at Rome, was deputed to execute one, and it was placed on the spot whore he had been buried, between the tombs of Lord Chatham and of Lord Robert Manners. The bulk of his fortune, which was very considerable, comprising it is said upwards of 26,000*l.* a year on mortgages, besides property otherwise invested, descended with his title to his nephew, Lord Stormont. Considerable legacies were left to his two nieces, the honorable Anne and Marjory Murray, to whom the king, in compliment to the memory of their uncle, shortly afterwards (April, 1793) granted, by his royal sign manual, the same pre-eminence and precedence as if they had been daughters of an Earl of Great Britain. Among the other bequests was one of 2000*l.* to Judge Buller, who had been indebted to the friendship of Lord Mansfield for his early promotion to the bench; and would have been nominated as his successor, but for the debility of his health, in consequence of which the chief justiceship was given, with a peerage, to Sir Lloyd Kenyon, the Master of the Rolls.

With the exception of the celebrated answer (drawn up in 1752, when he was solicitor-general) to the memorial of M. Michel, the secretary to the Prussian embassy, which, though it bears the signature of other law officers besides himself, we know to be entirely his composition, we are not aware that any proofs of his talents as a writer have been preserved. The protest against the repeal of the American stamp act, which was entered on the journals of the house of lords in 1776, during the time when he was in opposition to the administration, is also supposed to have been dictated by him throughout. It is allowed to be one of the ablest performances contained in the records of parliament; as the former production assuredly is a model for state papers. The general belief, which is expressed in the verses of Cowper we have already quoted, was, that several manuscript compositions of his own were consumed by the conflagration of his house in Bloomsbury-square; but this was merely a vague supposition, and as it is well known that he never was fond of writing, we may infer that it was incorrect. The grandest monument of his genius is assuredly the commercial jurisprudence which he created and brought to maturity.

In stature Lord Mansfield was not above the middle size. His personal appearance was extremely prepossessing, and this natural advantage, which is of more importance to an orator than is perhaps usually supposed, he improved by the consummate grace and propriety of his gesture in speaking; in the same manner as he gave additional effect to the natural melody of his voice, by his skill in modulating it. The brilliancy and vivacity of his eye was such as could not fail to catch the attention, and gave token of the acuteness and vivacity of his intellect. The general expression of his countenance is probably familiar to most of our readers, from the many likenesses of him that have been painted, and reproduced in the shape of engravings. The originals of two miniatures by Vanloo, taken in the earlier part of professional life, are still, we believe, in the possession of private individuals. Besides the portrait painted by Martin for Christ Church, there is another by the same artist, representing him in the court dress he wore when presented to the king and queen of France, during a short visit he paid to his nephew at Paris in the year 1774. He also sat twice to Copley, at the request of his friend Justice Buller; and once to Sir Joshua Reynolds, on the solicitation of the corporation

of London, who were anxious to adorn Guildhall with the portrait of one who had done so much, on that very spot, to claim the gratitude and the respect of the merchants of England. Trinity Hall, Cambridge, has a bust of him by Nollekens.

There can be little occasion, we think, for adding to this sketch, however feeble and imperfect, of the life and character of Lord Mansfield, any formal refutation of the calumnies which personal jealousy or political enmity have directed against him. We have already alluded to the most serious of them; and we are even not without apprehension that in so doing, we may appear sometimes to have committed the fault which of all others we should be most anxious to avoid, namely, that of pleading for him as an advocate, rather than endeavoring with strict impartiality to form a calm judgment as to his merits. If this be so, we can only say, that we have, at least, done all in our power to guard against this besetting sin of biographers. It is only on mature consideration of the charges made against him, that we have arrived at the conviction of their injustice. As to his political opinions, we think it quite unnecessary to uphold them, in order to justify his adoption of them. That he was sincere and honest in his belief of their soundness, and always consistent in his advocacy of them, is, in our estimation, quite sufficient for that purpose. With respect to his merits as a judge, we consider them beyond all praise. We believe, indeed, that the opinion of the public in general, as well as of the legal profession, is quite made up on this point; and that we shall run little risk of contradiction, when we declare that, in our estimation, he has done more for the jurisprudence of this country, than any legislator, or judge, or author, who has ever made the improvement of it his object.—*Law Magazine.*

## DIGEST OF ENGLISH CASES.

### COMMON LAW.

(Comprising 10 Barnewall & Cresswell, Part 2; 1 Barnewall & Adolphus, Part 1; 7 Bingham, Part 1; 1 Crompton & Jervis, Part 2; 1 Tyrwhitt, Part 1. 3 Manning & Ryland, Part 3.)

#### ADMINISTRATOR.

Assumpsit by an administratrix on promises to the intestate, and also on an account stated with the plaintiff as administratrix, concerning money due to the intestate; the verdict was for the defendant. Held, that on the face of the declaration the contract appeared to be with the plaintiff, and that she was therefore liable to costs by the 23 H. 8. c. 15; but only to such costs of the declaration as applied to the count on the account stated.—*Jobson vs. Forster*, 1 B. & Adol. 6.

#### ARBITRATION.

The authority given to an arbitrator by order of Nisi Prius is revocable at any time before his award is made, and the court cannot grant costs, unless empowered by the order of reference.—*Skee vs. Coxon*, 10 B. & C. 483.

#### ATTORNEY.

1. A suit is ended by the judgment, and the attorney, &c, is then entitled to call for payment of his bill. No items of charge, therefore, for matters subsequent to the judgment, relating to the costs, will connect with the items previous to the judgment, so as to take these also out of the statute of limitations. It was contended further, that the right of action accrued *de die in diem* during the progress of the suit; but the Court gave no opinion upon that.—*Rothery vs. Munnings*, 1 B. & Adol. 15.

2. The Court will admit as an attorney, an articled clerk who has been prevented by illness from giving regular attention to business during a considerable part of the term of his articles, but has attended as his health permitted.—*Ex-parte Matthews*, 1 B. & Adol. 160.

3. Where, in an action against an attorney in the Court above, the plaintiff recovers less than 40*s*., the judge may certify to deprive him of costs.—*Wright vs. Nuttall*, 10 B. & C. 492.

4. It is the duty of an attorney, before suing out a writ, to communicate personally with his client, if possible; at all events to make inquiry into the nature of the claim, and of the evidence in support of it; otherwise he cannot recover for business done in the suit.—*Gill vs. Lougher*, 1 C. & J. 170; 1 Tyrw. 121.

#### AWARD.

An attachment will be granted for non-payment on demand of money awarded, notwithstanding an action brought on the award and afterwards discontinued, where the action was not pending at the time of the demand.—*Higgins vs. Willis*, 3 M. & R. 382.

#### BAIL.

Bail sued on the bail-bond cannot dispute the arrest. The sheriffs, having returned *non est inventus*, after taking the bond and before assigning it, does not affect the assignee's right of action.—*Taylor vs. Clow*, 1 B. & Adol. 223.

#### BILL OF EXCHANGE.

1. An acceptor is liable upon a bill dated on Sunday.—*Begbie vs. Levy*, 1 C. & J. 180; 1 Tyrw. 130.

2. In action by indorsee against acceptor, where the indorsement was not in the party's own hand-writing, evidence that other bills so drawn and indorsed had been accepted and paid by the defendant, was held, as against the acceptor, sufficient proof of an authority to *indorse*.—*Jones vs. Lord Turnour*, 1 L. & W. 318.

3. A bill was given for an apprentice fee. The apprentice served and was provided by his master with food, &c, for some months, when it was found that the indenture was wrongly stamped, and he left the service: Held, that this was only a partial failure of consideration, and afforded the acceptor no defence to an action on the bill by an indorsee.—*Mann vs. Lent*, 1 L. & W. 320.

4. In trover for a bill or note, a party having no title to the value cannot recover for the paper merely—*Perreira vs. Jopp*, 10 B. & C. 452. note.

#### BILL OF LADING.

By a Spanish bill of lading, the cargo was made deliverable to A. (omitting the words, 'or his assigns,') on being paid freight, &c. It was proved that this was the usual form of Spanish bills, and that they were nevertheless indorsable like others, and that the indorsee was looked to for the freight, &c: Held, that the indorsee of such a bill *was* liable.—*Renteria vs. Ruding*, 1 L. & W. 274.

#### COVENANT.

1. Covenant by the commander of a vessel in the service of the post office, that he would well and truly pay unto the owners of the ship, and to their and every of their several and respective heirs, executors, administrators and assigns, such sum, as should be allowed by the postmaster-general, in such parts and proportions as were set against their several and respective names; held, that the interest of each was several, and a joint action not maintainable.—*Servante vs. James*, 10 B. & C. 410.

2. The defendants chartered a ship to New Zealand, and covenanted either to load her there, or by their agent to give the plaintiff notice that they abandoned the adventure, in which case they were to pay him 500*l*. On the ship's arrival at New Zealand, neither cargo nor agent were there; and the captain made a circuitous voyage home, which voyage, after all allowances, proved to be more profitable than the original adventure would have been: held, that the plaintiff could not recover the 500*l*. penalty in addition to the profits of the homeward voyage.—*Staniforth vs. Lyall*, 7 Bing. 169.

#### DAMAGES IN TORT.

The owner of goods wrongfully seized, and of which a man is placed in possession, may recover damages, although he be allowed to use the goods all the time.—*Bayliss vs. Fisher*, 7 Bing. 153.

#### DECEIT.

1. The defendants made false statements to the plaintiffs, respecting a person whom the former wished the latter to employ as their agent: held, that in an action on the case for deceit, the plaintiffs need not show that the defendant was actuated by an intention to benefit himself or injure them.—*Foster vs. Charles*, 7 Bing. 105.

2. The judge at the trial directed the attention of the jury to the distinction between fraud in fact and fraud in the legal acceptation of the term: the jury found for the plaintiff, and added, that the defendant had no fraudulent intention, although what he had done constituted a fraud in the legal acceptation of the term: the court refused to enter the verdict for the defendant.—*Id. ibid.*

#### DEMURRAGE.

The master of a ship cannot maintain assumpsit in his own name on an implied contract to pay demurrage.—*Evans vs. Forster*, 1 B. & Adol. 118; 1 L. & W. 285.

#### DEVISE.

1. Devise of copyholds to the testatrix's mother for life, then to F. and his wife for life, then to their children, living at their decease, in fee. The testatrix then devised all the residue of her estates do her mother in fee, but charged *such residue* with an annuity of 20*l*. to her grandmother for life. F. and his wife died leaving no child. Held, that the reversion of the copyhold estates passed by the residuary clause; for that the charge of the annuity upon the residue did not, under the circumstances, sufficiently manifest a clear intention that it should not so pass.—*Doe d. Moreton vs. Fossick*, 1 B. & Adol. 186.

2. Devise to A. and his heirs for ever; but in case A. die without heirs, then to J. P. and his heirs, or in case A. offers to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to J. P. and his heirs: held, 1st,

that (the plaintiff) took an estate in fee in the devised lands, under the will, with an executory devise over, to take effect upon conditions which are void in law. 2d, That if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser's title would not be affected by the plaintiff's afterwards mortgaging or levying a fine, or suffering a recovery of the residue of the estate. 3d, That if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee, against all persons claiming under the said will.—*Ware vs. Cann*, 10 B. & C. 433.

EMBLEMENTS.

A lease was granted on condition, that if the lessee should contract a debt upon which he should be sued to judgment, and a writ of execution should issue, the lessor should re-enter as of his former estate: the lessor did so re-enter after judgment and execution, and it was held that he was entitled to the emblements.—*Davis vs. Eyton*, 7 Bing. 154.

EVIDENCE.

1. Evidence of the execution of a deed is not dispensed with because it was obtained out of the hands of the adverse party, who formerly claimed a benefit under it, some months before the trial of the cause.—*Vacher vs. Cocks*, 1 B. & Adol. 145.

2. A private book, kept by a collector of taxes, containing entries whereby he acknowledged the receipt of sums in his character of collector, was held admissible after his death against his surety. The case was decided on the general principle that statements of deceased persons, which appear to have been made against their interest, are admissible; and without reference to the relation of principal and surety.—*Middleton vs. Melton*, 10 B. & C. 317.

3. An action was brought by a corporation against the defendants for having made, while directors, false entries in the books of the corporation; the specific entries complained of were not disclosed in the declaration, nor was any particular delivered: the defendants were held not to be entitled to inspect the books, at all events not without an affidavit that they were unable to conduct their defence without such inspection.—*Imp. Gas Co. vs. Clarke and others*, 7 Bing. 95.

4. An offer by the defendant to pay a sum less than that demanded by the plaintiff, is not of itself evidence to support a count upon an account stated.—*Wayman vs. Hilliard*, 7 Bing. 101.

5. Secondary evidence may be given of the contents of a writing, promising to pay a debt barred by the statute of limitations, where the writings has been lost.—*Hayden vs. Williams*, 7 Bing. 163.

6. W., having an open account with the defendant, drew a bill on him, which was accepted, neither knowing at the time the state of the account between them; it appeared afterwards, that W. was then indebted to the defendant. The bill was indorsed by W. to the plaintiff, who knew that he was absconding from his general creditors, and that he had comitted an act of bankruptcy. W. afterwards became a bankrupt: held, that W. was an admissible witness in the cause; and the court refused to disturb a verdict for the defendant.—*Bagnall vs. Andrews*, 7. Bing 127.

HIGHWAY.

1. If a road be made public a one by an act of parliament, which is to continue in force for a limited period only, and which binds the parish to do statute duty on the road, that liability ceases on the expiration of the act, for then the road ceases to be a public one.—*The King vs. Mellor*, 1 B. & Adol. 32.

2. An order of justices for making a new road, and stopping up the old one was quashed, they not being empowered to stop up the old one, till the new one is complete. Littledale J. observed, that there was another fatal objection to the order, viz. that it did not contain any statement that the justices had viewed the course proposed for the new road. (See 13 Geo. 3. c. 78. and 55 Geo 3. c. 68. s. 2.)—*The King vs. Justices of Kent*, 10 B. & C. 477.

3. A surveyor going out of office is not bound to pay over the balance to his successor, until his accounts have been settled in the manner pointed out by 13 Geo. 3. c. 78. s. 48.—*Heudebourck vs. Langton*, 10 B. & C. 546.

4. Where a turnpike road is stopped up by the trustees, and the site of it given in exchange for that of a new road, under 3 G. 4. c. 126, there is no necessity for a conveyance of the latter to the trustees, or for any written agreement, if the owner of the soil be *sui juris*. *Allnutt vs. Pott*, 3 M. & R. 439. n.

HUSBAND AND WIFE.

1. A husband is not penally answerable under 5 G. 4. c. 83. s. 3. for refusing to maintain his wife, who has left him and committed adultery; although he also has since lived in adultery.—*The King vs. Flintan*, 1 B. & Adol. 227.

2. By a deed of separation, reciting that the husband had agreed to allow the wife an annuity of £250 out of his salary as an officer of customs, he covenanted *generally* to pay her an annuity of £250. Having been deprived of his situation, held that he was no longer bound to pay the annuity.—*Hesse vs. Albert*, 3 M. & R. 406.

INDICTMENT.

Indictment for perjury stated, that it became a material question whether, on the occasion *of a certain alleged arrest*, L. touched K. &c. The defendant's evidence, as set out, was, L. put his arms round K. and embraced him; innuendo, that L. had, *on the occasion to which the evidence applied*, touched K: Held, that the materiality of the evidence was not sufficiently shown, there being nothing to indentify the transaction to which the evidence applied with the certain alleged arrest.—*The King vs. Nicholl*, 1 B. & Adol. 21.

INSURANCE.

1. A shipowner may effect an insurance on freight on his own goods by his own ship, and recover from the underwriter, in case of loss, the the value of the benefit he would have derived from carrying them on the voyage insured.

The risk on freight does not attach, until goods are actually shipped, or there is an actual binding contract for shipping them.—*Flint vs. Flemyng*, 1 B. & Adol. 45; 1 L. & W. 257.

2. The port of destination mentioned in a policy was altered by a memorandum after the policy had been subscribed, in consequence of the ship's being unavoidably detained beyond the intended time of sailing: Held, that the change of destination was merely an alteration in one of the *terms or conditions* of the insurance, within the meaning of the 35 G. 3. c. 63. s. 13. and that a fresh stamp was not required.—*Brocklebank vs. Sugrue*, 1 B. & Adol. 81; 1 L. & W. 263.

3. Assumpsit for work and labor in and about the drawing, &c, of divers policies of insurance, as an insurance broker, and also for divers sums advanced and paid for the defendants as premiums, and for divers premiums due from the defendants, for and in respect of T. F. (whose assignees were the plaintiffs in the action), having underwritten, and subscribed, and caused and procured to be underwritten and subscribed, divers policies for the defendants. Plea, general issue by both defendants; plea, also, by one of them, B., that the plaintiffs had formerly impleaded him for the same cause of action, and that he paid a certain sum into court, which they received, with the costs, in full satisfaction.

The defendants were shipowners. F. was employed by them to effect divers policies, which he effected with a company (to which he belonged, though the defendants did not), by the regulations of which none but members could insure. The policies were, therefore, effected in F.'s name, and he covenanted to pay the premiums—the defendants' names not being mentioned in the policies. F. would have been entitled, and allowed by the company, to deduct from the premiums to be paid by him, the amount of the commission due to him for effecting the policies. The particular of the plaintiff's demand was for insurance merely: Held, 1. That under this, a compensation (the commission) for work and labor in effecting the policies, was recoverable. 2. That the premiums, whether actually paid or not, were recoverable under the count for premiuns due in respect of plaintiff's having *underwritten and subscribed*, and caused to be underwritten and subscribed, policies; the words in Italics being rejected as surplusage. It would seem that the premiums not actually paid could not have been recovered under the count for money paid. With regard to the special plea, it appeared that the plaintiffs, in the former action, did receive the taxed costs, but suffered the money paid into court to remain: Held, that this did not amount to satisfaction.—*Power vs. Butcher*, 10 B. & C. 329.

4. Settlement in account with an insurance broker, by set-off against premiums due from him, is not good payment to the assured, unless it appear that the broker had authority to receive payment in that mode, either express, or implied from the former course of dealing, or the circumstances of the case, or a usage of trade, known and recognised by the assured.

A cash payment to the broker is not a good payment to the assured, unless it appear to have been specifically applied to the loss in question.—*Bartlett vs. Pentland*, 1 L. & W. 235.

5. A policy was effected on goods by four ships named, all or any, at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports and places whatsoever, and wheresoever, in the East Indies, Persia, or elsewhere; beginning the adventure upon the said goods from the loading thereof aboard the ship *as above*; with liberty to sail to, and touch, and stay at any ports or places whatsoever and wheresoever, in any direction, and for

any purpose, necessary or otherwise, *particularly Singapore, Penang, Malacca, Batavia*, &c, without being deemed any deviation. It was found by a special verdict, that the ship having taken on board goods at Batavia, sailed from thence, in the prosecution of the adventure, to Sourabaya, another port in the island of Java, but not in the direct course from Batavia, Singapore, Penang, or Malacca, to Europe, and directly out of the course from each of those four places to any other of them, and distant from Batavia four hundred miles eastward: that she there took on board other goods, then returned to Batavia, and sailed thence with all the goods on board, for Europe, and was lost by perils of the seas: Held, that the sailing to Sourabaya was a sailing on the voyage insured; that it was no deviation; and that the goods loaded there were protected by the policy.—*Hunter vs. Leathley*, 1 L. & W. 244.

LIBEL.

The judge directed the jury to consider whether it was the defendant's intention to injure the plaintiff; but in conclusion, told them to find for the plaintiff, 'if any person, from reading the matter complained of, could conceive an ill opinion of the plaintiff:' Held to be a substantially proper direction, though it was admitted that the effect, and not the intention, was the proper object of consideration.—*Fisher vs. Clement*, 10 B. & C. 472.

LIMITATIONS, STATUTE OF.

A conditional promise in writing to pay a debt barred by the statute of limitations, must be declared, as conditional, although it was given within six years after the debt was contracted.—*Haydon vs. Williams*, 7 Bing. 163.

MARRIAGE.

If banns are published in a wrong surname, and that a name by which the party has never gone, although one which had been entered by mistake in the register of his baptism, and although there is no intention to mislead, and no one having an interest in the marriage is in fact deceived, the marriage is void. Semble, that if the name had been one which the party had ever been known by, or if the error had been merely the partial variation of the name, or the addition or suppression of one christian name, there being no fraud, the case would have been different.—*The King vs. Inhabitants of Tibshelf*, 1 B. & Adol. 190.

## RECENT AMERICAN DECISIONS.

The most important cases in
VERMONT REPORTS. Vol. I. and II.
HALSTED, New Jersey. Vol. VI.
GILL and JOHNSON, Maryland. Vol. I.
PICKERING, Massachusetts. Vol. VIII.
MASON. Vol. V. Circuit Court of the United States in the District of Maine, New Hampshire, Massachusetts, and Rhode Island.

CONSIDERATION.

1. The assignment of a *chose in action* for a valuable consideration, is a sufficient consideration for a promise of the debtor to make payment to the assignee. *Moore vs. Wright*, 1 Vermont Cases, 57.

2. A special promise of an executor to pay a debt of the testator to such assignee, in consideration of the assignment and of assets in the hands of the executor, is valid, and he is liable thereon in his own right. *Ib.*

3. H. purchased a quantity of tin in boxes for one F. at his request, and delivered it to him in the same condition unopened: afterwards, on opening the boxes, it was found that the tin was materially damaged; of which H. had reasonable notice, and thereupon promised F. to make him an equitable allowance therefor: *held* that said promise was void for want of consideration. *Hawley vs. Farrar*, 1 Vermont Cases. 420.

CONSIGNOR AND CONSIGNEE.

1. Where a voyage was undertaken to Havana, and thence to Leghorn and back, and the owners ordered the consignees at Leghorn to apply their funds, estimated at 4600 pezzos to the purchase, first of 2200 pezzos value of tiles, and the residue to invest in paper; and the consignees accepting the orders, invested the whole funds in paper, because they fell short of the estimated sum, although a sum of 1750 pezzos might have been so invested; it was *held*, that the consignees were liable in damages, for the breach of orders. *Cunningham vs. Bell*, 5 Mason, 161.

2. The damages in such case, are not to be confined to the transactions at Leghorn; but are to be calculated upon the actual injury to the plaintiffs in the events of the voyage, taking into consideration the markets at Havana, and all the other circumstances. *Ib.*

3. The receipt of the proceeds of the paper, after sale, by the master at Havana, is not in point of law, *per se*, a ratification of the purchase, and investment in paper by the owners. *Ib.*

4. By the act of Congress of 1799, ch. 128, consignees are authorized to enter goods, and give bonds for the duties. In such case the United States have no remedy over against the owner of the goods, for whom the consignee acts as agent or trustee, if the duties are not paid. *Knox vs. Devans*, 5 Mason, 380.

CONSTITUTIONAL LAW.

1. An act of the legislature exempting the body of a judgment debtor from arrest for a limited time, and discharging him from imprisonment on the creditor's execution, is void. *Lyman vs. Mower*, 2 Vermont Cases, 517.

2. The 3d section of the act of 1823, ch. 95, by which the legislature required a husband to pay a trustee for the use and benefit of his wife, from whom such act divorced him, a sum certain annually, is an exercise of judicial authority, repugnant to the constitution of Maryland, and void. *Crane vs. Meginnis*, 1 Gill & Johns. 463.

CONTRACT.

1. B. with a number of other persons, signed a subscription paper, thereby promising to pay to the University of Vermont, fifty dollars, for the purpose of erecting such suitable college buildings as the corporation thereof should think adviseable. In an action brought against B. after the erection of the buildings to recover the amount of his subscription, it was *held*, that the acceptance of the subscriptions by the corporation, and the actual commencement of the work, with a view to complete the same, so consummated the contract that B. could not avoid payment on the ground that there was no consideration for the promise. *University of Vermont vs. Buel*, 2 Vermont Cases, 48.

2. When one, by voluntary subscription, promises to pay in labor or materials at his option, another season, for the purpose of erecting a public building, and who can be presumed to know that the building is being erected, a demand on him for the labor or materials, previous to the completion of the work, is not necessary. A demand made after the building is finished is sufficient, if the payee is ready and willing to receive such pay at the place where the building is erecting, or at any other place equally convenient for the promiser. *Ib.*

3. An agreement between A and B that the latter shall raise a single crop on shares upon the land of A does not amount to a lease of the land. *Bishop vs. Doty*, 1 Vermont Cases, 37.

4. Intoxication to avoid a contract, must disable a man to know the consequences of his agreement. *Foot vs. Tewksbury*, 2 Vermont Cases, 97.

5. An executory agreement in writing, may before breach, be discharged or rescinded by a subsequent unwritten agreement. *Perrine vs. Cheeseman*, 6 Halst. 174.

6. Contracts are distinguished in two classes; contracts by parol and contracts under seal. There is no distinct class of contracts merely in writing. *Ib.*

7. A lease with a scroll, or ink, or other device, affixed by way of seal, falls under the denomination of a simple or parol contract. So an indorsement on a lease, though it has a scroll by way of seal, may lawfully be rescinded by a subsequent parol agreement and parol evidence, to show it was so rescinded, is competent and admissible. *Ib.*

8. Where the plaintiffs agreed to perform work for the defendant upon a canal, and the defendant agreed to make payments 'from time to time by certificates from the engineer as the work advances,' it was *held*, that the plaintiffs might bring an action without having given notice to the defendant of a certificate previously made, each party being bound to take notice. *Punderson vs. Shepherd*, 8 Pick. 370.

9. The defendant gives the plaintiffs a written contract, by which, after reciting that he places his son with the plaintiffs to learn the art of printing, 'to stay till he is twentyone years of age,' the defendant agrees, 'in consideration of the son's being so old' (he was then eighteen), to pay the plaintiffs a stipulated amount if the son does not continue in the plaintiffs' employment six months after he is twentyone. The son enters into the plaintiffs' employment in pursuance of the agreement, and is instructed by the plaintiffs in the act of printing, for some months, when he leaves the plaintiffs without cause. *Held*, that there was a sufficient consideration for the defendant's contract, and that he was liable on it to the plaintiffs. *Phelps vs. Townsend*, 8 Pick. 392.

10. The want of a counterpart to such a contract does not render it invalid. *Ib.*

11. A covenant by an heir expectant that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor. *Fitch vs. Fitch*, 8 Pick. 480.

12. A owing B a note, gave several new notes to B, altogether being of smaller amount than the old note and payable at future days. At the same time they entered into a written agreement, that if the new notes were paid 'when due,' the old note should be given up to A to be cancelled.

but if any of the new notes were not paid, the old note should be in force; and B in such case agreed that if he should see fit to enforce the old note, he would enter upon it such sums as A should have paid on the new note, and return the other new notes to A. A paid the first of the new notes, but the second not being paid on the day when it became due, B had a writ made out on the old note against A, and afterwards indorsed on the old note the amount which A had paid, and then delivered the writ to the officer, who served it:—

*Held, first*, That payment of the new notes, on the days when they became due, was necessary to entitle A to the benefit of the agreement:

*Secondly*, That A having failed to perform this part of the agreement, B had a right to sue on the old note:

*Thirdly*, That the indorsing of the first payment on the old note, and the returning of the new notes, was not a condition precedent in order to entitle B to sue on the old note:

But, *fourthly, it seems* that if the performance of these acts had constituted a condition precedent they were done seasonably. *Tufts vs. Kidder*, 8 Pick. 537.

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CONVEYANCE.

1. A conveyance to a man, his heirs and assigns, so long as wood grows and water runs, creates a fee simple. *Arms vs. Burt*, 1 Vermont Cases, 303.

2. A purchaser with notice, from another purchaser without notice may protect himself by the want of notice in his vendor. Per Bland, chancellor. *Hagthorp vs. Hook*, 1 Gill & Johns. 270.

3. When a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially, when the deed by virtue of which he takes, recites, or directly refers to the instrument, in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice. *Ib.*

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CORPORATION.

1. A corporation may be bound by an implied promise. *Smith vs. First Congregational Meeting House in Lowell*, 8 Pick. 178.

2. An act, incorporating individuals for a particular purpose, does not vest in the corporation, land previously owned by them as tenants in common and previously used for the same purpose. *Leffingwell vs. Elliot*, 8 Pick. 455.

3. Parol evidence is not admissible to show that a deed given by one of such tenants in common, of his share in the stock of the corporation, was intended to pass his share of the land. *Ib.*

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COVENANT.

If a grantee of land with warranty, being evicted by a paramount title, extinguishes such title for a nominal consideration, he can recover upon the warranty the amount of such consideration only, together with a reasonable compensation for any trouble and expenses to which he may have been put in procuring the extinguishment. *Leffingwell vs. Eiot*, 8 Pick. 455.

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DAMAGE.

1. The obligee may recover on an indemnifying bond the money paid, to the amount of penalty, and interest on the same beyond the penalty. *Clark vs Wilson*, 1 Vermont Cases, 266.

2. When a foreign creditor sues for his debts in Mass. he will recover (except in the case of a bill of exchange) at the par of exchange. *Adams vs. Cordis*, 8 Pick. 260.

3. Where one summoned as trustee is indebted to the principal defendant on a demand drawing interest, and he continues, after the service of the writ upon him, to use the money due, he is chargeable with interest up to the time when the money is demanded of him upon the execution against the fund in his hands; but where interest would be recoverable by the principal defendant, only as damages for breach of contract, it will not accrue during the pendency of the trustee process. *Ib.*

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DEBT.

1. Counts on a special contract under seal, and a *quantum meruit* for labor done and materials found may be joined in an action of debt. *Smith vs. First Congregational Meeting House in Lowell*, 8 Pick. 178.

2. An action of debt or assumpsit may be maintained upon an implied promise, for labor done and materials found under a special contract which has not been performed on the part of the plaintiff. *Ib.*

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DEPOSITION.

Parol testimony is sufficient to prove the form of the caption of a deposition required by the laws of a sister state. *Brownell vs. Reynolds*, 1 Vermont Cases, 259.

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DUTIES.

1. Under the Tariff act of 22d of May, 1824, ch. 136, bombazines, being goods of which wool is a component material, are liable to pay a duty 30 per cent. *United States vs. Clarke*, 5 Mason, 30.

2. If a collector of the customs cancels a bond for duties, without receiving payment of the amount of duties, in connivance with the debtor, the cancellation is void, and the bond may still be declared upon as a subsisting deed; for the cancellation is, in such a case, a flagrant violation of duty. *Johnson in Error vs. United States*, 5 Mason, 425.

3. A collector of the customs is not at liberty to receive anything but money of the United States, or foreign gold or silver coin made current, in payment, of duties. If he receives a check on a bank in payment, it is at his own peril, and if the check is not paid, the bond is not discharged; *a fortiori*, it is not discharged by the receipt of a memorandum check. *Ib.*

4. The receipt of a collector acknowledging payment is *prima facie* evidence, but not conclusive of the fact of payment. *Ib.*

5. A collector, like other public officers, cannot bind the United States by any acts beyond, or contrary to, the authority given him by the Laws. *Ib.*

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EASEMENT.

A liberty granted in a deed 'to dig a canal through the grantor's land,' does not include, as an incident, the proprietary interest in the soil, when dug up and removed. *Lyman vs. Arnold*, 5 Mason, 195.

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EQUITY.

1. A failure to comply with an engagement to do a mere nugatory act ought not to impair the rights of a complainant in equity to relief, when the facts of his case, otherwise concur to sustain his bill. *Coale vs. Barney*, 1 Gill & Johns. 324.

2. Relief, by the doctrine of substitution, is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid—that his further detention of the mortgaged property, is against equity and good conscience. *Union Bank of Maryland vs. Edwards*, 1 Gill & Johns. 346.

3. So where a mortgage was executed, for the purpose of securing the payment of all or every sum or sums of money, then owing, or which might thereafter be due and owing from the mortgagor to the mortgagee, upon any promissory note, or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be drawer or indorser, or otherwise however, and upon sale of the mortgaged premises, the proceeds being insufficient to pay a note of the mortgagor's to the mortgagee, for which the latter had no other security than the mortgage; it was *held*, that an accommodation indorser on the note of the mortgagors, discounted by the mortgagee after the execution of the mortgage and before the sale could not call upon a court of equity to distribute the fund above mentioned, ratably, in payment of both notes. *Ib.*

4. It is the common practice where a purchaser is kept out of possession by the former owner, for the chancellor to interpose the authority of that court, and cause the possession to be delivered up. *Gowan vs. Sumwalt*, 1 Gill & Johns. 511.

5. A bill for a discovery of assets lies in equity, notwithstanding a remedy at law. *Pratt vs. Northam*, 5 Mason, 95.

6. Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his own part. *McNeil vs. Magee*, 5 Mason, 244.

7. If one defendant does not appear, and is not compellable to appear, and is a necessary party to the bill in equity, the other defendants who have appeared and answered the bill, may move for a dismissal of the suit for nonprosecution of the bill against the nonappearing defendant; and the Court will grant a further time for the appearance of such defendant, if it seems reasonable after which the bill is to be dismissed, unless such defendant appears and answers. *Picquet vs. Swan*, 5 Mason, 561.

8. In what cases a court of equity will reform a written instrument, upon the ground of mistake. The mistake must be made out by the clearest and most unequivocal evidence.

*Semble*, that the Court will not reform it to the prejudice of *bona fide* purchasers without notice. *United States vs. Munroe*, 5 Mason, 572.

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ESTOPPEL.

The obligors in an administration bond are estopped by it to deny that the principal was appointed administrator. *Cutler vs. Dickinson*, 8 Pick. 386.

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EVIDENCE.

1. The confessions of the overseer of the poor

and agent of a town, made while executing his agency, may be proved as evidence against said town. *Burlington vs. Calais*, 1 Vermont Cases, 385.

2. A book of accounts exhibiting no mutual course of dealings between the parties, but containing a single entry or charge of cash lent, is inadmissible evidence to sustain a demand for money lent and advanced. *Carman vs. Administrators of Dunham*, 6 Halst. 189.

3. In an action brought by an executor to recover rent of a person who had been a number of years in possession, parol evidence of the declarations of the testator that he was to pay no rent, are admissible. *Coxe vs. Baird*, 6 Halst. 105.

4. No person who is called as a witness, not being a party to the suit, can refuse to give testimony, on the ground, that he may thereby become liable to a civil action not of a penal nature; or sustain pecuniary loss: or that the verdict may be used as evidence against him in some other civil proceeding then pending, or which may thereafter be instituted. *Hays vs. Richardson*, 1 Gill & Johns. 366.

5. A witness on the *voir dire*, may by the party objecting to his examination in chief, for the purpose of showing his interest, be called on to state the contents of written instruments, which are not produced; and the reason assigned is, that the party objecting, could not know previously, that the witness would be called and consequently might not be prepared with the best evidence to establish his objection. *Ib.*

6. One of two witnesses to a deed deposed that he did not recollect witnessing it, but knew the attestation to be in his hand writing, and that the other subscribing witness had a short time previously, but long after the commencement of the suit in which the deposition was taken, left the commonwealth, after advertising his intention so to do and that though the deponent did not recollect having seen him write his name, he had often received letters from him, and thought the signature in question was his hand writing. *Held*, that this was sufficient proof of the execution of the deed for the purpose of reading it in evidence. *Russell vs. Coffin*, 8 Pick. 143.

7. Where a witness on the stand upon cross-examination, contradicted a deposition he had previously given in the same case, the party calling him was not permitted to call other witnesses in support of his general character for truth. *Ib.*

8. Where an assumpsit on a policy of insurance on a ship, the declaration alleged that the ship by force and arms and in a certain hostile manner, was captured, seized, and taken by certain armed soldiers and thereby wholly lost, and the plaintiff proved by witnesses, that she was seen in possession of armed soldiers in a foreign country, and that she never returned home, it was *held*, that he made out *prima facie*, a loss, and that he was not bound to read in evidence the record of a trial and decree of condemnation, which he had in court and which he offered to the defendant to be used by him if he thought proper. *Door vs. Pope*, 8 Pick. 232.

9. Evidence of acts done and declarations made by the claimants of land, after a possession by one of them for thirty years, is admissible to show that such possession was not adverse. *Church vs. Burghardt*, 8 Pick. 327.

10. The testimony of a juror who tried the cause, is admissible upon the hearing of a petition for a review. *Ferrill vs. Simpson*, 8 Pick. 359.

11. And where a deputy-sheriff returned on a writ, that on the day specified he had attached hay in the defendant's barn, his declaration on the same day, while he was at work on a fence near the barn, that he had attached the hay and was then watching it, was *held* inadmissible to prove the attachment, it not being a part of the *res gestæ*. *Merrill vs. Sawyer*, 8 Pick. 397.

12. In order to establish, on a trial, a title to personal property by purchase, it is not necessary for the purchaser to offer his bill of parcels in evidence; but he may prove his purchase by parol evidence. *Blood vs. Harrington*, 8 Pick. 552.

13. Persons who do not believe in the existence of a God, or in a future state of existence, are not competent witnesses. *Wakefield vs. Ross*, 5 Mason, 16.

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## THE JURISPRUDENT.

BOSTON, SATURDAY, MAY 14, 1831.


Condensed Reports of Cases in the Supreme Court of the United States; containing the whole series of the Decisions of the Court, from its organization to the commencement of Peters' Reports at January Term, 1827. With copious Notes of parallel Cases in the Supreme and Circuit Courts of the United States. Edited by Richard Peters, Esq. Counsellor at Law and Reporter of the Decisions of the Supreme Court of the United States. Vols. I. and II. pp. 655 and 736. Philadelphia. 1830.

The learned editor of this valuable work, who has now been the reporter of the Supreme Court of the United States between two and three years, gives the following reasons for the present publication, together with an exposition of his plan, in the preface to his first volume:

'The Supreme Court of the United States has been organised for thirtyeight years, and its decisions form, in themselves, almost an entire code of laws. Many of the difficult and important questions of constitutional construction, and of the nature and extent of the powers reserved, granted, and claimed under the constitution, have passed under the careful observance and judgment of the court. International questions of the highest moment; numerous points of general commercial law; principles, upon which, as its deep and broad foundations, the law of evidence rests; the construction of statutes of the United States; the rules and statutes, by which the titles derived under the United States, to the lands held by the enterprising and prosperous inhabitants of the vast and fertile regions of the south and west, are permanently governed:—all have there been subjects of investigation and final adjudication.

'The chancery jurisdiction of the federal courts has brought before the Supreme Court, in submission to its scrutiny and judgment, most of the rules of equity practice and much of the general chancery law; and the right of appeal and writ of error, by which cases arising in the courts of the District of Columbia may be removed for final determination, has obliged the court to decide many points, which, but for this domestic jurisdiction, might not have been under its consideration. Many questions which have been brought up in those cases, are of usual occurrence in the common transactions and business of life; and are of very general application and influence.

'Considerations growing out of these circumstances impose the necessity, that the law thus general, thus established, thus supreme, should be universally known. That there should be found but few copies of the reports of the cases decided in the Supreme Court of the United States, in many large districts of our country in which there are federal and state tribunals, is known to be a frequent fact. In some of those districts *not a single complete copy* of the reports is in the possesion of any one; [!] and thus the great and overruling law of the land, is almost unknown in many populous parts of the Union.'

Mr Peters then adds, what every professional man has felt, that this state of things is the consequence of 'the heavy expense' of purchasing the twentyfour volumes of Dallas, Cranch, and Wheaton; and it is the object of his present publication to obviate this inconvenience, by *condensing* those twentyfour volumes into six, which will include 'all the cases adjudged in the Supreme Court of the United States from 1790 to 1827, inclusive.' In order that the work may still preserve 'a form which will make it authority in all judicial tribunals, *the whole opinion delivered by the court in every case will be given in the language of the court;* and such a statement or abstract of the facts of the cause will be made as will fully and accurately exemplify the decisions. The matter will not be abbreviated, so as to omit anything which is important, or which in any manner forms an essential feature of the case. *An abridgment* is not contemplated; the work is intended to be of a higher order; . . . . and, to maintain and illustrate the connexion between this publication and the reports of Mr Dallas, Mr Cranch, and Mr Wheaton, and to enable those who shall possess it, to resort to the cases in their volumes, a reference is always given, as well in the body of the work as in the index, to the pages of those reports.'

Such is the plan of this work; and we believe the profession will generally agree, that it promises to be of great utility. We have been obliged thus far to deny ourselves the gratification of possessing all the United States' Reports, for the reasons alluded to by the editor; and we have accordingly resorted to the present publication. So far as we have had occasion to use it, we have found it very satisfactory in the statements of the original cases; and the numerous references to what Mr Peters calls 'the parallel cases decided by the court,' as well as his other references, give great additional value to this work. He has also supplied a deficiency, which has been always felt, in the decisions taken from *Dallas'* part of the series of United States' Reports—we mean, the want of an *abstract*, either at the head or in the margin of each case. Every little facility of this kind, made with judgment, is, to a practising lawyer, of more importance than its humble rank would seem to indicate.

It gives us much satisfaction to observe that Mr Peters, consistently with his plan of an economical and 'condensed' edition, contents himself with referring to the Digests now in use, (as in page 1, to *Coxe's Digest,*) instead of repeating the 'bead roll' of cases under every head. In conformity with his plan of retrenching unnecessary matter, we observe he generally omits the opinions of dissentient judges; but sometimes he inserts them. Which is the better course, might perhaps be a subject of *dissenting* opinions among professional men.

We need not add, that we are much gratified at the prospect of having in such a very moderate compass so great a body of American law from the highest tribunal of our country. The plan, we

presume, will comprehend the Reports of Mr Peters himself, after the decisions shall be so numerous as to make it proper for him to give the public a 'condensed' edition of the whole series. The body of judicial opinions, which will thus be communicated to all those countries with which we have any international connexion, will be one of the proudest monuments of American juridical talent and learning.—*Jurist.*

## REFORM IN CHANCERY.

The whole fabric of Chancery abomination totters to its fall; and venerated dust and rubbish of antiquity is to be swept away; the cobwebs are to be brushed from their perspective corners; the spiders cry out that the world is at an end; and, as daylight is let into the intricate crevices of the building, the obscene birds who have formed their hereditary nests there, from generation to generation, hoot at the light, and in there purblind struggles, fly in the faces of the unwelcome intruders. The *Chancellor* has redeemed his pledge; he now stands forth—not the popular declaimer—not the opposition orator—but the practical, ministerial, reformer of the law. He proposes no petty amendment—no abolition of minor officers or minor evils—no palliative—no sedate—*non placebo*—no compromise between acknowledged evil and conflicting interests. He lays his axe to the root of the evil—he aims a mortal blow at —— the pockets of his adversaries—he refuses the supplies, and the ways and means of corruption are at an end. Judicial officers, and their administrative subordinates, are to be paid by salaries—not by fees; or if in part by fees, then only in that stage of proceeding over which they have no control to multiply, hasten, or retard the steps of the suitor. The Masters' Clerks grieve for their *gratuities*—the Registers for their copy money; those pleasant unctions—those cordials to pen-wearied diligence—those stimulants to *expedition;* are gone forever. The Masters plunge their hands into the depths of their *femoralia*, and with lengthened faces and lack lustre eye, meditate the departed glory of their warrants; while seventy Commissioners of Bankrupts, dispersed to all quarters of the wind, wonder what this world is to do without them.—Yet all this is done with so much judgment, with so much due consideration for individual interest, that those who inwardly curse, and privately mutter, cannot openly complain. If they remain in office, they are liberally paid for the proper execution of their duty. If their services are dispensed with, they are as liberally compensated for the loss of their emoluments. A present and permanent good is cheaply purchased at the expense of a temporary and decreasing encumbrance; and this, too, is put on its just footing; there is no twaddle of the indefensible rights of vested interest—no prattle of freehold—no talk of inheritance in official exactions. Thus the sinecures held by the Reverend Mr Thurlow amount to between nine and ten thousand a year, among these is the most iniquitous office that it ever entered into the mind of man or courtier to imagine—a tax of seven thousand a year out of bankrupts' estates to be collected at a further expense of about fifty per cent.—*London Examiner.*

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*Rules of the Supreme Court of the United States.*—The following additional rules were adopted at the late Session of the Court; their importance to the profession and to parties has induced their publication, before the publication of Mr Peters' fifth volume of the Reports of the decisions of the Court, at January term, 1831, which will appear in July.—*U. S. Gazette.*

RULE NO. 37.

1. In all cases the clerk shall take of the plaintiff a bond with competent security to respond to costs in the penalty of $200, or a deposit of that amount to be placed in Bank subject to his draft.

2. In all cases the clerk shall have fifteen copies of the records printed for the Court, provided the government will admit the item in the expenses of the Court.

3. In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismission (except for want of jurisdiction) or affirmance one copy of the record shall be taxed against the plaintiff, which charge includes the charge for the copy furnished him. In case of reversal and dismission for want of jurisdiction each party shall be charged with one half of the legal fees for a copy.

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NEW HAVEN, April 30.

The U. S. Circuit Court, Judge Thompson presiding, assisted by Judge Bristol, the District Judge, commenced its session in this city last Wednesday. A cause of much importance to the town of East Windsor was tried on Thursday, and $1500 awarded against the town. It was a suit brought against the town by Mr Chester Kellogg, of Amherst, (Mass.) for damages sustained in falling through a bridge in a stage in May last, which bridge it was claimed belonged to the town to have kept in repair. Mr Kellogg had his leg broke in two places, and was detained from home and from his business for several weeks, at great expense. Another suit, brought by Mr Rufus Coles, of Amherst, (Mass.) who was in the same stage, and his thigh broken, was tried on Friday, and a verdict of $1050 against said town given in his favor.

We understand that two cases are pending before the Courts in this state for damages sustained on the same occasion; one for bodily injury received, and the other by the stage owners, for a horse killed by the breaking of the bridge.

The result of these trials thus far, is a loud call to the different towns to see that their bridges on all public roads are kept in good repair.—*N. J. State Gazette.*

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The Supreme Judicial Court, on Tuesday last, closed a term of four weeks and one day, having disposed of all the actions on the Docket.

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*Article* I. *Mathews on Presumptions.*

A Treatise on the Doctrine of Presumption and Presumptive Evidence, as affecting the title to Real and Personal Property. By John H. Mathews, Esq. of Lincoln's Inn, Barrister at Law. With Notes and References to American Cases: By Benjamin Rand, Esq.

II. *Notes on Mortgages in Cuba.*

III. *Insurance—Deduction in Repairs.*

IV. *Double Pleading.*

V. *Horse Causes.*

A Treatise on the Law of Warranty of Horses. By R. S. Surtess, Gent.

VI. *Cowen's Digest.*

A General Digested Index to the nine volumes of Cowen's Reports of Cases argued and determined in the Supreme Court and in the Court for the Trial of Impeachments and Correction of Errors in the State of New York. By the author of those Reports.

VII. *Advice to a Young Lawyer.*

*Digest of Recent Decisions.*

The most important cases in Vermont Reports, vols. 1 and 2; Halsted, New Jersey, vol. 6; Gill and Johnson, Maryland, vol. 1; Pickering, Massachusetts, vol. 8; Mason, vol 5, Circuit Court of the United States in the District of Maine, New Hampshire, Massachusetts, and Rhode Island.

*Chancery.*

Principal cases in Paige's Chancery Reports, vol. 1.

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Account of the various Officers attached to the French Courts.
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*Quarterly List of Law Publications.*

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The following deserved compliment to the above work was given in a speech recently delivered by the Hon. G. C. VERPLANCK, of New York, at a public dinner given him in honor of 'his able and persevering exertions in the Congress of the United States to place literary property on a secure and permanent footing.'

'It would be unjust on this occasion to omit to mention, with special honor, the first and ablest champion who appeared in this cause, and I have only to regret that I cannot mention him by name. I mean the author of a well written, and well reasoned article in a valuable legal journal of Boston, the *American Jurist.* I have not the pleasure of any acquaintance with the editors, nor have I ever been able to ascertain the name of the author of the article to which I allude. But it is due to him to say, that in his essay on the law of the copy-right he placed in a striking point of view the defects of the existing legislation and the obvious justice and policy of an efficient reform, asserting the rights of literary property with the learning of an accurate lawyer, the congenial feeling of a man of letters, and the large views of a statesman.'

ESSAY ON JUNIUS. This day published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

These volumes, by the author of Peter Parley, will complete a series of Tales for Children, designed to interest them in History and Geography. Those previously published are Parley's Tales about America, Europe, Asia, Africa, and Sun, Moon, and Stars. April 9.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

G. & B. also have for sale—

Peter Parley's Tales about Africa.

Peter Parley's Tales about Europe.

Peter Parley's Tales about Animals, with three hundred Engravings.

Peter Parley's Juvenile Tales.

Peter Parley's Winter Evening Tales.

Peter Parley's Geography for Children. April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIII. for March, 1831.

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ART. I. Moral Education. 1. The Library of Education, edited by Wm. Russell, vol. 1; containing 'Some Thoughts concerning Education, by John Locke,' and 'A Treatise on Education, by John Milton.'

2. Account of the Edinburgh Sessional School, and the other Parochial Institutions for Education, established in that city in 1812; with Strictures on Education in general. By John Wood, Esq.

II. Prison Discipline 1. Report of the Board of Managers of the Prison Discipline Society.

2. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

III. Collection of Psalms and Hymns. A Collection of Psalms of Hymns for Christian Worship.

IV. Meaning of Αἰών. Professor Stuart's Appendix to his Exegetical Essays on several words relating to Future Punishment.

V. Works of the Rev. Robert Hall. The Works of the Rev. Robert Hall, A. M. Minister of Broadmead Chapel, Bristol, England. First complete edition, with a brief Memoir of the author.

VI. Stuart and Whitman. 1. A Letter to William E. Channing, D. D. on the subject of Religious Liberty. By Moses Stuart, Professor of Sacred Literature in the Theological Seminary, Andover.

2. Two Letters to the Rev. Moses Stuart, on the subject of Religious Liberty. By Bernard Whitman.

VII. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College, February 3, 1831. March 19.

NEWSPAPER AND PERIODICAL AGENCY. EICHBAUN & NORVELL, Booksellers, Nashville, Tennessee, have, in addition to their regular business, established a GENERAL AGENCY for the procuring of subscribers to, and the collecting of debts due to Newspapers and Periodicals throughout the United States. To this business great attention will be paid, and the instructions of Publishers strictly attended to. The city in which they are established contains a population of six thousand inhabitants, and as the citizens have ever shown a disposition to encourage meritorious publications, with the aid of Agents, the publishers of Newspapers, Magazines, &c, might obtain a respectable number of subscribers. Refer to GRAY and BOWEN, Booksellers, Boston. March 19.

POPULAR JOURNAL OF MUSIC. *THE HARMONICON*, a Monthly Journal of Music—No. I. just received by GRAY & BOWEN. Each monthly number will contain—

I. An Original Biography of some distinguished Composer or Performer. II. Interesting Correspondence, or Original Dissertations, on Subjects connected with the Science. III. Detailed Accounts of the Opera, Concerts, and other Musical Performances of the past month. IV. Copious Extracts from the Foreign Musical Journals, giving the reader the latest information of the Progress of the art, and its Professors throughout Europe. V. Liberal and unbiassed Accounts of all Musical Works as they appear. VI. Six or seven pieces of Music, Vocal and Instrumental, English and Foreign, selected with care, and printed with a beauty and accuracy that may safely challenge competition.

Musical Families and Societies, subscribing to the Harmonicon, will be furnished monthly with (in addition to the literary contents of each number), on an average, Six Entire Pieces of Vocal and Instrumental Music, at a price not exceeding the common charge for a single piece, when printed in the usual way. March 19.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, The Westminster Review, No. XXVII. for January.

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Art I. Popular Defensive Force. II. Lesson's History of Man. III. Hannibal's Passage of the Alps. IV. Webster's American Dictionary. V. India and China Trade. VI. Character of George IV. VII. Scotch Parliamentary Reform. VIII. Heiress of Bruges. IX. Maxwell. X. Belgian Revolution. XI. J. P. Cobbett's Italy. XII. Bruce's Travels. XIII. Machine-Breaking. XIV. Tennyson's Poems. XV. Basil Barrington and Friends. XVI. The Wellington Administration. XVII. European Revolution; List of Books, &c. March 19.

SPLENDID BIBLE. This day published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HINTON'S UNITED STATES. GRAY & BOWEN have just received the four first numbers of the History and Topography of the United States, edited by John Howard Hinton, assisted by several literary gentlemen in America and England. Each number of this work is illustrated with three beautiful engravings on steel.

GRAY & BOWEN have also recently received and have for sale a few copies of the following Foreign Books, viz: Hamilton on the Progress of Society; Iconology or Emblematic Figures explained, by W. Pinnock, with 72 engravings; Panorama of London, with numerous engravings and a complete Plan of the city, taken from actual survey in 1830; Pinnock's Sacred Geography and History; Pinnock's Modern Geography and History; Abliaux or Tales of the 12th and 13th centuries, 3 vols; Spix's Travels in Brazil; Memoirs of Moses Mendelsohn; The Doom of Devorgoil, by Sir Walter Scott; Dibdin's Library Companion; Essai Politique Sur le Royaume de la Nouvelle Espagne, par Alexandre de Humbolt, in two vols. folio, accompanied by a splended Atlas. Price $15. Feb. 19.

GIRL'S OWN BOOK. This day published by CARTER, HENDEE, & BABCOCK,

'The Girl's Own Book.' By Mrs Child, author of Hobomok, and Evenings in New England, and editor of the Juvenile Miscellany.

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The Girl's Own Book is intended for those who are too old to read merely infantile books, yet somewhat too young for such costly presents as the Annuals. It embraces a great variety of subjects: All sorts of Games and Exercises suitable for Girls—Directions for Sewing and Knitting, Needlebooks, Pincushions, Purses, Boxes, and Bags of all sorts—Charades, Puzzles, &c.—Fables, Stories, and Maxims, Poetry, Gardening, Silk Worms, and Bees. Jan. 1.

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

II. Economy of Athens. 1. Die Staatshaushaltung der Athener, vier Bücher. Von August Boeckh. Mit einundzwanzig Inschriften. 2. The Public Economy of the Athenians. Four books; by Augustus Boeckh.

IV. Character and Abuses of the Medical Profession. Rules and Regulations of the Boston Medical Association.

V. Waverly Novels. Parley's edition.

VI. British and American Shipping. 1. The Merchant, Ship-Owner, and Ship-Master's Import and Export Guide; by Charles Pope. 2. Speech of Right Honorable William Huskisson in the House of Commons.—May, 1827.

VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

MECHANICS' MAGAZINE.—This day published by GRAY & BOWEN.

No. 15, North American Series.

This number contains articles on Screw Cutting; Locomotive Carriages; finding Velocity of Ships at Sea; New Metallic Alloy for pivot Watches; Reflections on the Decline of Science in England; Improved marine Steam Engine Boiler; Claxton's Air Pump; Almanacks for 1831, &c, &c, with a great number of engravings.

Subscriptions received as above at $3 75 per annum. March 19.

REV. MR. MAY'S LETTERS.—Just received by GRAY & BOWEN, Letters to the Rev. JOEL HAWES, D. D. in Review of his Sermon on the Memory of the Pilgrims. By Samuel J. May, Pastor of the First Church in Brooklyn, Conn. March 19.

HARMONY OF THE GOSPELS. This day published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

WEBSTER'S WRITINGS. This day published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

'We offer this volume of Mr Webster's Speeches to our Countrymen in full confidence that they will sustain the high reputation they have already acquired for Political Wisdom, and true Eloquence.'—*Editor's Preface.* Jan. 8.

AMERICAN ALMANAC, Second Edition. This day published by GRAY & BOWEN, The American Almanac and Repository of Useful Knowledge, Vol. II., for the year 1831. Jan. 1.

THE JURISPRUDENT

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, MAY 21, 1831. NO. XLIII.

## INCOMPETENCY OF WITNESSES,

### FROM INFAMY OF CHARACTER.

'There are many offences which our law considers such blemishes on the moral character, as to incapacitate from giving evidence in courts of justice; as treason and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, &c, and other offences of the same kind, which involve the charge of falsehood, and effect the administration of justice.' Individuals convicted of those crimes, upon whom judgment has been passed, are said to be incompetent from infamy of character, and are not even heard.

The evils of this rule may be enumerated in a few words. To the extent of its operation, it licenses the commission of any and all crimes in the presence of, and upon persons thus convicted, (none but convicts being present) and completely annihilates all rights of person or property, where those rights can only be established through the medium of this sort of evidence. The benefits of a contrary rule would, of course be the prevention of those evils.

The object of courts being to ascertain the truth, and the only evil to be guarded against being wrong decision, it is perfectly immaterial, what or how infamous the witness may be, provided, when called on the stand, he speaks the truth. This being the only object of the introduction of any witness it follows, that if a person convicted of theft be equally likely with any other individual not so convicted, to state the truth, he answers equally well the purpose of his introduction, and should be heard. Infamy of character, no more than deformity of body, affords a valid reason for rejecting testimony which is probably true. However desirable it might be that none but witnesses of high moral character should ever be introduced, it would undoubtedly be still more desirable, that no occasion should arise for the introduction even of such testimony; that is, that litigation should cease. But as this is utterly hopeless, and as it is impossible to foresee every dispute which may arise, and to pre-appoint the testimony, and, as there are frequently no witnesses of a contested transaction but those whose characters are thus tainted with infamy, the question occurs whether the ends of justice would be better served by the introduction of such testimony, however dangerous it may be, than by its rejection. If other testimony be attainable, this will never be introduced. It might as reasonably be supposed, that a party would prefer the interests of his opponent to his own, as that he would introduce secondary, when the best evidence was within his reach—a man of less, when one of more credit, might be obtained. The question, therefore, is, whether, when as full evidence as by possibility might exist, cannot be obtained, we shall reject that which actually is within our power; whether the light of the sun being unattainable, total darkness should be preferred to the dim and uncertain light of the twinkling stars.

In discussing every question of exclusion, the argument for general admission is so cogent, that the burden of proof undoubtedly lies on the objecting party to support his position; to show a preponderance of evil resulting from the admission of the evidence, which he would reject.

The strongest objections which can be urged against the admission of a witness convicted of crime, are, a *presumed** want of truth inferred from the moral turpitude displayed in the commission of previous crimes, and the inefficiency of moral restraints in such witness, and the probability that, if he should testify untruly, the judge of the facts will, from some cause, place undue reliance on this evidence; for if the witness testify truly, or if no more than proper credit be given to his statements, the rights of the parties or the interests of the community will not suffer. In other words, the advocates of exclusion say, that there is preponderant probability that the witness will perjure himself, and that his perjuries will be credited.

To justify this result, it is, inferred, from the commission of one crime, that the individual will commit perjury. It is undeniably correct, that the fact of a witness' having once violated the laws of morality, is a good reason why less reliance should be placed on his statements, than on those of an individual of unimpeachable reputation. It is a well known rule of the law, that every man is to be presumed innocent till his guilt is established by satisfactory proof. But this rule reverses that statutory maxim; it excludes not for actual, but *presumed* want of truth, and on account of supposed prospective guilt. The convict *may* and can speak the truth. Because a man has committed theft, it by no means follows that he will commit perjury. Because he has violated one law, it is by no means sure that he has or that he will violate any or all the laws in the statute book. Does the father never again question a child who has once told an untruth? After having once felt the punishment of the law for its violation, it by no means follows, that, from some peculiar obliquity of taste, he will again court its punishment. Take the case of perjury; and let the inference be, that because he has once perjured himself, he will do the same the next time an opportunity occurs. Who does not perceive such an inference rash and unbounded? Where an individual on trial for theft, what magistrate would consider the record of *past*, conclusive proof of the *subsequent* supposed theft, in the absence of all other evidence? But this rule of exclusion conclusively infers perjury from some precedent delinquency, and it allows no evidence to dispove this inference. The case in which the perjury was committed, was one in which the balance of conflicting motives induced him to commit the crime; but it furnishes no certainty in a case differently situated. Indeed, unless the present penal code be deplorably inefficacious, even in a case perfectly similar, the probability is, that having once experienced the penalties of the law, he will not again provoke them. The commission of other crimes affords still less proof of this species of guilt.

In all cases, where there is no sinister interest, no motive to seduce from truth, the worst equally with the best man, is entitled to credence, *unless* it be considered sound reasoning to suppose an effect without a cause. The convict is of the same common nature, actuated by the same desires, incited by the same hopes and deterred by the same fears which influence the actions of others. The commission of any given crime shows that under a certain combination of circumstances, he had not sufficient firmness to resist temptation, and affords a ground to believe that where his own interests are an issue (*and in no other case*) that he would more readily than another yield to temptation; that preventives to crime have *less* weight with him than with others—but not that they have *no* weight. It is a stain on his character, for which a deduction should be made from the credit otherwise to be given to his evidence, and of the force of which the jury can judge as well as of any other discrediting circumstances.

So stands the argument as to the probability of the truth of his statements. If, then, his evidence being necessary, it be rejected, certain evil, inevitable misdecision is the result; while, if admitted, the worst that happens is what is sure in the event of exclusion: that is, certain, is preferred to doubtful and contingent evil.

If then the witness, whether his testimony be true or false, is admitted, still, unless *undue* reliance be placed on his testimony, no evil ensues. The position that there will be this error assumes for its basis, either imbecility or dishonesty on the part of the judge of fact, and operates *only* as an argument why there should be a change of judges. The evil, remember, is *undue* reliance on this *suspicious* testimony. The judge, who can in other cases weigh and compare testimony, can equally well do the same in this. A witness comes forward, having, at some previous time, been convicted of perjury. He comes with the mark on his forehead. The jury, (if the trial be by jury) are cautioned by counsel and judge, and the proof of his recorded infamy. Would every word he uttered be received implicitly as truth? Would the danger be that, thus forearmed and forewarned, he alone would be too dangerous to be heard?—so dangerous that he must be excluded? Would not the danger rather be, that his evidence, being true, would be disbelieved, than that being untrue, it would be credited? Is there such magic in falsehood? The judge says, this is suspicious, dangerous evidence, too doubtful to affect the rights of parties; and yet knowing its doubtfulness, the suspicion adhering to it, for fear he shall believe, dare not trust himself to hear it. 'Strike, but hear.' To judge, hear. Would he not be better prepared to judge of the truth of his testimony *after* its delivery, than *before?* The evidence when disbelieved, is the same as if not heard. When believed, the legislator, who establishes such a law, assumes, on his part, that he is a better judge of the truth of the statements of an individual of whom he is totally ignorant, than the tribunal which sees his manner, hears and compares his testimony with the other evidence adduced, and after this comparison, still believes.

* 'It cannot reasonably be expected that such a person would regard the obligation of an oath. By the turpitude of his conduct he has shown that he is regardless of all laws, human and divine,' 1 Starkie, 82.

But to this as to every other rule of law exceptions exist—exceptions, which, if correct, show the impropriety of the general rule, and which, if incorrect, should be repealed. Accomplices are every day admitted, and yet the anticipated evils do not occur. In this case proof of *present* depravity, the fact alone worthy of regard, (for past is adduced only to prove present depravity) is more clear and decisive than in any other case. Persons formerly convicted may have changed their character, or the conviction may have been erroneous; but in this case the guilt is recent and the proof conclusive. So far, therefore, as present depravity is regarded, the accomplice is less admissible than the convict. *Policy** and *necessity* are the reasons given for the admission of this testimony, as otherwise the greatest crimes might escape unpunished. But if guilt be a ground of exclusion and if the testimony of persons of such character, is too doubtful and suspicious to be introduced in civil cases much more should *policy* and *necessity* reject such evidence in criminal cases, when reputation and even life itself are at hazard. Infamy or interest either excludes testimony, says the judge, and as proof of this truth, up steps on the stand the accomplice confessing his guilt—the traitorous accomplice, "who swears 'under an implied promise of pardon;' who 'has an equitable title to recommendation for the king's mercy,' and who to the unlearned in the law would seem excluded on the double ground of infamy and interest. The taint on the character, the moral guilt of the individual, the doubt and suspicion attached to the statements of him who is condemned out of his own mouth, are equally great as if the guilt were proved by the production of a record. If there be danger from the thief, whose recorded guilt is adduced against him, it is none the less because he voluntarily admits his guilt. The law, in a spirit of mercy, says, that it is better ten guilty men should escape than one innocent man suffer. How important, then, would seem the rejection of this testimony to the exclusionist? But in fact if any judgment can be formed from the experience of centuries, no evil results from this rule, or if occasional evil, it is more than balanced by its benefits.

There is still another exception. The convict, if a party to a suit, may make an affidavit in his defence, but not as complainant. Here under the very worst mode of testifying, when the evidence is given unquestioned, uninterrogated, his interests being involved, the convict is allowed to give his evidence under the additional disability of interest—as if any conceivable danger attached to such testimony, were not more than double under these circumstances. Yet his affidavit is admitted; and why? Because 'otherwise he would be without remedy:'*—a good reason undoubtedly, indeed the only reason, why testimony is ever given: but equally applicable to the case, when, without such testimony, others 'would be without remedy,' in which case the evidence would be given under infinitely less objectionable circumstances.

The witness, too, whose character for want of truth is notorious, is admitted, and this want of truth is urged as an argument against his credibility. In this case a witness with a *proved* want of truth, is admitted, while in the exclusion of the convicted, a supposed want of truth excludes.

But this exclusion is said to be a part of the punishment attached to the offence. As a punishment on the guilty this is nugatory—as if an individual, when other motives would not restrain, would be influenced by the fear of not being permitted to give testimony when the rights of others were concerned. The real punishment falls not on the guilty, but on the innocent, on him whose misfortune it is to need such testimony, and whose rights are impaired by its rejection.

Objectionable as is the rule, the modes of 'restoring competency,' the sovereign remedies by which all danger is removed, and the mouth of the witness opened, can scarcely be mentioned without a smile. To pass by the sham process of 'confessing errors in the record,' or the mystic virtues of burning in the hand, as modes of expelling mendacity, a remark or two many be made with regard to the case of pardons, whether by statute or under the great seal, the 'most effectual modes of restoring competency,'* and which are the only modes in vogue with us. The others though possessing no ordinary virtue, have been little tried here. It would hardly be supposed that a witness would be more trustworthy the moment before, than the moment after pardon: and indeed it seems (1 Phillips' Ev. 29) that some have thought 'that a pardon could only remove the incompetency and not the blemish.' But such absurd notions have given place to more reasonable ideas; it being now clear that a pardon, whether under the great seal, or by act of parliament, 'makes the witness a *new creature*, and gives him a new capacity.' If such be the virtues of the great seal, or of parchment, (and if such are *not* the effects, it will be difficult to tell what they are) it seems unfortunate that they are not oftener tried to the utter removal of all falsehood. However, as a sure though a quack remedy to an imaginary disease, it is not without its use.'†

In the preceding remarks, the case of the accomplice was considered an exception to the rule; although one in reality, yet technically considered it is not, as neither the crime, nor the punishment, nor the conviction, but the 'judgment alone creates the disability; but even then, only in the state where the judgment was passed. To most it would seem that guilt (when proved) should render infamous; that if there be danger arising from the evidence sufficient to warrant its rejection, the rule should be coextensive and commensurate with the danger; while the criminality or the infamy arising from this criminality, be proved by the admissions of the party or by record, whether the deed be committed within the jurisdiction of one state or another.‡ One thing is clear, namely, that the rule or the exceptions should be abolished.—*Jurist.*

* Policy and necessity, says Phillips: Policy and *perhaps* necessity, says Starkie. 2 Starkie, 19; 1 Phil. Ev. 31

† 2 Starkie Ev. 723.

* 1 Phil. Ev. 29.

† But even this remedy is not wholly free from evil. A pardon is frequently granted to a criminal; his punishment remitted, to procure his evidence against some other. His punishment was right or wrong. If wrong, he should on other grounds have been pardoned. If right, he escapes deserved punishment, that thus a chance may be had to punish some worse criminal. A certain evil done; the remission of deserved punishment, that good may come, and that good uncertain. It would obviously be better that neither should escape. The witness would be as likely to tell the truth without, as with a pardon. The pardon except as far as by rendering the witness a *new* creature, it alters his character in some miraculous manner, is, in respect to his credibility, mere mummery.

‡ In the case Com.v. Green, 17 Mass. 517. it is decided, that a conviction in another state does not render the witness incompetent. In Maryland the decisions are the other way.

## DIGEST OF ENGLISH CASES.

### NEW TRIAL.

Where a defendant, having an opportunity of trying a cause, permits a verdict to be taken against him, as in an undefended cause, the court will not grant a new trial, even on payment of costs.—*Breach vs. Costerton*, 7 Bing. 224. and *Masters vs. Barnwell, ib.*

### NONSUIT, EFFECT OF.

The judge directed the jury to find for the plaintiff, if they came to a certain conclusion; if they came to either of two other conclusions stated by him, to find for the defendant, and say on which ground they proceeded. The plaintiff then elected to be non-suited: Held, that he was not entitled to a new trial on the ground of misdirection, if either of the two latter points was properly put to the jury.—*Vacher vs. Cocks*, 1 B. & Adol. 145.

### PARTNERSHIP.

A. and others carried on business under the name of the Plas Madock Colliery Company. A. retired from the firm, which afterwards became indebted to the plaintiff. No notice of any kind was given of the dissolution. It did not appear that the plaintiff ever knew A. as a partner, or that his being so was so notorious that the plaintiff must be presumed to have known it: Held that A. was not liable to the plaintiff. *Carter vs. Whalley*, 1 B. & Adol. 11. 1 L. & W. 297.

### PRINCIPAL AND AGENT.

Where the seller of goods put into the hands of a broker who bought them for a party unknown to the seller, a document which enabled the broker to mislead his principal into supposing the contract different in its terms from that under which the broker actually bought, and the principal paid the broker for the goods according to the contract stated by him: Held, that the principal was not afterwards liable to the seller. And (by Parke, J., wherever the broker has stated to the principal) and the latter has *bonâ fide* adopted, a different contract from that under which the broker bought, the seller cannot call upon the principal; because the seller sues on the actual contract under which the goods are sold, and must, therefore, show that the principal authorized or ratified *that* contract, not a different one substituted by the broker.—*Horsfall vs. Fauntleroy*, 1 L. & W. 340.

### PRISONER.

A person who has been in execution for the costs of an ejectment more than twelve successive calendar months, is not entitled to his discharge under 48 Geo. 3. c. 123. the statute being confined to persons in execution upon a judgment for a debt or damages.—*Doe vs. Reynolds*, 10 B. & C. 481.

### PROBABLE CAUSE.

In an action for maliciously suing out a commission of bankruptcy against the plaintiff, he proved that shortly before the docket was struck, he had removed some goods under circumstances not constituting an act of bankruptcy, on hearing of which the defendant sued out the commission. It was not shown, however, that this was the fact on which the commissioners made their adjudication. He further proved that he sued the defendant in

trespass for the seizure under the commission, and, on issue joined on a plea of the bankruptcy, recovered a verdict: Held sufficient evidence of want of probable cause to throw on the defendant the onus of proving the contrary. Very slight evidence of such a negative is sufficient.—*Cotton vs. James*, 1 B. & Adol. 128.

PROMISSORY NOTE.

1. A declaration by the payee of a note that its concoction was illegal, is not admissible in evidence against a subsequent holder for value.—*Beauchamp vs. Parry*, 1 B. & Adol. 89 1 L. & W. 334.

2. A promissory note 'for value received by my late husband,' is valid on the face of it. Evidence cannot be given of a consideration other than that which appears on the face of note.—*Ridout vs. Bristow*, 1 C. & J. 231. 1 Tyrw. 84.

3. An instrument containing a promise to pay money on a contingency, for value received, is no evidence on the money counts.—*Mogan vs. Jones*, 1 C. & J. 162. 1 Tyrw. 21.

SHIP-OWNER'S LIABILITY.

The owner of a ship, by charter-party, appointed G. B. to the command, and agreed that he should be at liberty to receive on board a cargo of lawful goods, (reserving 100 tons for the owner,) and proceed therewith to Calcutta, and there reload the ship and return to London; and upon her arrival in London, and discharge, the service should end: the owner further agreed to supply the ship with stores for the time necessary to complete the voyage; in consideration of which, G.B. agreed to take the command, and pay the owner a certain tonnage per month for the use and hire of the ship. It was further agreed, that G. B. should remit all freight bills for the homeward cargo to B. B. & Co. in London, who should hold them as joint trustees for the owner and G. B. that they should be applied to the payment of the freight due to the owner, and the surplus be handed to G. B. It was then provided that the owner should have an agent on board, who was to have the sole management of the ship's stores, with power to displace G. B. for any breach of the charter-party, and appoint another commander. The plaintiffs shipped goods on board the vessel in Calcutta for London, having first received a copy of the charter-party: Held that they could not recover against the owner for the loss of their goods.—*Newbury vs. Colvin*, 7 Bing. 190; 1 C. & J. 192; 1 Tyrw. 55.

SLANDER.

An allegation of special damage in an action for words spoken by the defendant, is not supported by proof that the defendant had spoken the words to B, and that B had repeated them as the words of the defendant, whereby damage ensued to the plaintiff.—*Ward vs. Weeks*, 7 Bing. 211.

STOPPAGE IN TRANSITU.

The right to stop in transitu is paramount to any lien of a third party against the purchaser.—If goods be specifically directed to a particular place of destination, the transitus continues till they have arrived there, or the purchaser has given them a new direction.—*Morley vs. Hay*, 3 M. & R. 396.

TOLL.

Toll thorough cannot be claimed, unless in respect of repairs done to the particular road or street for passing through which it is claimed; not, for instance, upon all carts entering a town by a certain street, in respect of repairs done to other streets of that town.—*Brett vs. Beales*, 10 B. & C. 508.

TRESPASS.

Under particular circumstances, it may be lawful to lay hands on a party, in order to serve him with process.—*Harrison vs. Hodgson*, 10 B. & C. 445.

TROVER.

A. being indebted to B., gave him a delivery order for goods in a wharfinger's hands, which the wharfinger accepted. A. afterwards gave C. an order for the same goods; the wharfinger refused to transfer to C., unless he could get B.'s order, but engaged not to part with them without informing C. B.'s debt being afterwards paid in part, he gave A. a delivery order for the goods, which he handed to the wharfinger. C. again demanded them, and offered an indemnity, but the wharfinger again refused to deliver them to him, without B.'s order. Held, that C. had no property in the goods on which he could maintain trover against the wharfinger.—*Melling vs. Kelshaw*, 1 C. & J. 184; 1 Tyr. 109.

USURY.

A covenant that the grantor of an annuity for four lives should insure the principal sum within thirty days after the lapse of the third life, does not make the contract usurious.—*In re Naish*, 7 Bing. 150.

VENDER AND PURCHASER.

Assumpsit on an agreement for the sale of lands. The abstract was delivered to the plaintiff in August, 1827, and returned with objections on the 4th of September following. These were answered on the 20th; the conveyance was not to be perfected until April, 1828. The plaintiff re-sold the premises in November, 1827, without comparing the abstract with the deeds. The title having failed, but without any evidence of *mala fides* on the part of the defendant, (the original vendor); held that the plaintiff was only entitled to damages to the amount of the expenses that he had incurred in the investigation of the title, or to nominal damages for the breach of contract; but not to the loss he had incurred by the re-sale.—*Walker vs. Moore*, 10 B. & C. 416.

EQUITY.

3 Bligh, Part 1; 3 Y. & J. Part 4; Younge, Part 1; Tamlyn, Part 3.

ACCOMMODATION BILLS.

Bills of exchange were excepted by A. for the accommodation of B and C. B. being one of the executors of D., and as such having a large sum in his hands, which was deposited in a box in his possession, discounted such bills, by taking out of the box the requisite money, and placing the bills there instead: Held that B. could not so sever his character of co-executor of D. from his character of partner with C. as to prevent the executors of D. from being affected with notice of the transaction, and enable them to sue as indorsees, for a valuable consideration.——— ———, *vs. Adams*, 1 Y. 117.

EXECUTOR.

An executor is not accountable for moneys placed in the hands of persons simalarly entrusted by the testator, although such persons are not bankers; an executor is not chargeable unless he acts from corrupt motives, or *crassa negligentia*.—*Lord Dorchester vs. Earl of Effingham*, 1 Tam. 279.

JURISDICTION.

A., the accountant-general of the court of exchequer in Ireland, executed a power of attorney, authorising his clerk to make transfers in the bank books of any stock of which A. should first have executed a transfer draft, under his hand, upon cheque paper, pursuant to the order of the court. This power was deposited in the bank. The clerk having produced a certificate, purporting to be signed by A., but in fact forged, written on plain paper, and otherwise not conformable to the particulars required by the power and statutory regulations, obtained a transfer of stock from one cause to another. A., being ordered, on motion, by the court of excehquer, to replace this stock, appealed to the house of lords; and they, doubting whether the court below had jurisdiction to proceed in this summary way, on a motion not in a cause; and also, whether the house could entertain the appeal, ordered the case to stand over, with liberty to the appellant, in the meantime, to apply to the court below for a revision of the order on the question of jurisdiction, without reference to the merits. That court having refused, after many discussions to make any further order, the case came on again before the house of lords; when the person at whose instance the order was originally made purposely abstaining from appearing, it was reversed without observation, the council for the bank of Ireland consenting to take £100 for cost.—*O'Neill*, App., *Fitzgerald* Resp., 3 Bli. 24.

LANDLORD AND TENANT.

Demise to A. for eighty years, at a yearly rent, and subject to the payment, in addition, of certain sums in the nature of fines; with a covenant that, in case the rents and fines should be punctually paid, the lessor would, at the end of the term, renew the lease. A. assigned to B. part of the land for the residue of the term of eighty years, subject to the payment of a proportionate part of the rent, and of the sums to be paid as fines, but the proportion was not mentioned. C. afterwards purchased of the lessor the reversion, subject to the lease; and, subsequently, all the premises comprised in the lease which had not been assigned to B. After the purchase by C. one of the fines became due, but was not paid, and no proportion was demanded by C. from, or was paid by, B.: Held that the double character of lessor and lessee represented by C. relieved B. from the strict performance of the covenants, and that the non-payment by him of a proportion of the fines, was not such a breach of the covenant as to deprive him of his right to a renewed lease; and a demurrer for want of equity was overruled.—*Statham vs. The Trustees of the Liverpool Dock*, 3 Y. & J. 365.

POWER.

1. A. gave a voluntary bond to B. in a certain

sum, to be paid to B., 'for the use of herself and children, but at her disposal.' An error in the amount secured having been subsequently discovered, a second bond was executed by A. conditioned for payment of a further sum to B., 'for the use and benefit of herself and children only, in what proportion among the latter she might think proper to direct, but for no other use, purpose, or intent, whatsoever.' Held, that the obligor meant B. to have the interest of the money secured for her life, with a power of disposing of the capital among her children: that an exclusive appointment to two of them was void, and all of them took as tenants in common.—*Fowler vs. Hunter*, 3 Y. & J. 506.

2. Notwithstanding the general rule, that an instrument must be construed by the provisions contained in it, and not by anything dehors; it was held that the justice of the foregoing case required the language of the second instrument should be kept in view in construing the first.—S. C.

3. Where there is a power of appointment among children, and the appointment from any cause fails, the children take as tenants in common.—S. C.

PRACTICE.

1. On a bill for a discovery and an injunction to restain proceedings at law, the injunction was granted until answer and further order. Upon motion pursuant to notice, on the part of the defendant in equity, before answer, and an undertaking by his counsel to admit, at the trial of the action at law, the facts upon which the plaintiff grounded the equity of his case, the injunction was dissolved. —*Fletcher vs. Birch*, 1 Y. 22.

2. A supplemental bill cannot be filed where subpœnas have not been issued on the original bill; the latter should be amended.—*Stewart vs. Nicholls*, 1 Tam. 307.

PRINCIPAL AND SURETY.

A. and B., his surety, gave C. a joint and several promissory note. C. having recovered in separate actions against A. and B., sued out execution against the latter, who paid the debt and costs. To a bill by the representative of B. against A. and C., for an assignment of the judgment obtained by C. against A., a general demurrer for want of equity was put in by A. The Court allowed the demurrer, on the ground that the point might possibly come before the court of law on pleading in *scire facias*, or in a proceeding by *auditâ querelâ*.—*Dowbiggin vs. Bourne*, 1 Y. 111.

SOLICITOR AND CLIENT.

In a suit for tithes, the defendant averred in his answer that the plaintiff was simoniacally presented to the living. To establish this, interrogatories were exhibited for the examination of A, who had acted as solicitor for B, the owner of the advowson, in the sale of the next presentation to the person by whom the plaintiff was presented. A demurred to answering without the consent of B, alleging that he had no knowledge of the matters inquired after, except such as he had derived from being the solicitor of B. The demurrer was overruled, as applying to some of the interrogatories which could not relate to privileged communications; but the witness was allowed to say that any particular fact interrogated to was communicated to him by his client, or to state how he derived his knowledge of it: the question of privilege being left to the future consideration of the court.—*Lonsdale vs. Heaton*, 1 Y. 72.

SPECIFIC DEVISE.

A testator having given various pecuniary legacies, and devised certain specified lands, concluded thus: 'I do hereby expressly charge and make liable my real and personal estate to and with the payment of the aforesaid several legacies.' The Lord Chief Baron Alexander, in his judgment in the court below, laid down, 'that there was no difference between a specific devise of a particular estate, and a residuary devise of a real estate; and that a general charge of pecuniary legacies upon real estate, as it would effect a residuary devise, so it would effect a property specifically devised: real estates being, in their nature, specific devises; and if a legatee has a right to resort to the one, he has an equal right to resort to the other;' and he decreed that the lands in question were liable to the payment of the legacies on a deficiency of personal assets. The house of lords, refusing to assent to the proposition laid down, reversed the judgment.—*Spong*, App., *Spong*, Resp., 3 Bli. 84.

SPECIFIC PERFORMANCE.

In a suit for the specific performance of an agreement to accept a lease, the Court being of opinion that the defendant had waived his right to a reference of the title, directed the master merely to settle and approve the lease. In the course of the inquiry for this purpose, circumstances were disclosed which showed that the plaintiff could make no valid title to the lease which he had undertaken to grant; but the master, nevertheless, approved of a lease. On exceptions to his report, the Court held that notwithstanding the defendant's waiver, yet, as it had come out collaterally, that the plaintiff could make no title, a specific performance could not be decreed; and dismissed the bill, but in consideration of the circumstances, without costs.—*Warren vs. Richardson*, 1 Y. 1.

2. A. having made two wills, the provisions in which caused great discontent among his children, they entered into an agreement for the division of the property, with the intention of submitting it to him for his approbation; this, however, in consequence of his death on the following day, was not carried into effect. The personal property having been divided according to the agreement, a deed was executed, which J. S., one of the parties, understood to be for the purpose of carrying into effect the agreement; when, in fact, the two instruments differed materially. The Court, notwithstanding it deals liberally with family arrangements, refused to enforce the agreement, which was not to operate without the approbation of the testator; and also, to execute the deed by which J. S. clearly intended to carry into effect the agreement.—*Beastall vs. Swain*, 1 Tam. 288.

3. The defendants covenanted, within two years, to procure the heir at law of K. L. to convey certain premises, or within that time to prefer a petition to the House of Lords for, and use their utmost endeavors to procure, an act of parliament for substituting some proper person to be a trustee of the premises in the stead of the heir, in case he could not be discovered, or there should be no heir, and the estate should have, in consequence, escheated. The master, on reference, certified that he did not find that there was any heir at law. The Court decreed the defendants to permit their names to be used in an application to parliament for the necessary act, by petition or otherwise, as the Master should appoint, in case the parties differed, and to pay the costs up to the time of the decree.—*Frederick vs. Coxwell*, 3 Y. & J. 514.

*Semble.* The old law by which a husband was compellable to procure his wife to levy a fine according to his covenant, is now shaken. The Court will not decree an impossibility.—S. C.

STATUTE OF LIMITATIONS.

A. and B., his wife, in 1757, joined in making a mortgage in fee of an estate belonging to the wife, and a fine was levied to the uses of that deed. In 1765, they conveyed the equity of redemption to the mortgagee, but the wife's interest did not pass for want of a fine. The wife died in 1780, and the husband in 1809, and in 1829, the persons claiming under the heir of the wife, filed a bill for redemption. A plea of the statute of limitations, 21 Jac. 1. c. 16., was overruled, without prejudice to the defendants using it as a defence in the answer.—*Ravald vs. Russell*, 1 Y. 9.

TITHES.

On a bill by a rector, the defendant set up a composition real. The lands in question were, in the reign of Charles the second, divided, upon partition, among three persons, from whom the title was conveyed to the present proprietor by numerous instruments, many of which include the tithes of those portions of the lands comprised in them; and some of which show that a small money payment, parcel of a larger one, amounting to 10*s.*, was provided for the parson in lieu of tithes. A verdict in an action in 1663 for not setting out tithes, on the statute of Edward, in favor of the defendant, a then occupier of the lands, was also given in evidence. There was no trace of tithes having been set out after the reign of Edward the second, nor of the payment of the 10*s.*, or any part of it. Neither the pleadings nor evidence contained any reference to a composition deed. The question was, whether upon the partition deed, the verdict, and the non-render of tithes, a composition real could be inferred. The Court held that such evidence was not sufficient; and that a real composition cannot be acted upon without some evidence of a deed containing the contract having been executed.—*Lediard vs. Ainstie*, 3 Y. & J. 548.

## RECENT AMERICAN DECISIONS.

EXECUTION.

1. A levy of execution on *all the right, title, and interest, in and to land*, of a particular description, is void. *Arms vs. Burt*, 1 Vermont Cases, 303.

2. A prior execution, kept on foot with an intent to delay and defeat other creditors, will be postponed to a subsequent execution. *Matthews vs. Warne*, 6 Halst. 295.

3. The requisites of a good levy, in all ordinary cases, are 1st. That the officer should *see* the goods and have them in his power. Per Drake, Just. [But quære of this.] See the opinion of Ford Just. contra. 2d. That he should, in addition to this, do some act demonstrating his intention, from that time forward, to appropriate them

in obedience to the command of the writ. *Lloyd vs. Wyckloff*, 6 Halst. 218.

4. Two executions should not be issued at one and the same time against several persons, upon one judgment rendered on one scire facias and one recognizance. *State of New Jersey vs. Stout*, 1 Halst. 362.

5. A sheriff must apply the money arising from a sale to the execution under which he sells; he canot apply it to the discharge of previous liens. *Mushback vs. Ryerson*, 9 Halst. 346.

EXECUTORS AND ADMINISTRATORS.

1. A charge of interest by an administrator will be viewed with caution, and the circumstances offered to sustain it will be examined with scrupulous care. But circumstances may exist which will not barely justify, but commend an advance of money by the administrator, and entitle him to the allowance of interest. *Liddell vs. McVickar*, 6 Halst. 44.

2. If the personal estate is insufficient for the payment of the debts; and the administrator actually and in good faith, and under proper circumstances, advances moneys for the purpose, an order for sale may be made to reimburse him. *Ib.*

3. According to the law of England an administrator *d. b. n.* cannot call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate that such predecessor may have converted or wasted; nor can he claim or recover anything but those goods and chattels and credits of his intestate which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of the intestate. Per Bland, chancellor. *Hagthorp vs. Hook*, 1 Gill & Johns. 270.

4. Where an original administration is granted in one of the United States, and an ancillary administration, in another state, and the estate is insolvent, a creditor in the latter state is entitled to a *pro rata* dividend only, although the assets in that state are sufficient to pay his demand in full. *Davis vs. Estey*, 8 Pick. 475.

FOREIGN LAWS.

The knowledge of the court of the law of a neighboring state empowering a justice of the peace to take the acknowledgment of deeds may be sufficient without other proof. *Middlebury College vs. Cheney*, 1 Vermont Cases, 336.

FRAUD.

1. An administrator cannot avoid the deed of his intestate by showing the same to have been made to defraud the creditors of the intestate, though there be no other fund from which these debts can be paid. *Adm'r of Martin vs. Martin*, 1 Vermont Cases, 91.

2. Fictitious subscriptions, obtained for the purpose of affecting other subscribers, render void those that come afterwards; and owing to the particular character and object of the subscription in question, renders the whole uncollectable. *Middlebury College vs. Adm'rs of Loomis*, 1 Vermont Cases.

3. If there is an allegation of fraud in obtaining a bond on which judgment has been entered by confession, the court will award a feigned issue to try the question of fraud. *Barrow vs. Bispham*, 6 Halst. 110.

FRAUDS, STATUTE OF.

A parol agreement that the son of A shall serve B, for the term of four years, is void under the statute of frauds, as being a contract not to be performed within a year. And the operation of the statute is not avoided by a service of a few months under the contract. *Quære*, whether a part performance is ever an answer to the statute, except in courts of equity? *Squire vs. Whipple*, 1 Vermont Cases, 69.

FRAUDULENT CONVEYANCE.

1. A signed a note, as surety for O. payable to H.; and O. in order to secure A for becoming his surety, gave him an absolute bill of sale of a chaise then in the possession of a third person, and of some other property in the possession of O. The whole was left in the same situation as before, no actual delivery or change of possession being made, except that notice of the transfer of the property to A. was given to the person holding the chaise, and he agreed to keep it for A. Afterwards the chaise was seized and taken away on an execution in favor of a creditor of O., and A. took it from the possession of the officer. In an action of trespass brought by the officer against A for the chaise, it was *held:*

1st. That although the note in which A. had become surety, might be usurious and void, yet he was entitled to hold the property assigned to him for his security, until he was indemnified or relieved from the note.

2d. That there had been a sufficient delivery and change of possession against the creditors of O.

3d. That the fact of a part of the property being suffered to remain in the possession of the vendor, did not defeat the right of the vendee as to the residue, unless the transaction was fraudulent in fact.

4th. That the jury were the proper judges, whether, from all the circumstances in the case, the sale was merely colorable, and made to defeat the rights of creditors, or was fair and *bona fide*. *Spaulding vs. Austin*, 2 Vermont Cases, 555.

HIGH SEAS.

The words 'high seas' in the crimes statute of 1825, ch. 376, § 22, mean the uninclosed waters of the ocean on the sea-coast outside of the *fauces terræ*. *United States vs. Grush*, 5 Mason, 290.

HUSBAND AND WIFE.

An ante-nuptial contract by which the wife is to hold her own earnings to her separate use, is fraudulent as it respects previous or subsequent creditors of the husband. *Keith vs. Woombell*, 8 Pick. 211.

INFANT.

A minor, having purchased his time of his father is entitled to his own earnings as against the creditors of his father. *Chase vs. Elkins*, 2 Vermont Cases, 295.

INSOLVENT DEBTOR.

1. A person who, by the reason of the commission of a crime, is disqualified from being a witness, may be examined upon his application as an insolvent debtor. *Anonymous*, 6 Halst. 93.

2. If a surety on a promissory note pay it after the principal has been discharged under the insolvent act, he may recover the amount from the principal, whose discharge will be no bar to the action. *Paxson vs. Haster*, 6 Halst. 410.

INSOLVENT LAWS.

1. A certificate obtained under an insolvent law of one state, which declares the person of the insolvent to be exempted from arrest for debts contracted previously to his assignment, is no bar to an action on such a debt, commenced by arresting him another state. *Boston Type, &c, Foundry vs. Wallack*, 8 Pick. 186.

2. A discharge obtained under an insolvent law of one of the United states, is no bar to an action brought by citizen of another state against the insolvent, even upon a contract made between them in the state where the insolvent law was passed. *Braynard vs. Marshall*, 8 Pick. 194.

3. Where a contract is made between citizens of the same state, and the defendant is afterwards discharged under the insolvent act of such state from imprisonment, and his person is exempted from future imprisonment thereon; still, if the contract itself is not discharged, a general judgment will be entered against him upon a suit brought in another state, according to the *lex fori*. *Titus vs. Hobart*, 5 Mason, 378.

JUDGMENT.

1. A judgment rendered in one state by a court having jurisdiction, is conclusive evidence in another, if it appear from the record that the defendant was served with process within the state, or appeared and submitted to the jurisdiction of the court though he resided out of the state in which the judgment was rendered. *Hoxie vs. Wright*, 2 Vermont Cases, 263.

2. A defendant, appearing and answering to an action out of his state, and judgment against him, cannot, when sued upon that judgment in his own state, defend upon the original merits. *Bellows vs. Ingham*, 2 Vermont Cases, 573.

3. A judgment in the court of probate of a state is not conclusive where it has been obtained by fraud. The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive. *Pratt vs. Northam*, 5 Mason, 95.

LANDLORD AND TENANT.

G., a *feme sole*, contracted with the plaintiff to let him sow a field in grain, and he agreed to give her one third of all the grain raised, as *rent*. The plaintiff went upon and sowed the field in rye. The defendant, who after the making the contract, intermarried with G., entered upon the field, refused the plaintiff permission to cut the crop, and afterwards cut it himself and carried it away. In an action of *trover* for the value of the rye, it was *held*, that the contract between G., and the plaintiff, clearly constituted them landlord and tenant: and that the plaintiff was entitled to recover. *Hoskins vs. Rhodes*, 1 Gill & Johns. 266.

LIMITATIONS, STATUTE OF.

1. A replication to the plea of the statute of limitations, stating 'that the defendant before and at the time the cause of action accrued to the plaintiff, was out of the state of New Jersey, to wit, in the state of New York, and that the defendant has not been resident in the state of

New Jersey for the term of six years, nor for so great a term as six years since the cause of action accrued, and before the commencement of the suit, is bad on demurrer. *Patterson Bank vs. Ludlow*, 6 Halst. 354.

2. An account 'concerning the trade of merchandise, between merchant and merchant' is not barred by the statute of limitations, although none of the item are within six years before the action was brought. *Bass vs. Bass*, 8 Pick. 177.

3. The death of one of the parties to such an account, does not operate as a settlement or statement of the account, so as to bar it by the lapse of six years from the time of his death. *Ib.*

4. Whether accounts concern 'the trade of merchandise between merchant and merchant,' is a question of fact to be decided by the jury. *Ib.*

5. Such accounts are not merely accounts for merchandise bought and sold between the parties, but also include demands for money growing out of the trade of merchnndise. *Ib.*

6. The defendant in an action upon a promissory note said, 'he supposed the note was paid by the land mortgaged as collateral, that he was willing to do what was right, that he should be willing to make some small additional payment, for the purpose of settling the business, but if the plaintiff thought proper to sue, without taking the land, he should resist the suit.' *Held*, that this did not take the demand out of the statute of limitations, although it was proved, that the value of the land was much less than the amount due on the note. *Gardner vs. Tudor*, 8 Pick. 206.

**THE JURISPRUDENT.**

BOSTON, SATURDAY, MAY 21, 1831.

## SUPERIOR COURT OF JUDICATURE,

OF NEW HAMPSHIRE—GRAFTON COUNTY.

*May Term*, 1831.

The opinions of the Court were, as usual, at this term, pronounced by Richardson, Chief Justice. They are generally drawn by him, and, as is generally known, are by him reported.

It is not the practice in that state, as in Massachusetts, to report all the cases, which arise on matters of law and are decided by the Court. The Reporter is left at liberty to report such, and only such as may seem to him to be worthy of publication. In some of the counties, in that state, the number of points raised and cases made, during a term, are, considering the quantity and nature of the business transacted in the Court, altogether unusual and extraordinary. It is pretty much a matter of course to get the case upon some legal point or technical difficulty, which will serve to hang it up for, at least, an additional term.

A case can be hardly found so barren of all doubt and uncertainty, as to baffle the ingenuity of Counsel in attempts to create real or fancied legal difficulties.

It is quite a different thing there as well as elsewhere to get a verdict, and to get the case. There is often much less trouble about the merits of the question, than with the capricious and sometimes, absurd rules and doctrines of the law. A party is astonished to learn that, while he has the former so clearly with him, by verdict after verdict, he is likely to lose his case and suffer, as a natural consequence, an additional and often ruinous calamity from the accumulation of costs, upon the strength of some unsubstantial error or a case in point from the Books.

The community begins to doubt the wisdom of the law, and with much reason, suspect the fairness of some of its professors, and the propriety of the course of its administration.

Litigation has become burthensome and oppressive, beyond all example and all endurance. Difficulties arise and multiply as the cases progress, till a client, who supposed himself claiming a plain matter of right before a tribunal created to administer justice, between citizens, finds himself involved in a lawsuit, from which he can escape, if he escape at all, only by a sacrifice of double and sometimes, of ten times the amount in dispute. It is no unfrequent occurrence to have an action remain in Court, seven and ten years, and this under a constitution which provides that justice shall be administered 'promptly and without delay.'

It should not be understood that any blame is to be attached to the Judges. The fault lies in the system. The evil is in the organization of the Court and in the defect of the laws which they are called upon to administer. These delays and uncertainties are not only fatal to the parties, but are injurious to the members of the Profession. A reproach is thereby cast upon them and they are also made to suffer from the loss of much fair and honorable business, which would otherwise naturally pass through their hands.

In an action decided at this term, *Dyer vs. Hunt and als*, which was brought to recover damages for enticing away an indented apprentice, who had been bound by the overseers of the Poor in the town of Norwich, in the state of Vermont, by virtue of a provision of the Poor laws of that state, to the plf. a member of the society of Shakers in the town of Enfield, in the state of New Hampshire—the Court were of opinion that the contract being made in Vermont, with a view to its being performed in N. H., the right and obligations arising under it, and its validity were to be determined by the Laws of N. Hampshire; and as no law of N. H. was found authorising the overseers of the Poor in Vermont to bind out poor persons to the citizens of N. H., the indentures were void.

This opinion may materially affect the rights of many individuals who hold apprentices under similiar contracts made in the neighboring states. It has been long the practice to bind poor children from the poor houses of this state to the citizens of New Hampshire, Vermont and other New England States. We are not aware that the question of the validity of such contracts has ever before arisen.

In the *action Udal vs. Metcalf*, which was assumpsit for the price of tickets sold by the plaintiff, residing in Vermont, in a lottery authorised by an act of the legislature of that state, to the deft. a citizen of New Hampshire, with a view to their being sold in New Hampshire, where the sale of tickets is prohibited by law—the Court held that it could not enforce such a contract, and that the plf. was without a remedy in law.

## NEW HAMPSHIRE REPORTS,

VOL. V.—PART I.

The following are the principal cases reported in part 1. of Volume V. of N. H. Reports, recently published.

An officer, having an execution in a case where bail had been given, returned that he had given notice to the bail, but omitted to make a return of *non est inventus* as to the principal—it was held that the officer might be permitted to amend his return, and insert a return of *non est inventus* in order to charge the bail.

In *scire facias* against bail, it is no defence that the name and place of abode of the bail were not indorsed upon the execution which issued against the principal.—*Mahurin vs. Brackett.*

An attachment of goods is not to be considered as *ipso facto* dissolved by the lapse of thirty days after the end of the term when the defendant was defaulted, although no continuance of the cause was ordered; but a court may in its discretion order the cause to be brought forward at a subsequent term, in order to save the attachment.

And in such a case, a release of the attachment is a good consideration for a promissory note. —*Hackett vs. Pickering.*

C. being in prison on an execution issued in favor of N. and having the liberty of the prison yard, N. wrote on the back of the prison bond a certificate that he exonerated the sureties from all liability. But the certificate was not under seal and was without consideration. Immediately afterwards C. escaped and went at large, without the prison limits,—it was held that the certificate was not sufficient evidence to show the assent of N. to the escape.—*Nealey vs. Cilley.*

If a mortgagee continue in the actual and peaceable possession of the mortgaged premises for a year after the condition is broken, the right of the mortgagor to redeem will be lost, although he may have resided with the mortgagee upon the land.—*Gilman vs. Hidden.*

L. was the owner of a lot of land in the town of G. bounded upon the original line between the towns of G. and N., and H. was the owner of a lot of land in the town of N. adjoining L.'s said lot, and bounded on the said original line; it was held that an adjudication of the court of sessions establishing the said line, in a suit between the towns, was not evidence of the true line between L. and H.

But perambulations of the said line by the selectmen of the towns were held to be evidence in a suit between L. and H. —*Lawrence vs. Haynes and al.*

Where there are three sureties, if one be insolvent and another pay the whole debt, the third shall contribute a moiety.

And if three persons give a note for their joint debt, each is to be considered with respect to the others as a surety with regard to two thirds, and as a principal with regard to one third, of the debt: and if one be insolvent and another pay the whole debt, the third shall contribute a moiety. —*Henderson vs. McDuffee.*

Where a new trial was granted by this court in a case which had been decided in the court of common pleas, and the cause again tried in the common pleas and another judgment rendered, it was held that one of the parties who was aggrieved by the last judgment might bring the cause by appeal to this court.—*Robinson vs. McDuffee.*

Under the statutes of Febuary 15, 1791, and of June 13, 1796, it was not necessary, in order to entitle a prisoner to the benefit of the poor debtor's oath that he should make application to the magistrates in writing, or that the magistrates should be together when they appointed a day of hearing.

A creditor could take no advantage of any in-

formality in the certificate, which the magistrates gave in such a case to the jailor.—*Keay vs. Palmer.*

When a mortgagor continues in possession of the mortgaged premises, he may be considered, if there be no contract on the subject, either as a trespasser, or as a tenant at will at the election of the mortgagee.

If a tenant at will do any act, which amounts to waste, this will be a determination of the tenancy, and he, and those who assist him, may be treated as trespassers.

And even if a mortgagor who continues in possession can be considered as a disseizor, he will be liable in traspass after the mortgagee obtains possession, for any injury done by him, while in possession, to the freehold.

A mortgagor has no right to remove a building by him erected on the land.—*Pettengill vs. Evans and al.*

S being seized of a tract of land lying partly in lot No. 10, and partly in lot No. 9, and granted to J. S. a tract of land in which he described in the deed as lot No. 10, but as bounded on all sides by land of other persons—it was held, that the whole tract lying in both lots passed, although in the description of the granted premises it appeared there were mistakes as to the owners of the adjoining lots.

In a deed poll where there is a doubt, the construction must be against the grantor.

A general description may be enlarged or abridged by a particular description of the granted premises.—*Tenny vs. Beard.*

A gave B a note payable to him or order, and having made his will and constituted B executor and residuary legatee, died; B caused the will to be proved, and took upon himself the burden of executing the same, and gave bonds for the payment of the debts and legacies. He then indorsed the said note to C who brought an action against B as executor, and had judgment by default. Afterwards B and his sureties in said bond, applied by petition for a new trial. It was held, that although the note was discharged when the bond was given, yet there was no cause for granting a new trial, because by letting the judgment stand, no injustice was done to the executor himself, and the sureties and others who were strangers to the judgment could in no way be affected by it. —*Tarbell vs. Samuel and al.*

A refusal by an executor or administrator to account for a particular sum, supposed to have been received by him on account of the estate, is not a breach of the condition of probate bond.

A judge of probate may charge an executor or administrator with money not credited by him. And if there be anything in his hands for which he has not given credit, it must be adjusted and determined when his accounts are settled in the probate court.

In debt upon a bond, if the defendant plead performance of the condition and the plaintiff assign an insufficient breach upon which issue is joined and found for the plaintiff, judgment must be arrested.—*Judge of Probate vs. Briggs.*

## PHILADELPHIA DISTRICT COURT.

*Joseph Worral vs. Nathan Harper.*

Capias case to Sept. term 1829, No. 740. C C. B B. Bail bond executed by defendant and Lancaster.

December, 1829.—Continued at March T. 1830, to wit, on the 5th of April. Wm. Lancaster, who had joined in the bail bond, entered special bail; he was received without objection by the prothonotary. 20th May, 1830, the plaintiff, without examining whether special bail was entered, brought a suit on the bail bond to June, 1830, No. 347. Joseph Worral a. v. c. vs. Nathan Harper and Wm. Lancaster. 26th June, 1830, motion by Jesse Y. Castor on behalf of the bail to stay proceedings on this bail bond suit, and rule to show cause.

Opinion delivered by Judge Hallowell, 2d April, 1831, and concurred in by Judge Coxe, Judge Barnes being absent.

Hallowell, J.—It was improper and erroneous to sue the bail bond after special bail had been entered; there was default both in the plaintiff's attorney and in the prothonotary: the plaintiff's attoney should always ascertain by actual examination, whether special bail has been entered before he directs such a suit; and if *he* does not, the prothonotary should search for the original action; and if special bail has been entered, should refuse to issue the process. Special bail is a legal appearance; and after it is entered, the bail bond, which is conditioned for the appearance of the principal, is, generally speaking, satisfied; the proper method, and we think the *only* method for the plaintiff to pursue, if he deems the bail irregular so as to affect his legal rights, is to apply to the court to expunge it.

Union Bank of N. Y. a. v. c. vs. Kraftd and another, 2 S. and R. 284. and M'Farland vs. Holmes, 5 S. and R. 50. fully establish this doctrine; in the latter case the motion on behalf of the plaintiff was to expunge or strike out the special bail, which was *done*, because it was entered after the plaintiff had lost the opportunity of obtaining a trial or judgment at or before the third term.

We are therefore of opinion that for this irregularity the rule must be made absolute:—the proceedings on the bail bond suit set aside with costs, to be paid by the plaintiff, who brought that suit wrongfully, and which he cannot sustain.

But the setting aside this suit and the proceedings thereon, will not determine the question finally, as between the plaintiff and the bail; it is better, therefore, at once to consider the subject as it would stand if the case were now on a motion by the plaintiff to strike off the special bail, and direct the bail bond to stand as a security for the debt and costs due in the original suit.

The entry of this special bail cannot be considered as a nullity, and although it may have been taken in contravention of the 21st rule of this court, page 16, yet it was taken by the proper legally authorized officer without objection, as if all were *regular:* the rule is but directory to the officers; but if violated the act is good till vacated by the court, *quod fieri non debet factum valet.* What are the objects of giving notice to the plaintiff or his attorney as the rule requires? One is, that he may object to the sufficiency of the bail; but here he could not with any good effect have objected to the sufficiency, for it is undoubtedly sufficient, as the plaintiff's own conduct shows: —he has subsequently taken an assignment of the bail bond from the sheriff, with the same security; indeed, it seems agreed on all hands that he is sufficient. In this respect, therefore, notice would have been of no use to him. Another object to be answered by notice is, that the plaintiff may object to the entry of special bail as too late, and may allege that the bail is fixed, but the prothonotary took the bail without requiring such notice, or apprizing him of the necessity of it. He was therefore, from the 5th of April to the 20th of May, 1830, lulled by the officer of the court into a false security. That officer should have refused to take the bail without proof of notice: if he had done so, the surety would have awakened and have seen his actual situation,—probably have taken good advice: he would then have found that that he was still in time to relieve himself; he could have gone to his principal, got him to move the court for leave to enter special bail on confessing judgment, if the debt were undisputed, as we are informed it was; or if not, to permit the case to be put on the trial list of March term, 1830, which the court, on proper representation for the relief of the bail, which is always a favorite object with them, undoubtedly would have done. That was the third term;—the plaintiff, therefore, if the debt was *undisputed*, would have got his judgment and execution before the expiration of six weeks from the commencement of March term, 1830; or if *disputed*, he would have had the same chance of trial at that same term which every plaintiff in an action to Sept., 1829, had, where special bail had been entered, *with the utmost regularity.* We must look to the 5th of April, 1830, as the important day, and regulate the rights of the parties as they then stood.

The result is that we cannot strike off the special bail, it must stand; and the plaintiff must carry on his action against the principal in the usual way, and cannot avail himself of the bail bond as a security.

This decision does not interfere or come into collision with the judgment of the court delivered lately in Kuhn vs. Beatty, or with any of the principles therein stated, for there no special bail was entered or offered till the fourth term, when the plaintiff had completely lost his chance of judgment or trial at the third.

Rule absolute for setting aside the proceedings on the bail bond suit, with costs to be paid by the plaintiff.

Mr Archibald Randall and Mr Dallas for the plaintiff. Mr Stroud for the bail.—*Journal of Law.*

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## MERCANTILE LAW.

### THE CONTRACT OF SALE.

#### STOPPAGE IN TRANSITU.

To the extensive commerce the system of credit is of course essential; and one of the chief ends, therefore, of mercantile jurisprudence is the protection of creditors against the fraud or improvidence of debtors. Whether in this country the favor bestowed by the law upon the creditor has not been carried to an extreme, hurtful to the true interests of commerce, this is not perhaps the place to inquire; though we cannot help hinting, that in a community where capital is abundant and living expensive, there need no adscititious stimulants to speculating and adventurous trading. Credit, however, there must be; and it is, when taken in its largest sense, of two kinds: first, when a future day is fixed for payment, either by agreement or by usage, through the medium generally of bills of exchange, made payable at that date—and secondly, when the goods are sent upon the trust of immediate or early payment. Now we have seen, that in the former of these cases (supposing a specific appropriation to have been made), the absolute ownership vests immediately in the buyer—that in the case where no day has been fixed, although the seller may, if he choose, retain the possession as a pledge for the payment of the price, the privilege is lost by delivery—that in all cases, and under all circumstances, the entire right of property (including in that term, not merely the naked ownership, but the right of immediate possessson) is by delivery, transferred to the purchaser—and, lastly, that goods are, for this purpose, *delivered*, so soon as the seller lets them go out of his own hands on their way to the hands of the buyer. But it is obvious, that in the transmission of commodities between distant places, circumstances may occur during the interval of conveyance materially affecting the interests of the seller. It happens, for instance, very frequently, that after the consignment, and before the goods can possibly have reached their destination, intelligence is received of the insolvency of the buyer; and in that case what is the seller to do? What he *will* do is evident enough—he will endeavor, by every means in his power, to get them back again;—and however some may doubt as to the expediency of permitting a resumption under any circumstances, still, as it is impossible not to feel that it would be a hard case on the seller, if goods not paid for should come into the hands of a bankrupt, we cannot wonder that the attempt to get them back should have received the sanction of the law. Accordingly we find that in many of the continental states this equitable claim of the seller has been so entirely recognised, that, founding themselves upon the rule of the civil law, * they have allowed an unpaid vendor to take back his goods *even out of the possession* of the insolvent buyer, when found distinct from the general stock, and capable of specific identification. In other states the transaction has been treated as a *fraud* upon the seller, and disposed of accordingly. Thus, for example, the law of Scotland, as it formerly stood, decreed restitution of all goods not paid for, which had been purchased within three days of the period of insolvency, unless the buyer, or the creditors who had succeeded to his rights, could rebut the general presumption of fraud by showing that they were bought with a *bonâ fide* intention of paying for them. * Neither of these rules, however, is free from objection. That which founds itself upon fraud is obviously too vague and indefinite to be made immediately available in practice, and the other is obnoxious to the still more serious charge of affording a bankrupt debtor the means of favoring such of his creditors as he may think fit to prefer—and these probably, as regards the interests of the community, the least entitled to such preference—to the prejudice or even exclusion of the rest. The law of England, while it has recognised the justice of the principle, has judiciously, or rather perhaps *fortunately*, avoided both these faults in the application. The rule which it has finally adopted may be stated briefly as follows: The unpaid seller may, on the insolvency of the buyer, stop or reclaim the goods whilst on their passage; but if, before the assertion of the claim, they have come, either actually or constructively, into the possession of the buyer, the privilege is gone, and the seller must thenceforth be content to rank among the general creditors of the insolvent—a rule, which has so far received the warrant of experience, that (to say nothing of its introduction into the mercantile law of Scotland, where, indeed, it seems to have been *forced* upon the courts by a decision of the house of Lords, or rather of Lord Chancellor Thurlow who presided there) it was, after a careful investigation of the comparative merits of the two systems, adopted by the framers of the Code Napoleon in deliberate preference of the civil law doctrine of restitution, which had up to that time prevailed in France.† It is singular, therefore, that a doctrine so confessedly reasonable, should have been the result in some degree of accidental circumstances. Yet so, as we have before intimated, undoubtedly it was; and as the history of its origin and gradual development will not only be interesting in itself, but will, at the same time, materially illustrate the principles on which the system rests, the time which is devoted to a short review of both, will not, perhaps, be mis-spent.

The first instance which is found reported in the books, occurred in the year 1690, and was as follows: * Altenory and Altoery, merchants at Leghorn, had consigned silks to the Bonnells, merchants in London. Before the ship, which had the goods on board, left her port of sailing, information was received of the failure of the London house, whereupon the consignment was altered, and the good having come under this new direction to the hands of one Vandeput, the assignees of the Bonnells filed their bill in chancery against him for a discovery and relief. The lords commissioners (for the great seal was at the time in commission) ordered the plaintiffs to bring an action of trover for the purpose of trying, 'whether the first consignment, notwithstanding the altering thereof, and the new consignment made before the ship sailed, vested the property of the silks in the Bonnells.' Upon the trial a verdict was found for the plaintiffs; and the cause having come on for a second hearing in equity, the court finally adjudged, that 'the Bonnells having paid no money for the goods, if the Italians could by any means get them again into their hands, *or prevent their coming into the hands of the bankrupts*, it was but lawful for them so to do, and very allowable in equity.'

The principle thus laid down had been acted upon in two subsequent cases,† when, about forty years after its introduction, it received the full and unqualified approbation of Lord Chancellor Hardwicke, who, in pronouncing judgment on a case where the same point arose, though under circumstances more involved, is stated to have used the following strong and often-quoted expression: 'If the defendant [the unpaid vendor] got the goods back again *by any means, provided he did not steal them*, I would not blame him.' ‡ From this time the right of revendication may be considered as naturalized into the jurisprudence of England. It happened, however, that in none of the cases calling for the interposition of the courts had the goods reached their destination, when the privilege of resumption was exercised. It became unnecessary therefore to decide what would have been the effect, if, when reclaimed by the seller, they had been already reduced into the actual possession of the buyer; and as it is the principle of our law to proceed upon *precedent*, it thus came to pass, that the right of restitution in case of insolvency was narrowed into that of stoppage in transitu.

Hitherto the doctrine had been confined to courts of equity; and the reason of this is manifest, if in the instance first cited it was rightly decided, upon the trial at common law, that the original vendee had, notwithstanding his insol-

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* Quod vendidi non aliter fit *accipientis* quam si aut pretium nobis solutum sit, aut satis eo nomine datum, vel etiam fidem habuerimus emptori sine ulla satisfactione. Dig. 18. 1. 19.

'The seller, who has sold anything, and still lies out of the money which he was to have for it, if he finds the thing that he sold in the hands of the buyer, may seize on it and he is not obliged to share it with the other creditors of the buyer. Domat. book 4. tit. 5. s. 2. art. 3. And it seems that by the custom of some of the provinces of France if the article had been sold on the terms of prompt payment, the seller could have claimed it even from a third person who had purchased it *bona fide* from the buyer, the property not being considered as having passed from the orignal vendor. Id. book 3. tit. 1. s. 5. art. 4.

* See Bell's Commentaries, vol. i. 207. et seq.

† See the 'Discours des Orateurs du Gouvernment,' prefixed to the code, justifying this alteration in the law. It is important to know that the old doctrine of revendication had been almost universally reprobated by the merchants, *upon experience of its injurious operation.* Had Mr Eden been aware of this fact, he would hardly perhaps have ventured to recommend the substitution of it in this country for our own doctrine of stoppage in transitu. See his Treatise on Bankruptcy, p. 295.

* Wiseman v. Vandeput, 2 Vern. 203.

† Exp. Clare, Cooke's Bankrupt Law, 419. Exp. Frank. cited in Snee v. Prescot.

‡ Snee v. Prescot, 1 Atk. 245.

vency and the consequent alteration of the consignment, acquired an *indefeasible right of possession* by the mere placing of the goods on board. But this position was denied by Lord Hardwicke, who, in the somewhat diffuse and ill-reported judgment,* to which we have before adverted, is represented as saying, 'I admit, that if goods are delivered to a carrier or hoyman, the consignee can only [alone can] bring the action, which shows the property to be in him; and it is the same where goods are delivered to the master of a vessel. But suppose such goods are actually delivered to a carrier to be delivered to A, and while the carrier is upon the road, and before actual delivery to A, by the carrier, the consignor hears that A, his consignee, is likely to become bankrupt, or is actually one, and countermand the delivery, and gets them back into his own possession again, I am of opinion that *no action of trover would lie* for the assignees of A, because the goods, while they were in transitu, might be so countermanded.' † The claim thus put in for the jurisdiction of the common law over the doctrine of stoppage in transitu was afterwards strenuously enforced by Lord Mansfield, before whom, on the rapid extension of British commerce, which took place in his day, the question frequently arose on trials at Guildhall. That great judge, who has been styled, not without reason, the founder of our mercantile code, affected indeed to consider it as a branch of the general proprietory lien of the unpaid vendor, maintaining, that although delivery to a carrier, or on board a ship, was *constructive* delivery to the vendee, so as cast the risk upon him, yet nothing short of *actual* delivery could defeat the seller's right over the goods as a pledge for the payment of the price.‡ Lord Loughborough also, seems to have assumed for the foundation of his judgment in the celebrated case of Lickbarrow v. Mason, to which we shall have occasion hereafter to advert, that the privilege of stoppage in transitu was a strictly legal, and not a mere equitable right. § Yet notwithstanding the deference due to names so illustrious, it cannot be questioned, that the doctrine was unknown to the ancient common law—possibly because the case had never occurred—nay, further, that it is even inconsistent with its principles of the absolute transfer of property by sale and delivery; and that it must consequently be considered as a graft from the courts of equity, to which it owes its undoubted origin.

Accordingly, Mr Justice Buller, than whom none had more thoroughly investigated the subject, spoke of it thus: 'The right of the vendor to seize goods in transitu, is founded *only* on equitable principles. It is a right with which he is indulged on principles of justice, originally established in courts of equity, and since adopted in courts of law.'* And Lord Kenyon states it to be 'a kind of equitable lien adopted by the law for the purposes of substantial justice.'† Nevertheless, the successors of Lord Mansfield, though they rejected his reasoning, availed themselves of his authority, and acknowledged the doctrine of stoppage in transitu as part of the law-merchant, not upon ancient title, but because it was just in principle, and had been found expedient in practice.‡ Nor is the question as to the origin of the doctrine to be considered as one of mere controversy. That it has important practical results will be at once apparent from the following example. If this right were, as was insisted by Lord Mansfield, a part of the general proprietory lien of the seller, it would follow that he might exercise it at any moment before the actual arrival of the goods, *at his mere caprice*, and without reference to the circumstances of the buyer. He might thus, on a sudden rise of the markets, countermand the delivery, disappoint the consignee whom he had apprised of the shipment, and *at whose risk the goods had been* from the time when they were placed on board, and turn the speculation to a more profitable account, by selling them at an advanced price to another.§ It is true that by so doing he would render himself liable to an action at the suit of the buyer, for not delivering according to his contract, and that the difference in the market price would be taken into account in measuring the damages to be recovered. Still, even in the most favorable view, the *right to the goods* would be turned into a mere remedy *against the person*,—a difference, the importance of which will be at once felt by all who are conversant with trade. Lord Mansfield himself saw this consequence of his principle, and did not shrink from avowing it. 'The goods,' he said, 'are in the hands of the carrier *to be conveyed;* the owner may get them back again.' §

On the other hand, if the rule is to be taken as we contend it must be, not as resting on any legal right of property, but as a mere equitable indulgence to the unpaid seller, its application will then be confined to the case of *insolvency of the vendee*, in which case only the courts of equity either did, or consistently with the principles which govern them could, afford the extraordinary relief. Accordingly we find that, by the universal understanding of the profession, as well as the practice of mercantile men, the right of stoppage in our law *is* considered as depending on the fact of the vendee's insolvency. It is a consequence which flows, we repeat, necessarily from its equitable origin; but if the support of authority were wanted, what better could be given than the following extract from a judgment of Lord Stowell: 'If the person to whom the goods are consigned is *not* insolvent—if from misinformation, or from excess of caution, the vendee has exercised this privilege prematurely—he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. In the law of England, as far as I can recollect it, and in all books into which I have looked, it is not an unlimited power that is vested in the consignor to vary the consignment at his pleasure, in all cases whatever. It is a privilege allowed to the seller for the particular purpose of protecting him against the insolvency of the consignee.' 'Certainly,' he adds, 'it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which such a privilege is founded.'*

Lord Mansfield, as we have said, maintained that nothing short of *actual* delivery, was sufficient to devest the seller of his proprietory privilege; and that actual delivery might be distinguished from *constructive* by a broad and palpable line, he made the criterion of the former to be the *corporeal touch* of the vendee. On this principle many cases were decided, of which it may be sufficient to select one. A bale of cloth wat forwarded by order to an innkeeper for delivery to the vendee, who, on information of its arrival, directed that in should be sent to a neighboring quay for shipment. This was accordingly done; but arriving too late, it was sent back to the innkeeper, and again placed in his warehouse. Some days afterwards a clerk of the vendee being asked by the innkeeper what was to be done with the bale, desired him to keep it in his custody until another ship, which was presently to sail, should be ready to receive it. In the meantime, but after this direction, the vendee became bankrupt; and the innkeeper having, at the request of the vendors, refused to deliver the bale to the assignees, was sued by them in an action of trover. Lord Mansfield decided against the plaintiffs, expressing himself as clearly of opinion, that, to defeat the right of stoppage, there must be an *absolute* and *actual* possession by the vendee.†

The courts, however, in later times, considering that goods may be in the possession of the vendee for every available purpose, even though no brought within his personal keeping, have rejected this rigid interpretation of actual delivery, and

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* See the remark of Mr Justice Buller on this case in the elaborate judgment delivered by him before the House of Lords, in the case of Lickbarrow v. Mason, reported 6 East, 20. (n.)

† Snee v. Prescot, ubi ante.

‡ Assignees of Burghall v. Howard, 1 H. Bl. 365. n. 'Lord Mansfield said, that he had known it several times in chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, it was lawful for the consignor to seize the goods before they came to the hands of the consignee or his assignees; and that this was ruled, *not upon principles of equity only, but the laws of property.*' See also the case of Savignac v. Cuff, tried in 1778, and cited 2 T. R. 66., and Stokes v. La Riviere, as cited by Lawrence, J., 3 East, 397. 'No point,' Lord Mansfield said in this latter case, 'is more clear than that if the goods are sold, and the price not paid, the seller may stop them in transitu, I mean in every sort of passage into the hands of the buyer. There have been a hundred cases of this sort—ships in harbor, carriers' bills have been stopped—in short, when the goods are in transitu, the seller has that proprietory lien. The goods are in the hands of the defendants [the carriers] to be conveyed: the owner may get them back again.'

§ 2 H. Bl. 362. et seq.

* 3 T. R. 469; and see 6 East, 27. (n)

† 7 T. R. 445.

‡ See the excellent observations of Mr Justice Buller in Tooke v. Hollingworth, 5 T. R. 215: 'I have always,' he says, 'thought it highly injurious to the public that different rules should prevail in the different courts on the same mercantile case.'—'The mercantile law of this country is founded no principles of equity; and when once a rule is established in that court, as a rule of property, it ought to be established as a rule of law.'

§ 'The mercantile law I take to be clear and distinct, that the seller has not a right to vary the consignment, except in the peculiar case in which he is reinstated by the privileges of the *vendeur primitif.* The mischief and inconvenience that would ensue on a contrary supposition are extreme. The goods might be put on board, and might lie at the risk of the consignee for two or three months; and if the consignor could come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object which might be eventually defeated at any moment by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller.' Per Lord Stowell (then Sir W. Scott), 6 Rob. Adm. Rep. 321.

§ In Stokes v. La Riviere, *ubi ante.*

* The Constantia, 6 Rob. Adm. Rep. 321. Abbott, on Sh. 371. The remainder of this elaborate judgment will well repay a perusal.

† Hunter v. Beale, cited in Ellis v. Hunt, 3 T. R. 465.

have admitted constructive possession as determining the transit of the goods, and, consequently, the right of stoppage. * And thus the general doctrine, as it now stands, matured by the experience of a century, will be found to be in substance what was stated at the outset—viz. that the unpaid seller has a right, on the insolvency of the buyer, to stop or reclaim the goods while on their passage; but that the privilege is gone so soon as they have come actually or constructively into the possession of the vendee. It remains then that we proceed to amplify and illustrate the several parts of this rule in the order in which they are here presented.

To be continued.

* We are by no means sure that this change was an improvement. On the one hand it is true that a person, without having goods in his actual possession, may, by the aid of documents and other means, deal with them and obtain credit upon them as effectually as if they were visibly exposed in his warehouse. But on the other hand, this doctrine of constructive possession has introduced many nice and subtle distinctions, which ought above all things to be avoided in a rule of daily and almost hourly application. Broad lines, even though coarse and unphilosophical, are undoubtedly best for practical guidance.

## DIGEST OF ENGLISH CASES.

### UNSOUNDNESS OF MIND.

Upon the trial of an ejectment against parties in possession under a deed, the question was, whether the deed was void on account of unsoundness of mind in the grantor. The judge told the jury, that 'they were to decide, whether the party was of unsound mind or not: that to constitute such unsoundness as should avoid a deed at law, the party executing must be incapable of understanding and acting in the ordinary affairs of life: that it was not necessary he should be without any glimmering of reason; and as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him.' The judge having refused to tell the jury, that in order to avoid the deed at law, the unsoundness of mind must amount to idiocy, according to the strict legal definition of an idiot, a bill of exceptions was tendered and sealed. Held, that this direction was right; and that the objection that the direction was too vague, indefinite, or general, could not then be taken. Such an objection should have been made at the trial and put on the record. —*Hall*, plaintiff, and *Mannin*, defendant, (in error,) 3 Bligh. 1.

### VOLUNTARY CONVEYANCE.

A., having purchased a freehold house, and paid part of the purchase-money, died intestate, leaving two daughters, his co-heiresses. The remainder of the purchase-money was afterwards paid by B. and C., the husbands of the daughters and the premises conveyed to the latter as tenants in common. By indenture in 1806, reciting the conveyance to the daughters, and that no part of the purchase-money there represented as paid by B. and C., and their wives was in fact paid by B. or his wife, but that the whole was the proper money of C. and his wife; and also reciting an assignment of the same date, of certain leaseholds to the separate use of the wife of B., as her share of the intestate's property; a fine was covenanted to be levied, to the use of C. in fee. The fine was not levied, but C. continued in possession until his death in 1825. In 1823, a deed was executed, and a fine levied, by which the estate was settled upon C. for life, remainder to his wife for life, remainder to their children. A bill to set aside the last settlement as voluntary, and void as against the creditors of C., was dismissed. The fine levied was held to operate to the uses of the last deed, and not to that of 1806; the fact of its having been levied to a different conusee, and in a different term, from the conusee and term mentioned in the latter deed, was sufficient in itself to let in evidence of a new agreement, even if the second agreement were not of so high a character as the first. But the second being, like the first, under seal, would rescind the first, and lead the uses of the fine, even if there had been no variance between the covenant in the first deed and the fine.—*Houghton vs. Tate*, 3 Y. & J. 486.

### WILL.

A testator bequeathed certain stock to A. for life, and after her decease, to the grandchildren of the testator, share and share alike, if they were living at the time of A's decease; but they were not to receive any part till they arrived at the age of twentyone; and if any one, or all of them, should die under that age, the share of those so dying, he bequeathed to B. and C., share and share alike. Held, that the grandchildren took vested interests at twentyone, and on the death of one of them under that age, in the lifetime of A., his share did not lapse, but went to B. and C. A. died in 1787, and the defendant (her executor) having received the dividends of the share in dispute until 1804, when the fund was paid into court, without having invested any part of them, was decreed to pay interest up to the time.—*Goodchild vs. Fenton*, 3 Y. & J. 481.

### MORTGAGE.

We take pleasure in placing before our readers the able opinion of Chief Justice Gibson, in the case of *The Corporation v. Wallace*, which is interesting, not only on account of its general importance, but as pronouncing the law on a question about which great diversity of opinion, if not a decided inclination the other way, had prevailed in this part of the state, not only in the profession, but among the community. On the 21st of March, the Chief Justice and Judge Huston delivered the opinion of the court on the main point, from which Judge Ross dissented; and Judge Huston the opinion of all the judges but the Chief Justice, on the residue of the case. We have omitted to publish that part of the opinion of the chief Justice which relates exclusively to the particular cause.—*Jour. of Law.*

### CORPORATION V. WALLACE.

*Opinion of Chief Justice Gibson.*

No prudent judge will disregard an opinion of the bar. During an experience of fifteen years in this court, I have seldom found one of its decisions received with disapprobation at the bar, which did not contain something which called for revision. But professional opinion, though valuable as a test of judicial decision, is not infallible. The principle recognised in Willard v. Norris, was viewed in a particular part of the state, as a portentous novelty: yet a little consideration would have shown it to be a familiar part of the jurisprudence of every civilized people, whether ancient or modern. Of this, as regards the civil law, which with local modifications, is the code of continental Europe, there is not a doubt. 'The principal effect,' says Ferriere 'of an adjudication by decree, (judicial sale) is a transfer of all the rights of property to the highest bidder, so that he cannot be disturbed by lien creditors or mortgagees, who have not made resistance to the decree; nor after sale and confirmation, by any claimant of title to any part of the estate levied, because the decree extinguishes (*purge*) all rights of property, mortgages, incumbrances, quit rents, (*charges reelles et foncieres*) in default of opposition (*Dict de droit verbo Saisie reelle.*') In the language of the law, says Denisart, who says the same thing, 'the word opposition signifies an act by which the execution of a judgment by default is resisted, having for its object the prevention of a sale, till the interests of the opposing party are secured.' (*Collect. de jurisp verbo opposition.*) 'The resistance being in substance the defence of a terre tenant to a scire facias, is to be of course before the decree of confirmation. The sale is strictly judicial, being pursuant to an adjudication, and the proceeds distributed by the court among the creditors according to the priority of their liens or classes. (*Dict de droit verbo ordre.*) Thus we have distinctly announced to us a principle of the civil law, by which not only are liens extinguished, but even an estate paramount to the lien of the seizing creditor is divested. Such also is the rule of the maritime law, which distributes among lien creditors the proceeds of a ship sold by order of the Court of Admiralty on a younger lien; an instance of which is found in the case of the Madonna, (6 Robinson, 207.) I certainly do not pretend that the practice of the civil law is to have the force of precedent in the courts here: but in a case like the present, it seems fair to say that it goes far to efface the impression of juridical novelty. At the common law there is no judicial sale of lands, and of course we have no English authorities directly in point. In chancery the practice is to pay off incumbrances, out of the purchase money, which appear on the master's report, and no other is paid, only because as it is said there is nothing to show the court that there is such an incumbrance. (Vide —— a Stretton, 1 Ves. Jr. 266.) But this exception helps to establish the rule, and demonstrates not only the ability of the court to extinguish incumbrances, but its readiness to do so when judicially informed of their existence. When, however, an incumbrance cannot, for any cause whatever, be satisfied out of the purchase money, it of course remains there, as it does here, a charge on the land. But in chancery the process of sale is such, as to admit of exceptions, that have no place in a sale on execution which requires prompt payment by the purchaser, and deprives him of an opportunity to see to the application of the purchase money, and *by reason of which the rule is applicable in all its force, to judicial sales of chattels at the common law.* As to these, liens created by the act of the parties, require transmutation of the possession, and as goods taken in execution must be actually seized, the reversionary interest of the owner (so to speak) cannot be levied, and for this reason perhaps it is that goods pawned cannot be taken in execution before they are redeemed. But conflicting liens are created by delivering conflicting executions to the sheriff; and it is perfectly settled that a sale on a younger execution divests the lien of the older one, which takes, not the goods in the hands of the purchaser, but their price in the hands of the sheriff. Would it not

then have been strange, if our progenitors had not applied the rule of the common law to land when they subjected it to sale on a common law execution AS A CHATTEL. They carried the consequences of the principle further than is demanded here, and held that a judicial sale divests, without compensation out of the purchase money, the wife's inchoate ESTATE of dower—an interest in the land certainly as sacred as that of a mortgagee. At the end of a century, in which the most curious legal antiquarian might be challenged to produce an instance of a sale on an older judgment, after there had been a sale on a younger one, the practice of satisfying the older judgments out of the purchase money received the sanction of a direct judicial recognition; and as far as I have ever heard, with the most perfect acquiescence of the legislature, the bar, and the people. The rule, therefore, having been incontestably established, as regards incumbrances generally, it will require decisive arguments to prove a mortgage to be an exception.

This has been attempted on two grounds: the first, that the mortgagee, is not an incumbrance, but THE OWNER OF AN ESTATE IN THE LAND, has been abandoned by one of the eminent counsel, who have argued for the plaintiff. He has thought proper to occupy the second ground, that the lien of a mortgage is CREATED EXPRESSLY BY THE ACT OF THE PARTIES, while the lien of a judgment is but incidental. Of these in their order.

In form a mortgage is certainly a conveyance; but it is unquestionably treated at law here, in the way it is treated in equity elsewhere, as a bare incumbrance, and the accessory of a debt; as between the *parties* it is a conveyance, so FAR AS IS NECESSARY TO ENFORCE IT AS A SECURITY. As regards *third persons*, the mortgagor is the owner, even of the legal estate. This distinction, which, if attended to, will be found to reconcile the apparently jarring *dicta* of the judges, is as firmly established by the practice and decisions of the courts in Pennsylvania, as any other in the law. If the mortgagee had the title for any other purpose than to afford him a remedy, it would not be easy to account for the absence of all the incidents of his supposed ownership: yet his estate, if such it be, certainly cannot be set up as outstanding to bar an ejectment by the mortgagor, or an action of trespass, or a proceeding to obtain compensation for a privilege under a statutory license; nor is it subject to taxation, or lien by judgment, or sale on execution, or courtesy, or dower. It does not break the descent of the estate, or require a reconveyance to revest the title, or prevent it from vesting in a purchaser, or affect the validity of a second mortgage. In answer to the last remark it has been said, that a second mortgage is always of the equity of redemption, which I admit may be the subject of hypothecation. But that will be said of a third mortgage after the equity of redemption also has been conveyed? Contrary to professional sentiment here, it would be simply void, unless there be equity of redemption the springing from equity of redemption in an infinite series, like certain mathematical quantities, which, though perpetually vanishing, are perpetually in view. Such a mortgage would be incapable of confirmation, even by payment of the preceding ones, unless the vesting of the estate in the last mortgagee were supposed to have awaited that event: a process not at all in unison with our notions of conveyancing. But this qualification of the mortgagee's legal estate, seems to be recognised, in some degree, even in England. 'A mortgagor in possession,' says Mr Powel, 'gains a settlement, because the mortgagee, notwithstanding the form, has but a *chattel*, the mortgage being only a pledge to him for security of his money; and the original ownership of the land still residing in the mortgagor, subject only to the legal title of the mortgagee, *so far as such title is requisite to the end of his security.*' (Law of Mortgages, 221.) That the legal effect of the instrument should have been modified by time and circumstances, will not appear incredible to those who are familiar with the change produced by usage in the legal effect of a policy of insurance, which has been fixed, not by the letter, but the course of trade, which with frequent discussion, repeated decisions, and length of time, has reduced the meaning of a very incoherent instrument, to a reasonable degree of certainty.—Marsh on Ins. 304. Again, by the Stat. 7 and 8. W. 3. C. 25. a mortgagor in possession is treated as a freeholder so far as to entitle him to vote for members of parliament. This being a matter of arbitrary enactment, may be said to prove nothing: it discloses, however, the dawn of a sentiment which has been carried much farther by the courts. Even in the state of New York, where the distinction between equity and law is as scrupulously observed as in any part of the world, it has been explicitly declared in Hitchcock v. Harrington,—6 Johns. 290,—to be the settled doctrine of their courts of LAW, that the mortgagor is seized as to all persons but the mortgagee; and the principle thus broadly announced has been carried out in subsequent cases. 'Not only the original severity of the common law,' says the distinguished commentator on American law, 'treating the mortgagor's interest as resting on the exact performance of a condition, and holding the forfeiture or breach of the condition to be absolute by non-payment and tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed under the more enlarged jurisdiction of the courts of equity. THEIR INFLUENCE HAS REACHED THE COURTS OF LAW, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received in THEIR ADOPTION IN THE COURTS OF LAW.'—4 Kent, 151-2. If such, then, be the progress of equitable principles, in courts purely of common law jurisdiction, what might we not expect it to be in courts which are a forum for the joint administration of law and equity. The principle that the mortgagor is seized as to every one but the mortgagee was asserted by this court in the Schuylkill Navigation Company v. Thoburn,—7 Sergt. and R. 411,—and in Rickert v. Madeira, —1 Rawle, 321,—it was applied to the interest of a mortgagee, which was held to be exempt from execution because he had not an estate in the land. In Scott v. Croasdale—1 Yates, 75,—it was determined that dower is barred by a sale on a mortgage executed by the husband without the concurrence of his wife; from which it is clear, that the mortgage was not viewed as the conveyance of an estate (for the estate of the wife passes only by the joint act of herself and her husband) but as a legal incumbrance; like a judgment on which dower may be divested on the principle that the land is sold as a chattel. These cases, with Wentz v. Dehaven,—1 Serg. and R. 312. and M'Call v. Lenox,—9 Serg. and R. 302—in which a mortgage was in all essential respects put on a footing with a judgment, very satisfactorily disclose the judicial sentiment of Pennsylvania; to which may be added Blancharp v. Colburn, —16 Mass. 346—ass howing a similar sentiment in Massachusetts. It is supposed, however, that Simpson's lessee v. Ammons,—1 Binney, 175—in which it was held on the authority of York v. Stone,—1 Salk, 158, that a mortgage by a joint tenant is an act of severance, looks the other way, inasmuch as it is thought to be incapable of producing that effect without operating as a conveyance.

To be continued.

## RECENT AMERICAN DECISIONS.

### MARRIAGE.

1. An agreement to marry made between a man and a woman *per verba de præsenti*, followed by uninterrupted cohabitation for several years, though not solemnized according to the laws of the place where the contract is made, will be deemed a valid marriage. In the case in question the cohabitation had continued about eighteen years. *Newburg vs. Brunswick*, 2 Vermont Cases, 151.

2. A justice of the peace may solemnize a marriage out of the county for which he is commissioned as a justice. *Pearson vs. Hovey*, 6 Halst. 12.

### MORTGAGE.

1. If several parcels of real estate are mortgaged for the same debt, and a third person becomes interested in one of them, he may call on the mortgagee to have the debt apportioned between the parcel in which he is interested, and the residue of the mortgaged premises, or for an assignment of the mortgage on payment of the whole sum due thereon. *Chittenden vs. Barney*, 1 Vermont Cases, 28.

2. Where land is mortgaged a person who by taking possession of it disseises the mortgager, disseises also the mortgagee, and so long as the disseisor is in the possession, the deed of the mortgagee will not pass his, the mortgagee's, interest in the land. *Poignard vs. Smith*, 8 Pick. 272.

3. Where a person, without title, took the possession of the land which was under mortgage, and built on parts of it a carpenter's shop and a blacksmith's shop, and the tenants of the carpenter's shop occasionally used parts of the lot adjacent to their shops, to spread their boards on, and the tenants of the blacksmith's shop used other parts of the lot to run carriages on, and put tires on wheels, it was *held*, that this was a disseisin of the mortgagee only for the part of the land covered by the shops. *Ib.*

### PARTNERSHIP.

1. The law allowing the creditors of a firm a preference to the creditors of each partner, in attaching the property of the firm, has never been adopted in Vermont. *Root vs. Shepardson*, 2 Vermont Cases, 120.

2. In Vermont the property of partners is attached as if they were tenants in common. *Ib.*

3. Though the plaintiff is to receive from the defendant by way of rent, a portion of the profits of a farm and tavern, such agreement does not constitute them partners as between themselves,

so as to disable the plaintiff from suing at law. *Perrine vs. Hankinson*, 6 Halst. 181.

4. A bill drawn upon a partnership, but not accepted until after dissolution of the partnership publicly announced, binds only the partner who accepts it, and not the other partners, who have not consented thereto. *Tombeckbee Bank vs. Dumell*, 5 Mason, 56.

PLEADING.

1. Upon a a count for money had and received, by S. L. administrator, and S. B. administratix of W. B. deceased, a judgment cannot be rendered against the said S. L. and S. B. in their representative capacity. *Sibbit vs. Lloyd*, 6 Halst. 163.

2. Neither could judgment be rendered against them individually upon such a count. *Ib.*

3. Such a count in a declaration is bad on a general demurrer. *Ib.*

4. So also is a count for money laid out and expended to and for the use of the said S. L. as administrator, and S. B. as administratix of W. B. deceased. *Ib.*

5. The attempt and failure to prove the special agreement declared on, do not always prohibit a recurrence to the count for use and occupation. *Perrine vs. Hankinson*, 6 Halst. 181.

6. Repugnancy between a protestation and an averment in a replication, is not a ground of demurrer. *Hapgood vs. Houghton*, 7 Pick. 451.

SETTLEMENT.

A feme sole, about to be married, conveys real and personal estate to her father, his heirs and assigns, to be held in trust by him, and by any other trustee to be appointed by the Judge of Probate for her separate use, without being liable to the debts or control of any husband she may have during the trust: the income to be paid her during her life, and the residue and remainder to be conveyed to such child or children, his or their heirs and assigns, as she shall leave. She marries, and her husband dying, she takes a second husband, by whom she has issue living. Her father dies leaving several children. The Judge of Probate refuses to appoint a new trustee. Upon a bill in equity by the husband and wife to set aside the settlement, it was *held*, that the trust estate did not merge in the legal, the equitable estate being only for her life, and she having the legal estate in a portion only of the property as tenant in common with the other children of the trustee: and it was decreed that a new trustee should be appointed. *Hildreth vs. Eliot*, 8 Pick. 293.

REPLEVIN.

1. The use of the writ of replevin, and the relief afforded by it, are not limited to the taking of goods and chattels by way of distress. Where goods or chattels are so taken as to entitle the owner or possessor to an action of trespass, an action of replevin may be maintained. *Bruen vs. Ogden*, 9 Halst. 370.

2. If a marshal of the United States by virtue of a fieri facias, issued out of the District Court of the United States against A, B, and C, upon a judgment in favor of the United States against them seizes upon the property of D, replevin may be maintained in a state court by D, against the marshal, though in seizing the property the marshal acted under the direction of the district attorney of the United States; and the state courts are not prohibited by the constitutions of the United States from entertaining jurisdiction of such a case. *Ib.*

SHIPPING.

1. If the owner of a vessel let her to another person who is to have the sole charge and control of her, and by agreement is to pay the owner one half of the net earnings, after deducting expenses of repairs, the owner cannot join in an action to recover for the freight afterwards earned by the vessel. *Boardman vs. Keeler*, 2 Vermont Cases, 65.

2. The owner of the ship and cargo has the uncontrolled power of breaking up or changing the voyage. *Pawson vs. Donnell*, 1 Gill & Johns. 1.

3. A ship-master who was also the supercargo, was directed to proceed with his ship to several ports: his compensation, in addition to monthly wages, was to be a sum certain, with the privilege of bringing home a specific quantity of merchandise from one of such ports. After a part performance of the voyage, the ship owner changed its direction, and shortened it; so that the port at which the privilege might have been exercised was not visited by the ship; before the termination of the voyage the ship-master died. *Held*, that the privilege was so inseparably connected with the vessel's destination to the particular port at which it was to have been exercised, that upon its ceasing to be one of the *termini* of the voyage, the privilege of necessity expired, and that the sum certain stipulated to be paid the captain had relation to the voyage as originally contemplated, and was therefore subject to abatement in the discretion of the jury. First, for the alteration of the voyage, if they believed that the ship-master's labor and responsibility were thereby lightened; and secondly, for that portion of his contemplated services, which were lost by his death. *Ib.*

4. The misconduct of a captain or supercargo which produces neither injury nor inconvenience to his employer, forms no defence to the payment of his wages. *Ib.*

5. The consignees selected by a ship-master or supercargo in a foreign port, according to the usual course of trade, and in good faith, are so far the agents of the owners of the ship and cargo, that upon the death of the captain or supercargo, his representatives are not responsible for the consequences of the neglect or misconduct of such consignees in the execution of their agency after his death, not imputable to instructions given in the life time of such captain or supercargo. *Ib.*

6. A shipment of merchandise whose exportation is prohibited, made by a supercargo for account of his principal, is at his own risk, and if seized and condemned at the place of exportation, the supercargo must bear the loss. *Ib.*

7. The acceptance by a ship owner of the letters and invoices sent to him by the consignees of his ship in a foreign port, is not such a ratification of the acts of those agents, as would throw a loss arising from the seizure of merchandise exported against the laws of the port of shipment by them, for his account, upon such ship owner. *Ib.*

8. The owner of a ship after she was laden at Baltimore, on the 14th May, 1810, agreed with the shippers of the cargo, in writing, that their goods were 'to be landed in a permitted port on the continent of Europe, (meaning that they were not to be landed at the Island of Sylt,) before the freight should be earned, *but should the whole of the continent be shut*, the freight, with an addition as arbitrators might determine, would be earned, should the property be landed in England, agreeably to the custom of the country.' On the 25th of April, 1810, a charter party had been entered into for the same ship, by which the owner covenanted to proceed with his ship from Baltimore, north about, for the Island of Sylt, thence to Hamburg or Bremen, if open to American ships, if not, the cargo to be landed at Sylt, if permitted and in case of refusal there thence to such permitted port in the North Sea or Baltic, as the master and supercargo might direct: and should the Baltic be closed against the admission of American vessels, then to such other port as the master and supercargo might again direct. The freight was to be paid agreeably to the bills of lading, *provided*, that the cargo was discharged at a port in the North Sea; but if delivered at any port in the Baltic, an advance in the freight was covenanted for; and should the Baltic be shut, a further advance in the freight to besettled by arbitration. On the 8th of May, 1810, a bill of lading was also signed for the plaintiff's goods, which stated the ship to be bound from Baltimore for Sylt, and a permitted port in the North Sea or Baltic, the goods to be delivered at the aforesaid permitted port, unto P. of Hamburg, who was not the supercargo of the ship. In an action where the plaintiff claimed under these contracts, he offered testimony to establish that certain ports in Europe, not on the North Sea or Baltic, were open to American vessels, but the court held, that looking to the historical facts and occurrences of the time, it was manifest that the voyage was undertaken, and the charter party, bill, of lading, and agreement entered into, with a view to the then political state of affairs in Europe, and should be construed with a view thereto—that the permitted port on the continent of Europe, in which the goods were by the agreement to be landed, before freight could be earned, was intended to be a permitted port in the North Sea or the Baltic; and also that all the said instruments must be construed in connexion with each other, and the general terms in the agreement of the 14th May, restricted to the North Sea and Baltic; and therefore rejected the testimony offered, as inadmissible and irrelevant. *Wirgman's Adm'rs. vs. Mactier*, 1 Gill & Johns. 150.

9. Whether ship owners are entitled in equity and good consience, to retain money received on account of freight, is clearly a question not to be left to the jury; but proper only to be decided by the court, under the circumstances of each case. *Ib.*

10. So, where an action of *assumpsit* brought by the owner of merchandise shipped in the defendant's vessel, to recover a sum which the defendant had received and retained for freight, it appeared that the shipment was made under the charter party, bill of lading, and agreement above referred to, and that the master was furnished with instructions from the plaintiff, as follows, 'on account of the unsettled state of affairs on the continent of Europe, I have thought proper to request my friends Messrs P. & Co. of Hamburg, in the event of the cargo of the ship being denied entry at their port, to consult with you on the further destination of the ship, and the disposal of my interest on board. In case they have no friend at the port she may proceed for, you will please take charge of it, and advise with them what is best to be done for my interest. On your arrival off Sylt, should the situation of affairs be such as

to prevent you from communication with Messrs P. & Co., in that case you will have to proceed with the cargo where you judge it will be most advantageous for all concerned, and when I shall consider my part as entirely under your charge, &c.' The ship sailed on her voyage, was captured before her arrival off Sylt, taken into a port in Norway, but ultimately released. The master, after the restoration of his ship and cargo, without consulting with the consignees about the further destination of the ship, or disposition of the plaintiff's property, although he had the means of communicating with them, proceeded with his ship to England, there delivered his cargo, and received (from the agents who sold the cargo,) as freight, the sum claimed in this action. *Held*, he was not entitled to retain it. *Ib.*

**THE JURISPRUDENT.**

BOSTON, SATURDAY, MAY 28, 1831.

## NEW HAMPSHIRE REPORTS,

VOL. V.—PART I.

An insolvent debtor may give a preference to one creditor by paying his debt in full, to the exclusion of all other creditors, provided it be done with good faith.

It is not essential to the valid delivery of a deed, that the grantee be present—a delivery to a third person for his use is good, if he afterwards assent, and the thing granted shall be said to rest in him from the time of such delivery.

The liability of a grantee as a surety for the grantor, is a good consideration to support an absolute conveyance of land against a creditor of the grantor.

If a debtor convey land to his creditor in payment, and the creditor accept the same, it will operate as a payment to the extent of the value of the land, although there was no agreed price for the land.—*Buffum vs. Green and al.*

The statute of the 3 and 4 W. and M. chapter 14, has been adopted in this state.

But no action lies against a devisee so long as there is any remedy against the executor or administrator.

When the estate of any person deceased has been settled in the insolvent course, there is no remedy against the executor or administrator, even if the estate was not in fact insolvent, and the demand depended upon a contingency that did not happen until the estate was settled.—*Judge of Probate vs. Brooks and al.*

If a party deliver papers to the jury which he knows have not been read in the cause, the verdict, if in favor of such party, will be set aside, whether the papers were material or not.

But if a paper go to the jury by mistake, and they do not examine it or if it be immaterial, this will furnish no ground for setting aside the verdict.

But if a material paper be delivered to the jury by mistake the verdict must be set aside. A party cannot be permitted in such a case, to show by the testimony of the jurors that they were not influenced by the paper.—*Page vs. Wheeler and al.*

The privilege of clients to have their communications to counsel kept secret, extends in this state not only to communications made to professional men, but to those made to any other person employed to manage a cause as counsel.

An uncle to a party in a suit is not a proper person to take depositions for such party to be used in the suit.—*Bean vs. Quimby.*

When a note is signed by a surety, if the creditor, after the note is due, for a valuable consideration contracts to give day of payment to the principal without the consent of the surety, the latter is discharged.

A written contract, not under seal, may be varied by a subsequent parol agreement, and if by such agreement the time of payment be prolonged, no action lies upon the original contract till the expiration of the prolonged time of payment.—*Grafton Bank vs. Woodward.*

Where an administrator, who has obtained an execution in his favor as administrator for a debt due to the deceased, causes the same execution to be extended upon land, the title to the land vests in the heirs of the deceased, and cannot be sold by the administrator with a license from the judge of probate.—*Foster vs. Huntington and al.*

When a plaintiff recovers less than $13,33 by reason of set-off, he is not to be limited in his costs, although it appear that the matter of the set-off, might have been given in evidence as payment upon the general issue.—*Burbank vs. Willoughby.*

A debtor may lawfully assign all his property to pay the debt of a single crditor, or the debts of a set of creditors.

And neither a want of a schedule, or an estimate of the value of the property assigned, nor a stipulation in the deeds of assignment, for a release of the debts of those who become parties to the deed, nor a reservation of the surplus after the payment of the debts of those who assent to the assignment, are conclusive evidence of fraud.

In all grants made by individuals, a general description of the things granted is sufficient.

When a debtor assigns property to trustees for the benefit of his creditors, it is not necessary that all the creditors should become parties to the deed of assignment before it is recorded.—*Haven and al. vs. Richardson.*

A makes a contract, not in writing, with B, to convey land to the latter. B can maintain no action upon the contract, even when he has performed it on his part.

But such a contract is not to be considered wholly void. And B can have no remedy, to recover back what he may have paid under it, until A has disabled himself, or refused to excute the contract on his part.

And if A convey the land to a third person in mortgage, with a power to sell, he is not to be considered as having disabled himself to perform the contract until his right to redeem is gone.—*Lane vs. Shackford.*

Where a committee appointed by this court to make partition of a mill privilege, made partition by assigning to each of the owners so much water as would run through a gate of certain dimensions, it was held that partition might be legally made in that manner, unless shown to be very injurious to the estate.—*Morrill and al. vs. Morrill.*

An accord and satisfaction to constitute a legal bar to an action, must be full, perfect, and complete.

Where a party agrees to accept a sum of money in satisfaction of damages he may have sustained, a tender of the sum agreed to be received is without legal effect, and cannot supply the place of an actual satisfaction.

In an action in form, *ex delicto*, if one of several plaintiffs accept a sum of money in satisfaction of his part of the damages, such accord and satisfaction is no answer to the action.—*Clark and al. vs. Dinsmore.*

In a writ of entry, a parcel of land, described in the count as an entire tract, was demanded. But only a part of the land demanded was in dispute between the parties, and that part within the tenant's inclosure; the residue being within the inclosure of the demandant. After a plea of an entry by the demandant, pending the suit in abatement of the writ, it appearing that the demandant had only entered upon the parcel of the land which was within his own inclosure; the court permitted the demandant to amend his count so as to confine his demand to the parcel within the tenant's inclosure, upon terms.—*Wilson vs. Eaton.*

A rule of reference before a justice of the peace, is only an agreement of record by the parties to submit to the decision of referees, matters in controversy between them, and no written application to the justice for the purpose is necessary.

Where a rule of reference made the report returnable to a justice, on or before a day named, it was held that the rule was sufficient, and that the day named must be considered as the day of hearing before the justice as to the acceptance of the report.

And in such a case, it is not necessary that it should be stated in the rule that the controversy is of the value of two hundred dollars or under, the jurisdiction of the justices depends upon the amount of the award and not upon the value of the controversy in any other sense.—*French vs. Shackford.*

In assumpsit by the indorsee against the maker of a note, if the defendant concludes a plea of usury with an offer to verify it by his own oath, the plea is bad, unless it contains an allegation that the payee of the note is alive.—*Plummer vs. Drake.*

Parties cannot in any case enter into a rule of reference before a justice of the peace, who is named as a referee in the same rule.—*Drew vs. Mulikin.*

When a case is to be taken out of the statute of limitations by a new promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a subsisting debt, which the party is liable and willing to pay. —*Russell and al. administrator vs. Copp.*

A tenant in a real action may, for the purpose of disproving the demandant's seizin, show a title in a stranger.—*Berry vs. Brown.*

E. being the owner of two promissory notes which are payable on demand, deposited them with P. for collection, more than ten months after the date of the notes. P. delivered the notes to C. in payment of a debt, due from P. to C.; and C. received the contents of the notes from the maker—in an action by E. against C. to recover the amount of the notes, it was held that the notes must be considered as discredited when C. took them, and that he was not entitled to retain the money against E.—*Emerson vs. Crocker.*

At an auction, when one of the conditions of the sales was, that the purchasers should have a credit of ninety days, giving good security, an anvil was struck off to a bidder, who removed it a little distance in the auction room, but afterwards refused to take it, or to give secuity—it was held, that *indebitatus assumpsit* could not be main-

tained for the price, until the expiration of the ninety days.—*Parker vs. Mitchell.*

## ACCOUNT OF THE VARIOUS OFFICERS

### ATTACHED TO THE FRENCH COURTS.

All persons, whose services are necessary in the prosecution of a law suit, and who are compellable to act when called upon, are called by us '*officers ministeriéls.*' These are *huissiers, avoués notaires,* and *greffiers.* With the office of greffier, I have at present nothing to do; you are aware that there is one attached to each court, to take notes, take care of the original judgments, and deliver copies when necessary. Notaries receive all acts (*actes*) of convention between individuals, such as sales, leases, partnership, mortgages, &c; they prepare these acts, and if the case require it, may take the opinion of an advocate. Thus the notaries discharge in part the duties of your attorneys. They moreover keep the originals of all acts that have been executed in their presence, and deliver copies to those who are interested in them; but, it is necessary to inform you that a great number of conventions may be entered into by acts privately executed, that is, signed solely by the contracting parties, and it will easily be understood that if two parties wish to enter into a private agreement, they may consult whom they choose in the drawing up of the final instrument, either notary, advocate, or avoué. The number of notaries is limited; they are divided among the different provinces with reference to population: there may be, perhaps about 4000 of them in France.

'The Huissiers, who in ancient time were called *sergents,* are the official agents of the parties for all extra-judicial purposes; it is they who at the instance, and in the name of the parties, serve the summonses, make tenders, enter protestations, &c, signify decrees, and enforce their execution; their number is also limited.

'And now we come to the principal topic of this letter—the Avoué. In all civil suits, except before the *juges de paix* and the commercial courts, the parties can appear only by an avoué—not that the avoué is entitled to address the court; generally speaking, this privilege is positively denied him; he is only permitted to address the court *pour prendre des conclusions,* that is, to state the claims and objections of his client. But from the moment the avoués are named, they take the whole management of the case; all documents are interchanged between them, and all acts of procedure are signed by them. In all ordinary cases, they unfold the claim by a sort of memorial addressed to the courts, commonly called a *requête.* When the avoué has notified his requête and had the requête of the adverse party notified in turn, he delivers a summary of all the proceeding to the advocate, which is called *le dossier;* to this he adds such remarks as may be necessary, and sometimes consultations take place between the counsel, the avoué, and the client. In Paris, it rarely happens that the client communicates with any but the avoué, the avoué selecting the advocate and paying him his fees. Except in very important cases, it seldom happens that a party communicates immediately with the advocate. In many of the towns, the practice is wholly different; the parties know only the advocate; he selects the avoué, and had the general direction of the case. The number of avoués is fixed, and their appointments are private property; which, at their death, devolve on their heirs, and which may be sold, subject to the approval of the government. Partnerships consisting of many members are of rare occurrence, but not without precedent, among the avoués. To qualify a person for the office of avoué, he must have studied civil jurisprudence and procedure for a year, and have undergone an examination; he must, moreover, have been employed as clerk to an avoué for five years at the least, that is to say, two years at least as principal, and the remaining time as inferior clerk. There are 3600 avoués, of whom 400 belong to the courts royals, and 3200 to the courts of first instance. At Paris we have 150 avoués in the court of first instance, and 50 in the court royale; they were formerly more numerous, but throughout France they have been successively reduced, by substituting one avoué in the place of two till the number was definitively fixed. The social rank of the avoué is not the same throughout the whole country; in Paris, as you know, we enjoy a perfect freedom from exclusiveness. Their education is generally good, and yet they often carry into society a tone not the best in the world, which also is not unfrequently the case with the avocat. In the provinces, where the distinction of ranks is much more marked, the avoués have the same rank as the attorneys in England. I should state, however, that the avoués having the privilege of pleading in the courts which have no fixed bar, and which are not of unfrequent occurrence, in that case sometimes rank as advocates. Two of them have been elected members of the chamber of deputies; but it may be stated as a general proposition, that avoués belong to what we term the middle class. The annual receipts of an avoué in the court of first instance at Paris are from 15,000 to 30,000 francs, seldom more, seldom less. An office *(etude)* of first instance, previous to the late disturbances, fetched, at Paris, from 150,000 to 300,000 francs. There is one instance of the place of avoué selling for 360,000 francs. The offices of avoués of the cour royale of Paris fetch from 60,000 to 200,000 francs. If anything be calculate to throw disfavor upon the profession of avoués, it is the general and pretty well founded opinion of their avidity, and their propensity to create unnecessary expenses, with a view of adding to their incomes. This evil is particularly felt in the sales which are made before the courts.

'We have besides a class of men of a far more dangerous description than the avoués; I mean those whom we term "*agens d'affaires.*" These agents are not ministerial officers, but undertake agencies for individuals in every species of business, judicial, ministerial, or otherwise; they solicit, on behalf of others, pensions from government, undertake the settlement of accounts, place money at interest, make purchases and manage sales. They institute suits, and select advocates and avoués; but they only stand in the place of the parties by virtue of a procuration they obtain from them. These agents are knaves almost to a man, and as it is impossible to express them, it is this cause principally which induces us to retain the avoués, inasmuch as it is better to entrust suitors to men subject to a certain control, and who are compelled to give security to the government, than to abandon them to the discretion of these "agens d'affaires." These agents are considered in France as exercising a calling *(industrie),* and as such are held liable to the duty to which all callings are liable, and which we term *patente.* They from partnerships among themselves, &c. Again, the employment of avoués being prohibited in the courts of commerce, the parties empower a class of these agens d'affaires, recognised and approved by the courts; these are called *agrèes.* They are the avoués of the commercial courts, but their services are not indispensable; a party may conduct his case in person, or employ any one he likes. The agrées are little better than the agens d'affairs. In the courts called Justices de Paix, it is these agens d'affaires, or the huissiers, who usually plead; the avoué cannot be employed there, and the advocate will rarely condescend so low.'—*Law Magazine.*

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An Apology.—When John Clerk (Lord Eldin) was at the Bar, he was remarked for the *sang froid* with which he treated the Judges. On one occasion, a junior Counsel, on hearing their Lordships give judgment against his client, exclaimed that 'he was *surprised* at such a decision!' This was construed into contempt of Court, and he was ordered to attend at the bar next morning. Fearful of the consequences, he consulted his friend John Clerk, who told him to be perfectly at ease, for *he* would *apologize* for him in a way that would avert any unpleasant result. Accordingly, when the name of the delinquent was called, John rose, and coolly addressed the assembled tribunal;—'I am very sorry, my Lords, that my young friend has so far forgot himself, as to treat your Honorable Bench with disrespect; he is extremely penitent, and you will kindly ascribe his unintentional insult to his *ignorance.* You must see at once that it *did* originate in that. He said he was *surprised* at the decision of your Lordships! Now, if he had not been *very* ignorant of what takes place in this Court every day—had he known you but *half* so long as I have done—*curse* me if he would be surprised at *any* thing *you* did!'—*Aberdeen Chronicle.*

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It is generally understood in the legal circles, that Lord Lyndhurst's appointment to the chief seat on the Exchequer Bench is only a provisional arrangement, his Lordship's ultimate destination being the Chief Justiceship of the King's Bench. The retirement of the venerable and Learned Lord who has so long dignified that high office, is stated, may, in consequence of his Lordship's age and increasing infirmaties, be shortly expected. When that event should happen, nothing will give greater satisfaction to the profession, or to the public generally, than the removal of Lord Lyndhurst to the King's Bench, in which Court it will be recollected that his Lordship's extensive practice when at Bar was almost exclusive ly confined. We believe that we may state, on very excellent authority, that under no circumstances will Lord Lyndhurst consent again to take the Great Seal.—*Standard.*

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It has been currently reported at the west end, this morning that Lord Althorp has intimated his intention of withdrawing from the Chancellorship of the Exchequer, and that he will be succeeded by Sir James Graham.—*Ib.*

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Judge Peters.—On some occasion, a very fat man and a very slim man stood at the entrance of a door into which the judge wished to pass. He stopped a moment for them to make way, but perceiving they were not inclined to move, and being urged by the master of the house to come in, he pushed on between them, exclaiming, 'here I go, then, through thick and thin.'

VALUABLE ENGLISH BOOKS, recently received from Europe, and for sale by *GRAY & BOWEN*, No 141 Washington street.

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# THE JURISPRUDENT.

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## MERCANTILE LAW.

Continued.

And first, as it is a right of the *seller*, it can only, of course, take place where there is a consignment by way of *sale*. Accordingly, it has been decided that the privilege does not belong to a person having a mere *lien* upon goods for work bestowed on them—the very notion of a *lien*, indeed, implying actual possession; * nor to a foreign correspondent of the buyer, standing between him and the seller in the mere relation of an agent, even though he may have become surety for the buyer by accepting bills for the price.† Yet the rule has not always been inflexibly adhered to; for in one case—to be considered, perhaps, rather as an exception than a precedent—an agent abroad who had consigned goods *with a charge for commission*, purchased, however, on his personal liability from one to whom the consignee was unknown, was regarded as *substantially* filling the character of a seller, and entitled to the right of stoppage.‡ We should have thought it unnecessary, had not the point been made the subject of a solemn decision, to state that the right of stoppage, in its proper and legal sense, has nothing to do with consignments to a factor for sale; § because in such cases, the property never having passed out of the consignor, he needs not the aid of an *extraordinary privilege* to enable him to retake the goods on their course. ‖ *As* little doubt can there be of the right of one who has consigned goods for sale on the joint account of himself and the consignee, to stop them on the insolvency of the latter: ¶ but neither is this an act of stoppage in transitu in its technical sense, but a mere exercise of the right of undevested ownship. Lastly, as it is the right of the seller, so it must be exercised by him, or some one acting for him, *adversely* against the buyer: a countermand, therefore, by the buyer, though given on behalf, and with a view to the interest of the seller, will not enure to the benefit of the latter as an act of stoppage. **

Secondly, to justify a stoppage, the consignee must be *insolvent*—not necessarily *bankrupt*, but in such circumstances as to be unable to honor his draft, or meet the demands of his creditors. Any information, which turns out to be well founded, of such embarrassment in the affairs of the consignee, will entitle the seller to countermand the delivery—much more, therefore, will the actual dishonor of the bills which have been drawn for the price. A question at one time arose, whether the right was defeated by part payment of the price; but the court at once intimated an opinion that it would be dangerous to introduce an exception wherein it might be difficult to draw the line; and after further deliberation decided, that the vendor was entitled to stop, notwithstanding a partial payment—refunding, of course, the sum which he had received. * It is almost needless to add, that neither does the seller forfeit his privilege by taking the buyer's acceptances, that being as we have said, one of the ordinary modes in which credit is given. †

Thirdly, there must be a *stoppage*. The bankruptcy of the vendee does not *of itself* remit the vendor to his right of possession, or put an end to the subsisting contract. There must be a positive exertion of the right by the vendor himself, or some one acting in his behalf. It is in fact, a race of competition between the seller and the general credstors of the buyer, in which the most diligent gains the prize. For the manner of exercising the right no specific form has been prescribed: if the transport is by land, a written notice (though a verbal notice will suffice) to the carrier or other middleman in whose hands the goods may be, not to deliver them to the consignee, is the ordinary and recognised mode of stoppage; if by sea, the shipper usually forwards to his agent at the port of destination one of the bills of lading, the presentment of which is a sufficient assertion of the claim, and an authority to the master to deliver accordingly. If the bills of lading expressly make the goods deliverable *to the order of the shipper*, then, upon the production of one of them duly indorsed, it will be at the peril of the master, if he should refuse to obey the order; and this, therefore, seems the surest and most convenient mode for enabling the consignor to regain the possession.

Fourthly, the right of stoppage over-reaches the goods *during the whole period of their passage*; so long, therefore, as they continue in the custody of a middleman, whether carrier, wharfinger, or warehouseman, *on their way* to the destination originally contemplated as between the buyer and seller, they are liable to this privilege of resumption. ‡ And for this purpose it is indifferent, so far as the carrier is concerned, whether he has been specially appointed either by the vendor or by the vendee, or is a general carrier for hire. It may be that he is the agent of the vendee, but he is an agent *to carry*, not finally to receive and appropriate. Thus, not only may goods on board a general ship be stopped, but the right continues even when the shipment has been made on board a vessel chartered by the consignee for that express adventure. On this point, it is true, a different opinion was at one time entertained; * but the question was subsequently set at rest by a solemn decision of the court. †

But, lastly, the transitus is over and the right of stoppage gone, so soon as the goods have come into the actual or constructive possession of the vendee. Lord Ellenborough, on one occasion, observed that Lord Mansfield's expression of the 'corporal touch,' was to be taken not literally, but *figuratively*. ‡ And certainly it can never have been thought necessary that the buyer should in his proper person actually *handle* the goods. Lord Mansfield himself would have considered it enough that they should be delivered into his warehouse whether under his own eye-sight or not. And if this be so, there seems no very sound reason why delivery into the warehouse of another, which the buyer expressly makes his own for the time being, should not be considered equally complete and effectual. Thus to take the instance before cited, of Hunter v. Beale: after the direction given by the clerk of the buyer, it is manifest that the warehouse of the innkeeper became, so far as the custody of the bale was concerned, the warehouse of the buyer. Unless therefore we are prepared resolutely to draw the line of demarcation, by saying that no possession of a third person shall under any circumstances, be deemed to be a possession of the buyer, we must admit that in this case the bale had come into the warehouse, and consequently in the possession, of the person to whom it was consigned. Accordingly this decision of Lord Mansfield, which, as we have seen, determined that the transitus was still incomplete, has been not only questioned by the conrts, § but impliedly, if not in express terms, overruled; and it may be taken as now settled, that one ordinarily acting in the character of a middleman, may be converted into the warehouseman or special agent of the vendee, either

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* Sweet v. Pym, 1 East, 4.

† Siffkin v. Wray, 6 East, 371.

‡ Fries v. Wray, 3 East, 93.

§ Patten v. Thompson, 5 M. & S. 350.

‖ 'The right of stoppage in transitu does not depend upon a supposition that the property has not passed from the consignor, but on the contrary, is founded on an admission that the property has become vested in some other person. No question can be made upon the right of a man to seize his own goods: but the question in cases of stoppage in transitu generally is, whether under the circumstances the consignor may divest the property which had passed to another, and revest it in himself.' Abbot on Sh. 368.

¶ Newsom v. Thornton, 6 East, 17.

** Siffkin v. Wray, 6 East, 371.

* Hodgson v. Loy, 7 T. R. 440.

† 3 East, 93. 1 Stark. N. P. C. 115.

‡ Stokes v. La Riviere, as cited by Mr Justice Lawrence, 3 East, 397. Hodgson v. Loy, 7 T. R. 440. Mills v. Ball, 2 Bos. & Pul. 457. There the good were in the hands of a wharfinger; and Lord Alvanley says, 'Where there is a contract for the sale of goods, and a delivery has been made to a middleman, who is *merely the vehicle* between the buyer and the seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. The only question is whether these goods are to be considered as having been in the hands of a middleman, or as having been taken into the possession of the person for whom they were ultimately intended. I am of opinion that the wharfinger in this case, not having been particularly employed by the vendee, is to be considered as a middleman.' See also Coates v. Railton, 6 B. & C. 422.

* Inglis v. Usherwood, 1 East, 515. In that case the consignment was on board a ship *wholly chartered by the consignee*; and, on the supposition that by the law of England delivery on board such a ship was a complete and final delivery to the vendee, recourse was had, for justifying an act of stoppage, to the law of Russia. On that law the case was decided; and although Lord Kenyon shrunk from determining the question whether by the law of England transitus was at an end, Mr Justice Grose expressly stated that 'he agreed to *the general rule*, that a delivery of goods by the vendor on board a ship chartered by the vendee, is a delivery to the vendee himself;' in which opinion he was supported by Mr Justice Lawrence.

† Bothlingk v. Inglis, 3 East 380. The decision of the court proceeded merely on the ground, that there is no substanstial difference whether the contract for carriage be made expressly with the vendee, or not. In either case he is the hirer of the ship, and must pay the freight.

‡ In Dixon v. Baldwin, 5 East, 175.

§ In Dixon v. Baldwin, 5 East, 175.

by express directions, applicable to the particular consignment, or by a general course of employment rendering such particular direction unnecessary. Thus it was stated by Mr Justice Chambre, that, 'If a man be in the habit of using the warehouse of a wharfinger or other middleman as his own, and make that the repository of his goods, and dispose of them there, the journey will he at an end when the goods have arrived at such warehouse;'* and it has been accordingly on this principle decided that goods in the custody of a packer,† and a carrier,‡ had respectively reached there ultimate distination; the vendee in each case having no warehouse of his own, and having been accustomed on other occasions to use the warehouse of the middleman as the temporary repository of goods so consigned. The question in short, seems to be this: in what capacity did the middleman hold the goods at the time when the claim of the vendor was made? If he held them *as a mere vehicle* between the buyer and the seller, they were still on their passage, and might be stopped: but if they were in his hands as the warehouseman, special agent, or bailee of the buyer, then the transit was at an end.§

Another question, in principle closely connected with this arises, when goods are ordered, as frequently they are, for the purpose of being again consigned elsewhere. In such cases, it may not suit the buyer that the goods should be transmitted directly to himself, and he may consequently order them to be sent to his agent at a particular place, to be by him despatched on their ulterior destination. At what point then, under such circumstances, will the right of stoppage be determined? The answer will readily suggest itself, if we keep steadily in view, that by the transit of goods is meant the course of delivery from the seller *to the buyer*. Thus, for instance, if goods ordered by an agent in England, on account of a house abroad, are sent to the agent for the purpose of being forwarded to his principal; there can be no doubt, that in general, into whatever intermediate hands they may come, they will remain subject to the right of the vendor until their arrival at the point of ultimate destination.* But if the agent receive them, not as the instrument of transmission to his principal, but either under a general authority to deal with and dispose of them as he may think expedient,† or for the express purpose of re-consigning them on a new adventure, it is equally clear, that in either of these cases, *so far as the seller and his contract are concerned*, the transit is determined by the possession of the agent. Thus, to take one example; goods were ordered by a firm in London from a house at Manchester, with directions that they should be sent to the buyer's agents at Hull, to be shipped, *as usual*, for Hamburgh. After the arrival of the goods at Hull, and whilst they were in the possession of the agents there, the vendors claimed to stop them; but the case being brought before the court, it was decided, that they were too late, inasmuch as the transitus was complete by the delivery to the agents.‡ And indeed it is obvious, that the seller in this case had nothing to do with the sudsequent shipment to Hamburg. His contract regarded only the buyer and *his* possession, and could not therefore be affected either in its rights or liabilities by a new destination given to the goods after they had come into the possession of the buyer, or, which is the same thing, the possesion of an agent specially appointed by him to receive them. The same principle is illustrated in a case cited by Mr Justice Lawrence, under the name of Kymer v. Fowler.§ Goods purchased at a foreign port were put on board the buyer's own ship, hired by him for a certain term, not to be conveyed to the buyer himself, but be sent out to Alexandria on a mercantile adventure, with a view to which they had been bought. And this was considered as a complete and final delivery to the purchaser himself.

In the instances hitherto given, the possession has been that of a person acting for and representing the vendee. But this is not the only sense in which the possession may be said to be constructive. The term comprehends every mode of final appropriation short of an actual taking into the vendee's own possession. Thus, affixing a mark,* tasting,† taking samples,‡ while the goods were yet in the warehouse of the middleman, have severally been considered as acts of appropriation, rendering the delivery complete, and consequently determining the transit. Nay, it has even been said, that if at any time in the course of conveyance from the vendor to the vendee, the latter be allowed to exercise any act of ownership over the goods, he thereby reduces them into his possession and puts an end to the vendor's right to stop them.§ And it seems to be now placed beyond question, that if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act equivalent to taking actual possession of them, the transitus is at an end.‖ Lord Kenyon, indeed, in an early case ¶ is reported to have said 'that to give the consignee a right to claim by virtue of possession, it must be possession obtained *on the completion of the voyage.*' The case which gave occasion to the dictum was as follows: a cargo consigned to a person at Liverpool, was, on the arrival of the vessel, taken possession of (in what manner does not appear) by the assignees of the consignee, who had become bankrupt. The ship, however, was immediately ordered into quarantine, and a claim having been made during the period of quarantine, on behalf of the seller, Lord Kenyon decided in his favor, on the ground that the voyage was not complete when the right was asserted. If this decision can be supported at all, of which it is impossible not to entertain doubts, it must be on grounds, we apprehend, somewhat different from those taken by the court. It may be said, not without plausibility, that the law never raises a constructive possession, while anything remains to be done, without which possesion could not be taken in fact; and that as in this case the actual possession could not have been obtained until the performance of the quarantine, it would have been an inference false in fact, if the law had assumed, from any act of the assignees prior to that time, that possession had been taken by them. For constructive possession, it must be remembered, in the sense in which we are now using it, is but in other words *evidence* of actual possession; and it has been frequently decided, that where the *consignee* has yet nothing to do before he is entitled to the absolute possession, no act of ownership, however strong, will countervail the fact, or be sufficient to clothe him with the legal possession. Thus it has been decided, that goods remaining in the king's warehouses, the duties not being paid, are still in their transit, and liable to be stopped by the vendor;** and *that*, even where the consignee has sold them to another.††

To be continued.

* In Richardson v. Goss, 3 B. & P. 119.

† Scott v. Pettit, 3 B. & P. 469. Goods were ordered from a house in Manchester and forwarded to the address of the buyer at the Bull and Mouth, London. From thence they were taken to the house of the defendant, a packer, not in consequence of any orders respecting these particular goods, but in consequence of general orders to that effect from the buyer, who had no warehouse of his own in London. No inquiry was made and no orders given by the buyer, who soon afterwards became bankrupt, respecting the goods in question. The defendant, however, received them as usual, and opened the package for the purposes of examining the contents. They were then claimed by the vendor; but the court was of opinion that the transitus was at an end, when the goods were received into the possession of the packer. 'It seems to me,' said Lord Alvanley, 'impossible to raise a doubt, whether the transitus was at an end or not; for if the bankrupt had no warehouse to receive the goods but that of the packer, the transitus never could be at an end, if it did not end there.'

‡ Rowe v. Pickford, 1 Moore, 526. The buyer in that case was in the habit of purchasing goods from Manchester, for exportation to the continent. Having no warehouse of his own in London, he used that of the defendants, who were carriers, as a place of temporary deposit before shipment. The transitus was therefore held to be determined so soon as the goods reached the warehouse of the defendants. See also the recent case of Foster v. Frampton, 6 B. & C. 107., in which the same doctrine was upheld. In that case, however, there were other circumstances indicating the termination of the transit; for the vendee took away part of the goods, and gave special directions to the carrier to keep the remainder in his warehouse.

§ Foster v. Frampton, 6 B. & C. 109; and see Hodgson v. Loy, 7 T. R. 440.

* See the case of Stokes v. La Riviere, as cited in 3 East, 397. The goods were ordered by Messrs Duhems of Lisle, and were sent first to their agents in London, by whom they were forwarded to their correspondents at Ostend to be sent onward to their destination at Lisle While in their hands waiting for orders, they were stopped. 'No point,' said Lord Mansfield, 'is more clear than that goods may be stopped *in every sort of passage to the hands of the buyers.*' And see also the late case of Coates v. Railton, 6 B. & C. 422,. which was decided on exactly the same principle.

† Leeds v. Wright, 3 B. & P. 320. Moisseron, the general agent in London of Le Grand and Co. at Paris, purchased goods in their name from a house at Manchester. Moisseron had a general authority to send the goods which he purchsed to La Grand and Co. at Paris, or to Holland, Germany, or such other port as he should think most beneficial. In this instance the goods were sent by his direction to a packer; and a part having been taken ont and sent off, the remainder were repacked, and there were, on the failure of Le Grand and Co., claimed by the vendors. But the court was of opinion that the packer had possession of the goods, not as a middleman between the sellers and Le Grand and Co., but on account of Moisseron, and that delivery to Moisseron was a complete delivery to the buyers, in as much as he had authority from them to give the goods what new direction he pleased.

‡ Dixon v. Baldwin, 5 East. 175. 'Here,' said Lord Ellenborough, after a review of the previous cases, 'the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, and communicate to them another substantive destination, and that without such orders they would have continued stationary.'

3 East, 396. The vessel was in this case the repository or warehouse of the buyer. It was to all intents *his own*; and in this respect it differs from a vessel chartered only for the particular voyage, the control and management remaining with the owner.

* Ellis v. Hunt, 3 T. K. 464. There the provisional assignee of the buyer put his mark upon the cask while remaining in the wagoner's warehouse.

† Wright v. Lawes, 4 Esp. N. P. C. 82.

‡ Foster v. Frampton, 6 B. & C. 107.

§ Per Lord Alvanley in Mills v. Ball, 2 Bos. & Pul. 461.; and his lordship goes on to say: 'So though it has been said that the right of stoppage coninues till the goods have arrived at their journey's end, yet if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end, with reference to the right of stoppage.'

‖ Per Bailey, J. in Foster v. Frampton.

¶ 6 Halst. v. Pownal, 1 Esp. 240.

** Northey v. Field Esp. N. P. 613.

†† Nix v. Olive. Abbot on Sh. p. 393.

## MORTGAGE.

Continued.

We know how eagerly a pretext is sought to elude the odious incident of survivorship, as for instance the execution of an elegit on the joint estate of one of the tenants, which is held to work a severance, (Gilb. on Executions, 41.) yet tenant by elegit has but a chattel. (2 Inst. 396.) An inference has been attempted also from Lancaster v. Dolan, (1 Rawle, 321.) which, it seems to me, it does not warrant. It was held there that a mortgagee is a purchaser within the 27 Eliz. and entitled to all the advantage which the character can give him in a conflict with a volunteer. But that proves nothing which has not already been conceded. The title doubtless passed as far as was necessary to the protection of his security, and so far the mortgagee was a purchaser in the strictest sense of the word. At one time it was doubted whether a judgment creditor is not a purchaser within the true intent of our recording acts, and it has been barely held that he is not; yet no one ever suspected him of being the owner of an estate in the land. As to the other ground of the inference from the position there taken, that a mortgage is a conditional sale, every one the least conversant with the doctrine of powers, knows that in the execution of them, form is substance; and that a mortgage, being in form a conditional sale, may be a valid execution of a power to sell without conveying the estate, to every intent and purpose. The case of Ripple, v. Ripple, (1 Rawle, 386.) has also been cited; but it seems scarcely necessary to say, that the nature of the incumbrance there, was such as to preclude it from being deducted from the purchase money. Finally, it has been dertemined, that the mortgagee may maintain ejectment against the mortgagor; but that is entirely consistent with the principle conceded at the outset, that the mortgagee is the owner, so far as is necessary to enable him to enforce his security. In fact, the only case in which a contrary sentiment has been intimated, is that of Moliere's lessee v. Noe; (4 Dall. 450.) but there the opinion on the particular point to which I allude, was not only an *obiter* one, (for the point did not arise) but that of a bare majority; and it was beside formed at a time when the professional sentiment was in a state of transition. Although now too late to question it in a case like the one supposed, it is hazarding little to say, that if an expression of judicial opinion on it had been delayed a few years, the result would have been different. Besides, the opinion of the chief justice was founded in some degree on a district provision of the same act.

So much for judicial decision, by which a mortgage has with a single exception been treated as an incumbrance; and the legislature seems to have acted on the same principle as a fundamental one. In the act of 1705, by which the mortgaged premises are subjected to execution, the mortgagee was treated as an incumbrancer, and not as the owner, even at that early day. As an accessory of the former ownership, the equity of redemption, although originally a creature of chancery, was considered to be inherent in the land, even without the existence of a court of equity to protect it; and the estate of the mortgagee, which would, by the terms of the grant, have, become absolute by a breach of the condition continued to be viewed as a contingent one. In truth, the inconvenience of treating the estate as it had stood at law, without a court to give relief on equitable terms, would have been intolerable. Accordingly, the remedy provided was not to enable the mortgagee to foreclose, but to get his money out of the land by a sale or extent, 'as in case of OTHER lands sold or delivered ON EXECUTIONS FOR DEBTS OR DAMAGES.' He was thus put exactly on a footing with a judgment creditor; and it is worthy of notice, that the legislature even then, recognised as applicable to a sale on a mortgage, the principle of judicial sales, subsequently applied in practice to all other cases, by directing that the purchaser hold clear, not only of the equity of redemption, but of all incumbrances whatever; thus disposing of the whole estate at once, instead of the particular interests of the execution creditor. In the act relative to mortgages, passed in 1820, the instrument is treated purely as an incumbrance, its lien being declared to attach, not at the execution of the deed, as it would necessarily have been supposed to do, had it been considered as arising from the vesting of the estate, but from the period of its being entered of record. So, in the acts of 1822 and 1823, the mortgagee is spoken of merely as the holder of a security, and one that may be released in part, or gradually discharged by indorsement of payment, as the intalments become due. These are the earlier and principal acts that seem to bear upon the question. But it is supposed that a different notion is perceptible in the Act of 18th of February, 1824, by which guardians and other trustees are authorized to invest the moneys of the trust 'in real securities,' at such rate of interest as the Orphans' Court may direct: and hence it is supposed that the securities thus spoken of are mortgages; that the legislature deemed it necessary to the purposes of the trust, that the investment should be permanent; and that to protect it from interference by the other creditors, it must have been considered that the mortgagee had an estate in the land. It seems to me this train of suppositions is entirely gratuitous. If the legislature had intended to designate a mortgage, they would have done so specifically insead of using a generic term. Besides, there is no reason to impute an intention to restrain the investment to this species of security, when a bond and warrant, or a redeemable ground rent, or a conveyance in trust with power to sell, would all equally answer the description, and two of them the object supposed to be intended. It cannot be doubted then, that the legislature had no view to the point mooted here. At its last session, however, it must be conceded that the legislature viewed the matter in a light entirely different, and it has been suggested that a due deference to its opinion requires us to retrace our steps. The act which changed the law laid down in Willard v. Norris, was a constitutional exercise of legislative power; and regarding it as furnishing a rule for cases in time to come, it will be executed by this court in good faith even to the letter. But we will never consent to attribute judicial authority to a branch of the government, whose province it is to enact the law, and not to administer it; nor surrender the constitutional franchise of the judiciary, by bowing to every intimation of a judicial opinion that may be supposed to proceed from the legislative halls. I, therefore, do not acknowledge the legitimacy of the argument drawn from a supposed intimation of legislative interpretation, that the opinion held by this court in Willard v. Norris, was an erroneous one. I admit that a *prospective* intimation by a course of legislation on the basis of a state of things supposed to exist, is a strong evidence that it does exist, inasmuch as it gives rise to rights founded partly in enactment and partly in usage; but here the existence of the law as settled in Willard v. Norris, was taken for granted as the foundation of the act which changed it, and which was a legislative affirmation of the very fact which it is the purpose of the argument to disprove. All other legislative acts, however, are in unison with the judicial sentiment, that a mortgage is purely an incumbrance.

But taking it to be an incumbrance, it is said to differ from a judgment in this, that it is created directly and expressly by the contract, while the lien of the judgment is the effect of the law; and this is the second principal ground of the argument. Admitting for the present this difference to exist, it is not easy to see what objection it furnishes to the application of the general principle. It is said that to discharge the incumbrance against the mortgagee's consent, would impair the obligation of the contract. It is obvious that the argument would not touch the case of a mortgage which is due, inasmuch as payment by the mortgagor or any one in his place as a purchaser of the equity of redemption, would stand with the very letter of the contract. But how would it affect the contract to compel the mortgagee to receive satisfaction even before the day of payment? Even as respects the acts of the legislature, the constitutional inhibition relates only to contracts which exist at the enactment of the law. I believe no one ever doubted the power of the legislature to regulate the obligation of contracts prospectively, or to take it away altogether, as was done some years since, in regard to the contracts of certain unchartered banks. The parties contract subject to the provisions of the law which enter into their stipulations, and thus tacitly become a part of their agreement; and when the law requires that a mortgage be subject to payment, in certain circumstances, before the day, it is as much an original condition of the contract as if it had been expressed in terms. But a decision of the judiciary is so far different from an act of the legislature, that it declares no new law; and consequently can never operate as an *ex post facto*. It merely recognises a rule so long respected in practice as to authorize a presumption of its having been adopted originally by common consent, and in that aspect is treated as having been the law from the beginning. Such was the origin and growth of the custom which gives the tenant the way-going crop, and impairs the obligation of the contract resulting from its apparent terms, so far as to give the tenant an interest beyond the expiration of his lease. No well advised judge will claim a right of legislation. Independent of the fact that all legislative power is placed by the constitution elsewhere, (a consideration that ought of itself to be decisive) every usurpation of such a right hitherto has proved to be extremely pernicious in its tendency to impair the public confidence in the stability of judicial decision, and subject the rights of the suitors to the prejudices and caprice of the judges. I take it then, that a judicial decision is not to be taken for an act of legislation; and that if the policy of the law, about which I shall have occasion to speak more particularly, should require the contact of hypothecation to be laid under restriction so far as to expose it to casualties, that are incident to every other species of incumbrance, the constitution interposes no bar. But

is the proposition that the lien is a matter of formal and express stipulation founded in fact? By the terms of the contract, the mortgagee is to have not a lien, but an estate; and that he *has* a lien and not an estate, is as much the *legal effect* of the instrument as lien is the legal effect of a judgment. It must be admitted, however, to be the intent of the parties that the contract shall create a lien, because they know that such will be its legal consequence, and they may therefore be said to stipulate with a view to it. But precisely such is the intent of parties who resort not to a mortgage, but to a judgment with stay of execution. In both cases the object is real security, not by stipulating for it in terms as in the case of recognisance; but by performing an act of which it is in the one case and the other a legal consequence; the difference being that the judgment pledges all the debtor's land within the country, and the mortgage only the lands described in the deed. For this reason a bond and warrant is thought to be the better security; insomuch that no creditor in the country accepts a mortgage except the vendor of land, who is generally content to rely on the security of the estate with which he has parted.

(To be continued.)

## ENGLISH.

### PUNISHMENT OF SAILORS FOR DISOBEDIENCE.

In another part of our columns will be found a letter from a correspondent, who calls in question the soundness of the decision of the Court of Exchequer in the recent case of *Lamb* v. *Burnett*, which was an action to obtain compensation in damages for flogging a sailor on board an Indiaman. The verdict was for the defendant, and the Court refused an application for a new trial, as they considered the verdict was a proper one, and ought not to be disturbed. Our correspondent states that the Learned Barons of the Exchequer held this doctrine—viz. 'That the authority or power of punishment in the king's and merchants' service was the same; and as the plaintiff had been guilty of disobedience, by opposing the infliction of punishment on a sailor, the Master was empowered to inflict such punishment as he thought proper on the plaintiff.' Now, with regard to the latter part of what is here stated as having fallen from the Bench, we are quite confident it has been misreported. It is impossible the Learned Barons could have propounded so monstrous a doctrine as that the Master of a ship, either in the king's or merchants' service, is empowered by law to inflict upon a sailor, for disobedience, *such punishment* as he *thinks proper*. Our correspondent denies that the master of a merchant vessel has a right, by law, to inflict any punishment. This is the other extreme. The Master is empowered to inflict some punishment for disobedience; but he must take care that it is not cruel or *excessive*. If he exceed the bounds of a reasonable authority, it is at his peril; and he is liable to answer either civilly or criminally, as the case may be, for the *abuse* of a power with which the law invests him for the preservation of good order in all lawful matters appertaining to the navigation of the ship. We are not now discussing the question whether it is necessary that he should have this power in consideration of the safety of the vessel and the lives of those on board—we are only speaking of the law as it is, without reference to its policy; though, at the same time, we cannot avoid saying we have the greatest possible abhorrence and disgust of the degrading practice of flogging, whether on sea or on shore, and hope to see the day when an Act of Parliament will protect both our sailors and soldiers from the slavish and barbarous castigation of the lash. Our correspondent, in support of his opinion that the Master has no power to punish a sailor for disobedience, refers to the *Lex Maritima*, and says that, from the days of Alfred to the present time, the law in substance is as follows:—'That if a sailor in a trading vessel refuse to do his duty, or be guilty of disobedience, he shall be confined, or put in irons if necessary, such as in the case of mutiny, &c, and forthwith delivered over to the Commander of the first king's ship the vessel shall meet, who shall hear and examine the case, and cause the offender to be dealt with according to law; that is, to take the sailor in charge if the case be for mutiny, and deliver him over to the Court of Admiralty, to be tried for the offence.' He also says that the only power by which the Captain of a king's ship can inflict punishment on any of his own ship's company is by the *Articles of War*, and not by *Lex Maritima*. We admit that, in case of serious crimes, which are not to be confounded with mere acts of disobedience, the Master can only exercise the power of putting the person of the offender under restraint, to prevent the repetition of the offence, and to secure him for trial before the competent tribunal, as he has no *judicial* authority. But in mere cases of disobedience, or disorderly conduct, which is more properly *misbehaviour* than *crime*, he has, by an authority long *antecedent* to the *Articles of War*, or to any *statutory* provision—we mean by the *common*, or unwritten law—the power of inflicting punishment on a mariner in a reasonable manner. His power, in this respect has been compared by ancient writers to the authority which a parent is allowed to exercise over his child, or of a master over his apprentice or scholar, which is derived from the *common law*. *Valin*, in his Commentary on the *French Ordinance*, cites this position from an old authority, where it is laid down that the master is armed by law with this disciplinarian authority *ad levem castigationem pro corrigenda insolentia et male morata vita seu licentia nautarum et vectorum, quemadmodum eam tenet pater in filies Magister in discipulos, &c.* This power of *moderately* punishing sailors by the Master, to correct insolence, disobedience, or disorderly conduct, is stated to be 'part and parcel' of the English as well as the French *maritime law* by Lord Tenterden, who, when Mr Abbot, gave to the commercial law of this country the benefit of his great research and luminous exposition, in his admirable treatise on merchant ships and seamen; and he quotes the case of *Watson* v. *Christie*, 2 Bos. and Pull. in support of this doctrine. He says the power in question is absolutely necessary for the safety of the ship and the lives of those on board; but he emphatically adds, 'it behooves the Master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression.' He quotes afterwards the French ordinance in allusion to certain modes of punishment which the Master may inflict on drunken, disobedient mariners, and which punishments required the *consent* of the steersman and mate. He then goes on to say 'By the law of England such consent is not required; nevertheless the Master should, *except in cases* requiring his *immediate* interposition, *take the advice* of the persons next below him in authority, as well to prevent the operation of passion in his own breast as to secure witnesses to the propriety of his conduct; for the Master, on his return to this country, may be called upon by action at law to answer to a mariner who has been *beaten* or *imprisoned* by him, or by his order, in the course of a voyage; and for the justification of his conduct he should be able to show not only sufficient cause for chastisement, but also that the *chastisement* itself was *reasonable* and *moderate*, otherwise the mariner may recover damages proportionate to the injury received.' When causeless or excessive punishment by the Master occasion death, he will be liable to punishment for murder or manslaughter, as the circumstances of the case, governed by the established principles of the common law of England, may sustain an indictment for one charge or the other. In the case of *Lamb* v. *Burnett*, which has given rise to our correspondent's letter, if we recollect right the question was not as to *excess* of punishment, but as to the right to inflict *any* punishment whatever. The Court decided that he had; but, had there been in the pleadings on the part of the plaintiff a new *assignment* for the excess, perhaps the Court would have been of opinion that five dozen lashes on such an occasion was *excessive* and *unreasonable* punishment. We should have thought so;—but it is not the present question.—*Morning Herald of Feb.* 1831.

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The Queen's County Assizes have terminated with one capital conviction for Whiteboyism. A Jury who could not agree as to the guilt or innocence of three prisoners given in charge to them on Monday, were subjected to the barbarous and unmeaning punishment of incarceration in a dark room, without fire, food, or covering, during the whole of that inclement night. When the Chief Baron came into Court on the following morning at ten o'clock, one of the unfortunate men was found in a very weak and deplorable condition; and a medical man having been examined, and testified that a further detention might endanger his life, the Jury was discharged. The prisoners were given in charge on Wednesday of another Jury, who had the good fortune not to disagree, but returned their verdict at midnight, and the culprit has been left for execution.

The Chief Justice (Bushe) presided in the Record Court. A case was tried before his Lordship which excited a good deal of merriment. Mr Pigott, of Cappard, brought an action of ejectment against some tenant, in the course of which it came out in evidence that the person for whose life the ground had been leased to the defendants was dead for some years, and that they dressed up an old beggarman, whom they placed, if not in the shoes, at least in the bed, of the deceased, where he *shammed Abraham* for a length of time. To render the delusion more complete, the room was darkened, the old gentleman's hat and wig laid on a chair beside his bed, and, lest the tongue of the *Parvenu* might bewray him, he was instructed to grunt 'umh,' as the sole and sufficient response to all the kind inquiries of his neighbors. Mr Cruise improved these circumstances in a speech full of fun and fancy, which delighted the court and the auditory for the best part of an hour.

By reason of the noise and tumult which customarily prevail in this Court, the Chief Justice was

in danger, on one or two occasions, of losing that amenity of temper for which he is almost as remarkable as for the higher qualities of his mind. However, by putting a vociferous drunkard into the dock, threatening to send the Sheriff to the same place, and ordering a pair of loquacious Magistrates into custody, his Lordship restored decorum to the Court, and resumed his wonted equanimity. You may judge of the liberties which are taken in our Irish Courts when I tell you, that while a prisoner was on his trial for murder, I saw one of the Counsel for the Crown conversing with a Juryman, who was separated from him only by a partition no higher than his elbow, at the same time that the tipstaff of the Court delivered a letter to another juror on the point of his wand.

## RECENT AMERICAN DECISIONS.

### SHIPPING.

11. Where by the municipal regulations of certain ports, a certificate of origin was necessary to the admission of certain merchandise there, a shipmaster having received such goods on board his ship, and signed a bill of lading for their delivery at one of such ports, cannot in the absence of evidence to show it was the duty of the shipper to furnish such a certificate, set up the fact of that document not being on board his ship, as an excuse for not entering the port at which he had agreed to land the property entrusted to him; nor as a justification for his delivering it at another port, and thereby earn freight. *Wirgman's Admr's. vs. Mactier*, 1 Gill & Johns. 150.

12. Under the 10th section of the act of 1825, ch. 67. [276] the forcing a mariner on shore must be done, not only without justifiable cause, but also maliciously, to justify a conviction. If done under a mistaken sense of duty, it is not a case for conviction. *United States vs. Ruggles*, 5 Mason, 192.

13. 'Maliciously,' in the statute, means, with a wilful disregard of right and duty, or doing the act against a man's own conviction of duty. *Ib.*

14. A master of a ship has authority to confine his seamen in a common jail, in a foreign port, for offences and misconduct, in extreme cases, and where the proper correction or punishment cannot be effectual on shipboard. *Ib.*

15. If the crew combine together not to do duty, it is an endeavor to make a revolt within the crimes act of 1790, ch. 9, [36] § 12, although no orders are actually given afterwards. *United States vs. Barker*, 5 Mason, 404.

16. If the shipping article are to the final port of discharge, the voyage is not ended until the cargo is wholly unladen. The owner may order the vessel from port to port until the whole is discharged. *Ib.*

17. To affect the master of a vessel with the penalty provided for his non-delivery of a temporary register, granted under the 3d section of the coasting act of 1793, ch. 52, there must not only be an arrival at the port to which the vessel belongs, but it must be an arrival there, not by accident or from necessity, but intentionally as one of the termini of the voyage. *United States vs. Shackford*, 5 Mason, 445.

18. To constitute an endeavor to commit a revolt within the crimes act of 1790, ch. 36, it is necessary that there should be some effort to act or stir up others of the crew to disobedience of the master. *United States vs. Savage*, 5 Mason, 460.

19. To constitute a confinement of the master within the purview of the same act, it is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement upon the master. *Ib.*

20. The master has authority to displace the mate and all other subordinate officers, during the voyage. If he abuses his authority, he is responsible for the wrong.

*Semble*, that the *mate* is a *seaman*, within the crimes act of 1790, ch. 36, § 12. *Ib.*

### SHIP.

In an assumpsit to recover one quarter of the proceeds of the sale of a vessel and of her earnings previously to the sale, the plaintiff, in support of his title, produced a bill of sale of one quarter thereof from S., who with three others was the first owner of the vessel. The defendant produced a paper, executed previously to the sale to the plaintiff, by all the first owners, whereby they agreed to 'pledge' to the defendant the vessel, then building as security for his advance thereon, and to allow the defendant to buy any part of the vessel, at a certain rate per ton. The vessel was afterwards sold by the defendant; but his advances amounted to more than the proceeds of the sale and earnings. *Held*, that the last mentioned instrument was not an absolute transfer, nor a mortgage, nor a pledge; and that it was incompetent to avoid the subsequent transfer to the plaintiff. *Bonsey vs. Amee*, 8 Pick. 236.

### STOPPAGE IN TRANSITU.

1. Goods shipped on board a vessel, are still *in transitu* after the arrival of the vessel in which they are shipped, until they are taken possession of on behalf of the consignee. *Naylor vs. Dennie*, 8 Pick. 198.

2. An attachment of goods on board a vessel, as the property of the consignee does not defeat the right of the consignor to stop them *in transitu*. *Ib.*

3. Though the right of stoppage *in transitu* on the part of the consignor, is adverse to that of the consignee, yet the consignor's right of stoppage is not defeated by his obtaining from the consignee a writing, in which the consignee declares that he revokes the order for the consignment, declines to receive the goods, and requests the master of the ship, or any other person having the goods in his custody, to deliver them to the consignor. *Ib.*

### TOWN.

The selectmen of any town, the inhabitants of which are exposed to the spreading of the small pox among them, may prevent such spread by procuring the inoculation for the kine pox among those exposed, and the town may legally vote a tax to defray the expense of the same. *Hazen vs. Strong*, 2 Vermont Cases, 427.

### TRESPASS.

1. A mortgagee of personal property mortgaged to secure a debt, may maintain trespass against a stranger, who takes it from the possession of the mortgager, although the trespass be committed before the debt becomes due. *Woodruff vs. Halsey*, 8 Pick. 333.

2. A mortgagee of a building standing not on land of the mortgager, but on that of a third person, may maintain trespass against a stranger who pulls down and carries away the building, the building being unoccupied at the time of the trespass, and the mortgagee not having taken actual possession. *Ib.*

### TRUST.

One receiving trust property, knowing it to be such, in payment of his own debts, is liable to account for the same to the *cestui que trust*. *Towle vs. Mack*, 2 Vermont Cases, 19.

### VARIANCE.

In an action to recover damages for the non performance of a contract for the sale of lands a variance, in respect to the locality of the land, between the contract laid in the declaration and that proved is fatal. *Obert vs. Whitehead*, 6 Halst. 293.

### WAGER.

One cannot recover for property won of another on a wager, *That a certain chaise was the property of A. B. Collamer vs. Dey*, 2 Vermont Cases, 144.

### WASTE.

1. The court will not grant rules to stay waste in actions of trespass. *Leeds vs. Doughty*, 6 Halst. 193.

2. The statute of Gloucester, (*Ed.* 6. *c.* 5,) giving an action of waste against tenant for life, for the recovery of the place wasted and treble damages, has been adopted as a part of the law of Massachusetts: though in respect to tenant in dower it has been modified by our own statutes. *Sackett vs. Sackett*, 3 Pick. 309.

3. It is not waste in a tenant for life to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, for such repairs, provided this be proved to be the most economical mode of making the repairs. *Loomis vs. Wilbur*, 5 Mason, 13.

### WAY.

1. If the owner of the soil set apart a piece of land for the public use, and it is used and enjoyed by the public for fifteen years, or more, it becomes a highway, and cannot afterwards be reclaimed by the original donor, or by any claiming through or under him; and whoever obstructs the free passage of the public thereon, may be proceeded against by indictment. *State of Vermont vs. Wilkinson*, 2 Vermont Cases, 480.

2. And a shorter period than fifteen years may, under circumstances, afford sufficient ground on which to found a presumption of right in favor of the public. *Ib.*

3. A right of way in *esse* may pass by deed of bargain and sale, duly acknowledged and recorded. *Hays vs. Richardson*, 1 Gill & Johns. 336.

4. A transfer of way *de novo* may be by grant or at lease, but cannot be effected by way of bargain and sale. *Ib.*

5. A right of way may be said to lie in the county where it exists, or is exerciseable. *Ib.*

6. Where one has a right of way over another's land, and the way is not defined, if the owner of

the land stops up the way which is in use, the other party will be justified in going over another part of land. *Farnum vs. Platt*, 8 Pick. 339.

WILL.

Where G. by his last will devised certain tracts of land to his three sons in fee, and also devised to his daughters, 'the right, privilege, and liberty residing and living in the houses, with, and using and cultivating with themselves and their negroes, stock, and of keeping their negroes, and all their other property thereon with them, in common with my sons, all my lands during the term that my said daughters should remain single and unmarried,' it was *held* that the daughters did not take an estate for life or any other less estate in common with their brothers, which was susceptible of partition: and that the devise to them was a mere charge for their benefit upon the lands of the testator, and incapable of alienation to a stranger. Per Bland, Chanc. *Warfield vs. Gambrill*, 1 Gill & Johns. 503.

WITNESS.

A person not named in the suit, but who in point of interest, is the actual defendant, cannot be compelled to testify for the plaintiff in the suit. *White vs. Everett*, 1 Vermont Cases, 181.

CHANCERY

Principal cases in Paige's Chancery Reports, vol. I.

ASSIGNMENT.

C. held a single bill, or sealed note against H. for $2425, payable to himself in twelve months from the date, with interest. C. borrowed $100 of M., and pledged this sealed note to him to secure the repayment, and indorsed his name in blank on the note. M. being indebted to the Tradesmen's Bank in the sum of $2600, agreed to transfer the note to the bank, as security for $1000, part of the debt he owed the bank, provided the bank would advance to him the remainder of the note. The bank advanced the money and M indorsed his name in blank on the note, and delivered it to the bank. M. afterwards became insolvent, and never paid any part of the $1000, or of the money advanced to him by the bank. Soon after C. delivered the note to M., M. received a larger sum of money belonging to C. than the amount C. owed him. The bank was ignorant of the right of C., and gave H. notice not to pay the note to any one except themselves. C. gave notice to the bank of his title to the note, and demanded it from them. The bank refused to deliver C. the note. *Held*, that C. having both the prior equity and the legal right was entitled to the note. *Covile vs. Tradesman's Bank*, 1 Paige, 131.

Had the note been negotiable, and had it been taken by the bank in the usual course of business, the equity of the bank would have been equal to that of C.; and the legal right of the bank to collect the money due on the note in their own name, would have prevailed over the prior equity of C. *Ib.*

Aliter, if the note, although negotiable, had been transferred to the bank merely as a security for an antecedent debt. *Ib.*

The assignee of a judgment takes it subject to all the equities which existed against it in the the hands of the assignor. *Webster vs. Wise*, 1 Paige, 319.

Where the subject of litigation was a fund in the hands of an insolvent assignee, who was a defendant in the cause and had no personal interest therein, but claimed the fund for the benefit of others, the money was ordered to be brought into court, and invested to abide the further order of the court. *Haggerty vs. Duane*, 1 Paige, 321.

BANKRUPT.

Where a British subject being indebted, left England, and while on his voyage to this country, and before he arrived here, he was, under the laws of great Britain, declared a bankrupt, and provisional assignees were appointed; it was *held*, that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country. *Plestoro vs. Abraham*, 1 Paige, 236.

And an injunction will lie, upon the application of such assignees, to restrain a third person from delivering the goods to the bankrupt, and also to restrain the latter from receiving or prosecuting for the same. *Ib.*

And the commencement of suits against the bankrupt by his creditors in the courts of common law of New York, will not defeat the effect of the assignment to his assignees. *Ib.*

CITIZEN.

A citizen of one state becomes a citizen of any other state, when he makes such other state the place of his actual residence. *Rodgers vs. Rodgers*, 1 Paige, 183.

THE JURISPRUDENT.

BOSTON, SATURDAY, JUNE 4, 1831.

## MUNICIPAL COURT.

While everybody admits the propriety of doing something with regard to the location of this Court, nothing is done, or likely to be, so far as we can learn. If it were to be transferred with its jurisdiction to Middlesex, it could hardly be more completely out of the way of those who are interested in its proceedings and would be disposed to take a part in its business. The officers, lawyers, juries and parties unite in complaining of its condition and praying for a change, and those of the public especially, who have occasion to go into it, join them. Why should the business of so important a tribunal be done in a corner,—in an obscure, crowded, noisy, close, dirty room, in a remote part of the city, where nobody goes, but upon compulsion; while there are convenient unoccupied public rooms, near the centre of business, which may, with little or no expense, be appropriated for its accommodation? The court is, in every way, respectable and worthy the confidence of the public; let it, then, be placed in a respectable position, where the situation of the Judge, counsel, witnesses and juries, may be rendered, at least, something more comfortable and less perilous than that of the prisoners at the bar.

The following case tried in that Court, at the April Term, will be found to contain some points of interest to the profession.

CASE OF AMOS WARREN—A CONVICT

Amos Warren, a convict in the State Prison, was brought into Court by a writ of *Habeas Corpus*, directed to the Warden, to answer to an Information which had been filed against him by James T. Austin, Esq. the Attorney of the Commonwealth for the County of Suffolk, and to receive an additional sentence pursuant to the act of 1827, c. 118, § 19. The charges contained in the information were, that at the Supreme Judicial Court, in Norfolk County, October, 1811, he was convicted of the crime of Forgery, and sentenced to hard labor in the State Prison for eight years, which sentence was executed upon him there.—That at the Supreme Judicial Court, in the same County, in October 1821, he was committed on two indictments, each of which was for the crime of Forgery, and that he was sentenced upon each to suffer two years of hard labor in the State Prison, which sentences were also executed upon him there. And that at the May Term of this Municipal Court in 1826, he was convicted of the crime of breaking into a shop in the night time, and of committing a Larceny in the same, for which he was sentenced to hard labor in the State Prison for five years, and that he was still remaining there in execution of that sentence. By the record of the convictions in 1821, the party was tried and convicted under the name of *James M. Williams*, alias *James Woodward*. And it was averred, that said Amos Warren, the convict, now in the State Prison, was the same person who was named in each of the said convictions.

Upon his arraignment on the 8th of April, he denied the truth of the charges, and his trial was assigned for the 14th. A jury was then empannelled to try the issue. The prisoner's defence was conducted by Samuel D. Parker, Esq. To maintain the issue on the part of the Government, Mr Austin produced copies of the three first convictions, authenticated under the seal of the Supreme Judicial Court, and by the signature of the Clerk of that Court for the County of Norfolk. The original record of the conviction of the prisoner in this Court was read to the Jury.

To prove his identity, *Stephen Bennet* was sworn as a witness and testified, that he had been an Officer of the State Prison since 1814, that he had known the prisoner from childhood, that he was confined in the prison as a convict in 1814, and for some years afterwards,—that after his discharge from that first confinement, he was again, in 1821, received into the prison as a convict. And that having completed that second confinement, he was again, in 1826, received into the prison as a convict, and was still held under that sentence. During his second period, he was known and called by the name of *James Williams*. But the witness stated that convicts are always called by the name under which they are committed, but that it was known to him at the time, that his true name was *Amos Warren*.

Mr Parker rested the defence on the supposed deficiency of evidence to prove the identity. He insisted that the several prosecutors, and the jurors who tried the Defendant at the times mentioned in the records, should have been called to say, whether he was the same man.

But Mr Austin contended, on the part of the Government, that the testimony of Mr Bennett was not only sufficient, but better than any other which could be produced. It was not to be expected, that either the prosecutors or jurors, at the distance of ten and twenty years could identify the Defendant; but it was part of the duty of the officers of

the Prison, and it resulted from their daily intercourse with the convicts, to be able to identify their persons at distant periods.

In committing the case to the Jury, Judge Thacher informed them, that the process was founded on the act of 1827, c. 118, § 19, which enacts, that if a party shall be in the State Prison, under a legal conviction for a crime, the punishment of which shall be, by law, confinement to hard labor for any term of years, and shall have been upon a legal conviction, before sentenced to a like punishment; he is liable by that statute to be further sentenced to hard labor for an additional period of time. And in case the said convict shall have been twice before convicted and sentenced in manner aforesaid, he shall be punished by confinement to hard labor for life. The nature of the crime for which the party is, at the time, confined in prison, and the sentence to which he may be liable, and the sentence which was awarded against him upon the former conviction, are therefore material to be considered.

Amos Warren, the convicted Defendant, is now charged to be in the State Prison, under sentence for an aggravated Larceny, and the three former convictions were in each case for the crime of Forgery, which offences severally subjected him, on conviction, to be sentenced to hard labor for a term of years. Two of these convictions, the second and third, were at one and the same term of the Supreme Judicial Court, in Norfolk County, in 1821. But the words of the act are general, not requiring the convictions at different terms of a Court. If the party has committed the two offences, and has been convicted at one and the same term of a Court, it is within the letter and spirit of the law. Formerly, we gave a more lenient construction to the statute, allowing both sentences to constitute but one term of confinement, as they followed each other in immediate succession. But the Supreme Court has not sanctioned it; and every inferior tribunal is bound by their judgment.

The several convictions in the information are proved by the records, which in the estimation of the law are the highest evidence, being absolute verity. *

The records of the several convictions being shown, and it being proved by the testimony of an officer of the Prison, that the Defendant was confined there during the several periods; it will follow, that he was there pursuant to the judgments shown, unless he can disprove the fact; which may be done by proving that he was there for some other cause. But he has made no attempt to do so; and if the Jury believe the evidence, they are bound to find that the charges are true.

For where the law is clear and the facts are proved, the jury are bound in conscience and duty to pronounce verdict a accordingly.

It is not for us to inquire, whether the law is se vere and falls heavily upon a citizen. That would be to leave our sphere of duty, and to intrench upon the prerogative of the Legislature. If any hardship is found in any instance to flow from the regular operation of the Law, there is another department of the government, which can interfere and make things equal.

When the Defendant in this case committed his second, and third and fourth offences, his eyes were open, and he had a full knowledge that by law he would be subjected to a higher degree of punishment for these offences. His crimes were committed not only against all good conscience, but against experience. If therefore he should now by the verdict, be cut off from society, the day of repentance being past, it is because society deems him to be an enemy, and will not again suffer him to go at large.

But before the Jury should render a general verdict against the prisoner, they must be satisfied as to his identity, and that he was the same person who now being confined to hard labor in the State Prison, under sentence for an aggravated Larceny, had been thrice before convicted of the crimes of Forgery as set forth in the Information.

The Jury found, that the charges were true, and he was sentenced to be confined to hard labor in the State Prison, for and during the term of his natural life.

* 'Legally records are restrained to the rolles of such only as are Courts of record, and not the rolles of inferior, nor of any other courts which proceed not *secundem legem et consuetudinem Angliæ*. And the rolles being the records or memorialls of the judges of the courts of record import in them such incontrollable credit and verite, as they admit no averment, plea, or proofe to the contrarie.' *Co. Lit.* 260.'

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## NEW HAMPSHIRE REPORTS,

VOL. V.—PART I.

W. being indebted to F. S. agreed to sign a note for the amount as a surety, with K. A note was written, in which W was named as principal and S. and K. as sureties, and was signed by W. and S., and then carried to K., who refused to sign it; but it was without the consent of S., carried to F., who with a full knowledge of the circumstances under which the name of S. had put been on the note, received it. It was held that S. was not bound to pay the note. *Hill vs. Sweetser.*

Writs of error are judicial writs, and need not be indorsed. *Tracy vs. Perry et al.*

A justice of the peace may render a judgment upon a confession under the statute of December 20, 1808, for a sum exceeding thirteen dollars and thirtyfour cents. *Perry vs. Page.*

In an action of covenant broken, if the summons, left with the defendant in the service of the writ, does not set forth what sum in damages is demanded, and for what, it a good cause to abate the writ. *Putney vs. Cram.*

In the process of foreign attachment, if the trustee, in his answer, admits that money or goods of the principal came to his hands, he is to be charged, unless he clearly discharges himself.

But if the trustee denies that he ever had in his hands any money or goods of the principal, he is to be discharged, unless it clearly appears from what he discloses, that he had money or goods of the principal in his hands, notwithstanding his denial. *Wright vs. Foord and his trustee.*

It is no objection to the testimony of a witness, that it goes to invalidate a title derived by deed from such witness.

If a man takes a conveyance of land from one, while another is in the open and visible possession of the same land, he will be presumed to have known everything in relation to the title which could have been obtained by the most diligent inquiry.

And if, in such a case, the person in possession has an equitable title to the land, the taking of a conveyance will be deemed the fraud, and nothing will pass to the grantee.

It is not an offence in this state to purchase land of one, while another is in possession adversely. *Hadduck vs. Wilmarth.*

H. and B. were partners, and the goods of the firm were attached by virtue of writs issued against each of the partners separately, for his own separate debt. Afterwards a creditor of the firm caused the same goods to be attached by virtue of a writ against H. & B. for a partnership debt—it was holden that the officer, who made the attachments, was bound to apply the proceeds of the goods to the satisfaction of the partnership debt, in preference to the debts due from the partner separately. *Tappan & Mansfield vs. Blaisdell.*'

G. gave to P. an obligation to deliver to the latter, the promissory note of a third person, for a certain sum within sixty days. Before the expiration of the sixty days, process of foreign attachment was served upon G., as the trustee of P., and G. had the note ready to deliver according to his contract, on the day named in the obligation—it was held that G. could not be holden as the trustee of P. *N. H. I. F. Company vs. Platt.*

Upon a libel for a divorce by a husband against his wife for the cause of adultery, evidence that the wife has sustained the character of a lewd and unchaste woman is inadmissible against her.

And if it be alleged in the libel that she committed adultery with a particular person, the libel is not sustained by proof of adultery with any other person.

Confessions of the wife that she has committed adultery with the person named in the libel are not alone sufficient to justify a divorce. *Washburn vs. Washburn.*

In an action against one of several makers of a promissory note, another of the makers is a competent witness for the defendant, being released by the latter from all claim to contribution, to prove the consideration of the note to have been an illegal contract for the sale of the office of deputy sheriff.

The office of deputy sheriff cannot be the subject of a sale, and a contract for such a sale is illegal and void.

Where a contract is entire, if a part of the consideration be illegal, the whole contract is void. *Carleton vs. Whitcher.*

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CONTEMPT OF COURT; *or, blowing hot and cold.*—It is said that a late eminent judge, while holding a court on a sultry July day, being oppressed by the heat, directed a door which opened directly on the bench, to be left open. The door was repeatedly shut, and the order as often repeated. At length the judge's patience being exhausted, he committed an unfortunate fellow for shutting the door. Before afternoon the weather changed, a cold easterly storm blew up, and the judge was more annoyed than before, for every man, woman, and child who came in, carefully left the door wide open. Vexed beyond endurance, the judge finally committed a man for leaving the door open. The two delinquents met in prison, and the same room contained two prisoners, both confined for contempt of court; the one in leaving open, the other in shutting the door.—*J. of Law.*

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, JUNE 11, 1831. NO. XLVI.

## MERCANTILE LAW.

### STOPPAGE IN TRANSITU.

(Concluded.)

Again, every carrier or wharfinger has a lien on goods which come into his possession, not only for the charges due in respect of these particular goods, but for the general balance owing to him from the consignee; unless, therefore, he chooses to waive his right, it is manifest that no act of the consignee can amount to a taking of possession, until this claim is satisfied. Accordingly, where a carrier had actually begun to deliver, but afterwards, on information of the consignee's insolvency, re-shipped the part already landed, and detained the whole under a claim for a general balance of freight, it was held that delivery had not taken place, that the consignor was entitled to retake the goods by virtue of his right of stoppage.* Subject, however, to this limitation, there can be no doubt, that if the delivery has commenced and a part of an entire consignment has been actually taking possession of by the vendee, the right of stoppage is gone for the whole.†

The transfer of goods in the possession of a wharfinger or a warehouseman, by handing to the purchaser a delivery order or dock-warrant, has been already considered under the general head of delivery. In such cases the can be no doubt, notwithstanding a contrary opinion attributed in one instance to Lord Ellenborough,‡ that until the warehouse-man has done some act indicating an assent to the transfer, the seller has a right to countermand the delivery. This, however, ought to be regarded not so much an act of stoppage in transitu in the proper sense of that term, as a revocation of an unexecuted order.§

But there is one mode of taking constructive possession by an act of ownersnip, too important in its effect on commercial operations, to be dismissed with a cursory notice. It is, as we have more than once had occasion to remark, the invariable practice for the shipper of goods to transmit to the consignee by the first opportunity one of the bills of lading, which therefore usually arrives before the cargo of which it advises the consignment. Now, the mere possession of this document by *the consignee himself* does not turn the *property* which he has acquired in the goods by the delivery on board into such an absolute right of possession, as to defeat the consignor's privilege of stoppage. But bills of lading, are, as we have seen, by the custom of merchants, assignable, and the effect of such assignment, accompanied with delivery, to a *bonâ fide* indorsee for valuable consideration, is to invest him with a full and unqualified property in the goods represented by the document. Suppose then, that the consignee indorses over the bill of lading—that he becomes insolvent—and that the consignor, in consequence, before actual delivery reclaims the goods. In this conflict of rights between the vendor and the indorsee of the bill of lading, which is to give way? A question so important to the interests of commerce was not, as may be supposed, settled without some controversy; in fact, it gave rise to a memorable difference of opinion among the great legal authorities of Westminster Hall. The history of the well-known case of Lickbarrow v. Mason, in which the point was first solemnly raised, is briefly this: Four bills of lading were taken by the shipper to order or assigns; two of them he sent indorsed in blank to the consignee, who transmitted them, together with the invoice, to his agent, for the purpose of enabling him to receive and sell the goods; at the same time drawing upon the latter bills for a considerable sum, which was duly honored. The consignee subsequently becoming insolvent, and the bills which had been drawn on him for the price having been dishonored, the shipper sent the two remaining bills of lading, specially indorsed, to an agent, who thereupon obtained possession of the cargo from the master, and sold it for the benefit of the shipper. An action was consequently brought by the indorsee of the first set of bills, and these facts having appeared, judgment was given in the court of King's Bench for the plaintiff.* The defendant appealed to the Exchequer Chamber, and there, in an elaborate judgment delivered by Lord Loughborough, the decision was reversed.† The case was then carried into the House of Lords, and the judges being called upon to deliver their opinion *seriàtim*, a most luminous and masterly exposition of the doctrine was given by Mr Justice Buller,‡ supporting the resolution of the King's Bench. The question, however, was not even yet determined, the case being sent back for a new trial, on a mere technical point. On this second trial a special verdict was found, detailing the facts given above, and the case being brought into the King's Bench for judgment, the court satisfied themselves by saying that their former opinion remained unshaken.§ Here the matter rested; and although it is obvious, that the question can hardly be considered as having been conclusively settled by these proceedings, yet has the judgment of the court of King's Bench from that time been explicitly acquiesced in; and it is now an undoubted rule of law, that after assignment by the consignee of a bill of lading to an indorsee *for value, without notice*, the right of stoppage is gone.‖

We have placed some stress on the words 'for value,' and 'without notice,' because, as the rule was adopted for the protection of the *just rights* of third persons acquired under a known usage of trade, it is clear, that in the first place, it *can* have no application where there has been no consideration for the transfer, and consequently, no interest acquired by the assignee; and that, in the second place, it *ought* to have no application where the assignee is aware, or has good reason to suppose that the vendor is not likely to obtain payment from the consignee. It must not, however, be understood, that the title of the indorsee is affected by the mere fact of his knowing that the goods have not been *paid for* at the time of the assignment. The 'notice' here spoken of is, to use the words of Lord Ellenborough, 'notice of such circumstances as render the bill of lading not fairly and honestly assignable;'* and therefore, if the indorsee has no reason for doubting the ability of the consignee to settle for the price, it matters not though he be aware that no payment in money has been actually made.† But if any circumstance transpire indicating fraud or collusion between the consignee and the indorsee of the bill of lading—if, for instance, it appears that the latter was aware of the insolvency of the consignee, and knew, moreover, that he was still debtor for the goods—the law in that case will afford him no aid, and his title must yield to the more honest claim of the vendor.‡

Having thus shown by whom, under what cirstances, and within what period, the right of stoppage may be exercised, and when and by what means it is determined, it remains only to consider the *effect* of the assertion of this claim of the vendor upon the several rights of the vendor himself, the vendee, and the middleman. No point in commercial law is more clearly established than this: that after delivery to a carrier by land, or on board a ship, and before an act of stoppage, the vendee may maintain an action of trover against any one withholding the goods from him.§ And

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* Crawshay v. Eades, 1 B. & C. 181. The carrier cannot resist the claim of the vendor on the ground of his lien for the general balance owing from the vendee. Oppenheim v. Russel, 3 Bos. & Pul, 42.

† Slubey v. Heyward, 2 H. Bl. 504. Hammond v. Anderson, 1 N. R. 69.

‡ Harmon v. Anderson, 2 Campb. 243.

§ See on this subject, Williams v. Everett, 14 East, 582. Yates v. Bell, 3 B. & A. 643. Scott v. Porcher, 3 Mer. 652. Bailey v. Culverwell, 8 B. & C. 440. Dan. & Lloyd, 176. Winks v. Hassal, 9 B. & C. 272. Dan. & Lloyd, 312. Wedlake v. Hurley, 1 Cromp. & J. 83. Lloyd & Welsby, 330. The point was assumed by Bayley, B. as indisputable in a late case in the exchequer, Melling v. Kelshaw.

* 2 T. R. 63. † 1 H. Bl. 357.

‡ See an excellent report of this in the note to Newsom v. Thornton. 6 East, 23. n.

§ 5 T. R. 683.

‖ Those who wish to acquaint themselves with all which can be said on both sides of this important question, will do well to read the judgment of Lord Loughborough, 1 H. Bl. 357. and the opinion of Mr Justice Buller, 6 East, 23. (*n*) The controversy was not a new one among jurists. The great commercial lawyers, Valin and Emerigon, espoused opposite sides; the former maintaining that bills of lading were negotiable to all intents, like bills of exchange, and that commodities at sea might be sold even to the prejudice of creditors; the latter, on the other hand, contending that bills of lading were not negotiable instruments, and that the claim of the seller for the price could not be predjudiced by a sale of the commodities at sea.—See Valin, Nouveau Comment sur l'ordonnance de la Marine, vol. i. p. 572. Emerigon, Traite des Assurances, and des Contrats a la grosse, vol. i. p. 319.

* Cuming v. Brown, 1 Campb. 104. 5 East, 506.

† Ibid.

‡ Wright v. Campbell, 4 Burr. 2046. 1 W. Bl. 628. Solomons v. Nissen, 2 T. R. 674. As to the degree of title conferred by the different modes in which bills of lading are made out and transferred, and the consequent obligation of the master to deliver, *that*, we apprehend, is a subject to be treated of more poperly under the head of shipping. The effect of the indorsement or pledge of a bill of lading by a factor upon the rights of the real owner or consignor, certainly has no reference to the subject at present under consideration, and must be reserved for that of 'Prncipal and Agent.'

§ Snee v. Prescot, 1 Atk. 245. (per Lord Hardwicke Ch.) The Constantia, 6 Rob. Adm. Rep. 322.(per Lord Stowell).

it is equally clear, that after a claim of stoppage duly made by the vendor, *he* also (subject to the exception which has been made in favor of the holder of a bill of lading) may bring an action of trover for the goods, either against the middleman who detains or has delivered them to the vendee after notice of countermand, or against any other person into whose hands they may have passed.* Now *trover*, as we have said, can only be brought by one who has both a property and right of possession in the goods. It follows, therefore, that until the stoppage, the property and right of possession is in the vendee, and that after stoppage it is re-vested in the vendor. But there is this difficulty—the delivery of the goods to the carrier or shipmaster is an *appropriation* by the vendor, or in other words, an execution of the order, which at once transfers the ownership to the orderer or buyer; as a consequence of which, it is well known that the latter is at the risk of loss or accident during the conveyence † —a risk, which in sea-voyages he ordinarily protects himself against by insurance. Now there can be no doubt, because the point has been frequently determined, that neither the bankruptcy of the vendee, nor the stoppage of the goods by the vendor, has the effect of rescinding the subsisting contract.‡ The paramount ownership must consequently remain in the vendee, notwithstanding the re-taking of the goods by the vendor; because, although that act may clothe him again with the right of possession, it cannot do away with the effect of the appropriation once made. Upon the whole, therefore, we apprehend the real condition of the parties to be this; the ownership of the goods, once transferred to the vendee by the execution of the order, still remains in him, and he, or those who represent him, will be entitled (at all events within a reasonable time) to claim the goods from the vendor, on tendering the price originally agreed upon, and to sue him in *trover*, if he refuse to deliver them; while, conversely, the vender may, if he please, even after the resumption of possession, sue the vendee for the price, on condition that he is himself ready to deliver the goods.§ In the meantime he has, after a legitimate claim of stoppage, a *subordinate* or *special* property in the goods in respect of his right of possession, entitling him, as we have seen, to maintain an action of trover against all who withhold that possession from him. And thus, as it seems to us, is the apparent contradiction reconciled.

With respect to the middleman, it must be admitted, that called upon, as he frequently is, to decide a nice question of conflicting rights, he stands in a somewhat perilous situation. For an improper delivery to either party, he is liable to an action at the suit of the other.‖ It seldom, however, happens, that he is really a sufferer, the delivery being usually made under an idemnity from the party receiving. Where the conveyance is by sea, the claim of the shipper, as has been already intimated, is usually made through an agent, to whom one of the bills of lading is indorsed, for the purpose of enabling him to make the demand; and whether, on the refusal by the master to deliver, such an indorsee can maintain an action of trover for the goods in his own name,—in other words, whether the naked indorsement of lading, without a proof of value given, conveys a property in the subject represented by the bill—has been more than once a question before the courts. On the one hand, Lord Ellenborough, not only in one case intimated a strong opinion to the contrary;* but in a subsequent case expressly decided that it did not. His words are these, 'I am decidedly of opinion, that without value, the indorsee has not the legal property in the goods. No case has gone so far as to decide that a bill of lading is tranferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods, *primâ facie* passes the property in them to the indorsee. Much confusion has arisen from similitudinary reasoning upon this subject. There must be value upon the indorsement of a bill of lading, or no property in the goods is thereby transferred. The right to stop goods in transitu is a *personal* right of the seller, and cannot be thus assigned to another. In this case, the action should have been brought, not in the name of the agent, but of the consignor himself.†

Nevertheless, in the teeth of this opinion, thus strongly expressed, the Court of Common Pleas have since decided, that such an agent, armed only with his naked indorsement, may in his own name maintain an action of trover for the goods.‡ That this authority may not mislead others in practice, it is right to add, that the decision is supported by no reasoning, and is contrary to the opinion of the very learned and excellent judge before whom the cause was tried at Nisi Prus.§

[We cannot conclude this article without some notice of the case of Clay v. Harrison, 10 B. & C. 49. recently decided in the Court of King's Bench. The important facts of that case were as follows:—A contract was entered into for a quantity of timber of a specified sort and quality, to be shipped on board the chartered vessel of the orderer. The ship was sent, the timber put on board, and advice of the consignment forwarded to the buyer, who thereupon insured for the value. The vessel sailed on her return, but, being cast away on the voyage, notice of abandonment was given to the underwriters. Part of the cargo, however, was saved, and while lying ashore in charge of the captain, was claimed by the vendor, who had in the meantime received intelligence of the vendee's insolvency. An action being now brought by his assignees against the underwriters, the only question was, whether at the time of the loss the bankrupt had an insurable interest, in the goods. If he had *any property* in the timber, when the vessel was wrecked, he had undoubtedly an insurable interest, otherwise not. Now it is impossible to question that by the delivery on board, he acquired, not only a vested property in the goods but even a right of possession, subject only to the vendor's equitable privilege of stoppage. But the act of stoppage took place *after* the wreck, and, consequently, unless it had the effect not only of revesting the *whole* and *exclusive* property in the vendor, but also of retroactively annulling all which had been done—in other words, of rescinding the contract—it could not effect the interest of the vendee at the time of the loss. If the principles which we have laid down as the unquestionable result of decided cases, be in any degree correct, such a position cannot be maintained for a moment; and yet the court decided that the plaintiff's action could not be supported. Either, therefore, in our humble judgment, the case must be considered as anomalous, or principles, which seem too well settled even for controversy, must be subverted. The reporters of the case in Barn. & Cres. seem to have felt that there was something wrong, and endeavored, therefore, to support the decision by the following notable comment: 'It appears from the special case, that by the contract between the bankrupt and the vendors, the latter were to supply a cargo of timber. There was no bargain for any specific ascertained chattel, but the vendors were at liberty to supply any timber answering the description of that ordered; and, consequently, no property passed till the cargo of timber was appropriated by the vendors to the vendee, by the delivery on board the ship.' So far nothing can be more true; but mark what follows: 'The subsequent stoppage in transitu, supposing it had only the effect of revesting the possession in the vendors, and *placing them in the same situation as if they had not parted with the goods*, [a tolerably large supposition by the way], 'destroyed the effect of that delivery,' [an admirable consequence, the conclusion being narrower than the premiss!] 'which was the only circumstance which vested the property in the vendee, and, consequently, revested the property in the vendors.' [This used to be called reasoning in a circle—*If* the effect was to place the vendors in the same situation as if they had not parted with the goods, it revested the property in them: and, conversely, *if* it revested the property in them, it would place them in the same situation as if, &c. This little word *if* has other virtues, it seems, besides those of 'a peacemaker.'] They were then exactly in the same condition as if the goods had always remained in their warehouses; and, *in that case, the bankrupt would have had no interest* in the goods; his rights, if any, would have rested *in contract* merely.' Now without stopping to controvert the other points brought forward in this very singular note, we will content ourselves with asking, 1st, Was the contract subsisting at the time of the loss? Yes. 2ndly, What was the effect of the contract as it then stood? That the property in the timber was vested in the vendee. 3rdly, Did the stoppage in transitu rescind the contract? No. Then had not the vendee *in fact* a property, and consequently an insurable interest, at the time of the loss?]—*Law Magazine.*

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Fox was one day expatiating to a company, in which Sheridan was present, on the impossibility of paying off the National Debt. 'In fact,' said he, 'the creditors of the nation stand as little chance of being paid as'—he paused for a strong illustration; ere he could find one, Sheridan supplied it—'*your own.*'

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* Litt v. Cowley, 7 Taunt. 169.

† 6 Rob. Adm. Rep. 322.

‡ Hodgson v. Loy, 7 T. R, 445. Clay v. Harrison, 10 B. & C. 49. Lloyd & Welsby, 111; and the note on that case, ibid.

§ Kymer v. Suwercrop, 1 Camp. 109.

‖ See Litt v. Cowley, 7 Taunt. 169., and the numerous cases in which such actions have been brought. The vendor cannot, however, obtain the goods from the middleman without first satisfying the charges on them.

* Coxe v. Harden, 4 East, 211.

† Waring v. Cox, 1 Campb. 369. and see Sargent v. Morris, 3 B. & A. 77.

‡ Morrison v. Gray, 2 Bing. 260.

§ Lord Gifford.—Those who are desirous of seeing a philosophical and (we had almost said) an elegant summary of the law of stoppage in transitu, will do well to turn to the 'Code de Commerce, tit. Revendication. Our objection to codification has been already strongly recorded, and we are by no means disposed to retract or qualify the opinions we have expressed. Nevertheless, it must be admitted, that if it consisted merely, as in this instance it does, in a summary of principles generalised from cases of actual occurrence, lucidly arranged and clearly expressed, it would be impossible to dispute its excellence.

## RECENT AMERICAN DECISIONS.

### CONTRACT.

Where a parol agreement was made for the purchase of a lot of land for the sum of $21 50 per acre, to be paid in seven equal annual payments, and by the agreement, the grantor was to have the lot surveyed, and to give a conveyance with warranty, on the payment of $300 by the grantee, and upon his executing to the grantor a bond and mortgage for the residue of the purchase money; and the grantee went into possession under the agreement, and continued in possession eight or nine years, making payments from time to time towards the land, for which the grantor gave receipts, specifying therein that the moneys received were in payment for the land, and that, the grantor was to give the grantee a deed therefor; the grantee made a payment of $333 soon after he went into possession; at the expiration of eight years from the time the agreement was made, the grantor tendered a deed to the grantee, and demanded payment or security for the balance of the purchase money; the defendant refused to accept the deed, alleging that it contained too much land, and that the grantor had included too much interest in the balance he claimed to be due; it was *held*, that neither party could take advantage of the agreement not being in writing; that it was too late for the defendant to object that the grantor had not caused a survey to be made of the lot, and delivered a deed therefor immediately after the first payment; that the defendant could only have put an end to the contract by tendering the balance due and demanding a performance of the contract on the part of the grantor; that a tender and demand, after a bill had been filed by the grantor for a specific performance, was a nullity. *Knickerbacker vs. Harris*, 1 Paige, 209.

An offer to purchase was made by a letter, and previous to the receipts of the letter by the other party, the party making the offer, died insolvent. The party receiving the letter consented to sell on the terms proposed, and sent an answer to that effect, but without any knowledge on his part of the death of the purchaser. *Held*, that he was not bound by such acceptance of the offer, and that the title to the property was not changed. *Frith vs. Lawrence*, 1 Paige, 434.

To make a valid contract, it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but that fact must be communicated to each other. *Ib.*

Where an offer to sell is made to a distant correspondent by letter, and he declines the offer, he cannot afterwards assent to it so as to make it a valid purchase without a subsequent assent of the other party also. *Ib.*

Where there is a contract for the purchase of land, and the person contracting to sell declines executing the contract, upon the ground that he is unable to give a good title, and the purchaser files his bill to compel the defendant to complete the contract, or to rescind it; if the defendant is able to give a good title at the time of the decree the complainant will be compelled to accept. *Pierce vs. Nichols*, 1 Paige, 244.

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### CORPORATION.

The privileges and franchises granted to a private corporation, are vested rights, and cannot be divested or altered, except with the consent of the corporation, or by a forfeiture declared by a proper tribunal. *McLaren vs. Pennington*, 1 Paige, 102.

A state cannot pass any law which alters or amends the charter of a private corporation, without the consent of such corporation. *Ib.*

But a law altering the remedy of one of the parties to a contract, is constitutional and valid. *Ib.*

Where, however, a state legislature reserves to itself in the very charter it grants to a private corporation, the right of altering, amending, or repealing the act of incorporation, a subsequent repeal of such act of incorporation will be valid and constitutional. *Ib.*

Such a reservation in the charter of a corporation, upon common law principles, would not be a condition repugnant to the grant, but a limitation of the grant. *Ib.*

And if such a reservation at common law would be repugnant to the grant, and therefore void, it is competent for a state legislature to alter this rule of the common law; and the reservation of such a power in the legislative grant, would of itself change the law in relation to that particular grant. *Ib.*

Where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of the corporators have been fairly expressed, and the election was conducted in good faith, it will not be set aside on account of any informality in the manner of conducting the same. *Philips vs. Wickam*, 1 Paige, 590.

Whether at common law civil and corporate offices are authorised to hold over after the expiration of the time for which they were elected, until successors are appointed. *Quære.* *Ib.*

Where the officers of a corporation are not authorized to hold over, if the corporators, without the presence of any officers, or any act to be done on their part, possess the power to assemble and choose officers to carry into effect the objects of the incorporation, a neglect to choose officers at the proper time will not work a dissolution of the corporation, but will merely suspend the exercise of the powers of the corporation until proper officers are chosen. *Ib.*

But if the corporators have not the power to fill vacancies without the presence of their officers, or something to be done by them preparatory thereto, and such officers do not attend, or neglect to do the act requisite to the validity of the appointment, or there are no such officers, then, as the powers of the corporation cannot be revived, it is virtually dissolved.

The right of voting by proxy is not a general right, and the party who claims such right must show a special authority for that purpose. *Ib.*

But where property is devised or granted to a corporation, partly for its own use and partly for the use of others, the right of the corporation to take and hold the property for its own use, carries with it as a necessary incident the power to execute that part of the trust which relates to others. *In the matter of Howe*, 1 Paige, 214.

The court is not bound to decree a dissolution of the corporation, simply because a majority of the directors and stockholders request it to be done. *In the matter of Niagara Insurance Company of New York*, 1 Paige, 258.

But where the owners of a large proportion of the stock find it for their interest to withdraw their capital, it will be deemed presumptive evidence, that the interest of the stockholders generally will be promoted by a dissolution of the corporation. *Ib.*

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### COSTS.

Where exceptions are taken to the defendant's answer, some of which are allowed and others are disallowed, and the defendant excepts to so much of the master's report as allowed a part of the exceptions to the answer, and on hearing before the court, the master's report is confirmed, the complainant is entitled to the costs of the hearing, and also of the reference and of those exceptions to the answer which are allowed by the master; and the defendant is not entitled to the costs of the exceptions disallowed by the master. *Richards vs. Baslow*, 1 Paige, 138.

If any of the exceptions to the answer are well taken, the defendant must submit to answer further as to those exceptions, or he will not have costs of the exceptions which are disallowed by the master. *Ib.*

Where a judgment creditor having a claim upon the surplus moneys raised by the sale of mortgaged premises, litigates in good faith before the master, on a reference to settle the priority of liens, he will not be charged with the costs of such litigation. *Norton vs. Whiting*, 1 Paige, 578.

But if he excepts to the master's report, and those exceptions are disallowed, he may be charged with the costs of the hearing on the exceptions. *Ib.*

On a reference of exceptions to an answer, if part of the exceptions are allowed by the master, the complainant is entitled to costs on the exceptions allowed, and neither party is entitled to costs as to those which are disallowed. *Richards vs. Barlow*, 1 Paige, 323.

If some of the exceptions are disallowed, and none of them are allowed in full, the defendant is entitled to his costs on the reference. *Ib.*

On exceptions to a report, each party is entitled to the costs of the hearing as to the exceptions decided in his favor, which costs are to be set-off against each other. *Ib.*

Where the costs of exceptions on each side would be nearly equal, the usual practice of the court is to give no costs to either party. *Ib.*

Where in a bill filed for a specific performance of the contract or the sale of land, the complainant insisted upon the defendant's taking two acres more than he was bound to take, and the defendant declined paying interest, which the complainant was entitled to, neither party was allowed costs. *Knickerbacker vs. Harris*, 1 Paige, 209.

As a general rule a mortgager pays costs to the defendant, on a bill to redeem, although he is successful; but if the defendant has been guilty of improper conduct, he will be deprived of costs, and in some cases will be compelled to pay costs. *Broeckway vs. Wells*, 1 Paige, 617.

If a mortgager who is entitled to redeem, applies before filing his bill to the mortgagee for that purpose, and the latter refuses to allow him to redeem, the mortgagee will not only be deprived of costs, but may be compelled to pay costs to the complainant. *Ib.*

Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful. *Slee vs. Manhattan Company*, 1 Paige, 48.

There are, however, exceptions to this rule;

as where the mortgagee sets up an unconscientious defence: in such case the mortgagee is not only refused costs, but must pay costs to the other party. *Ib.*

If a widow makes application for her dower before she files her bill, and it is refused, she will be entitled to costs; but where she neglected to make such application, and in her bill alleged that an outstanding mortgage was paid off, and insisted upon her right to be endowed of the whole premises, and claimed arrears previous to the purchase of the defendant, and the decree was against her upon all these points, no costs were allowed to either party. *Russell vs. Austin*, 1 Paige, 192.

Where the complainants became insolvent pending the suit, and assigned all their interest therein to a third person, the assignee was not permitted to proceed with the suit in their names, without giving security for costs. *Massey vs. Gillelan*, 1 Paige, 644.

Where the assignee after notice of the fraud attempted to enforce the judgment against the land, he was decreed to pay costs to the complainant. *Webster vs. Wise*, 1 Paige, 319.

Where a defendant in a bill of foreclosure knowingly sets up an unjust defence, and thereby subjects the complainant to extra costs and expense, he may be charged personally with the costs. *Park vs. Peck*, 1 Paige, 477.

## ENGLISH.

### LEGAL CHRONOLOGY
#### OF THE YEAR 1830.

*January* 16.—Lord Redesdale died in the 89th year of his age. His Lordship had been successively Solicitor-General, Attorney-General, Speaker of the House of Commons, and Lord Chancellor of Ireland.

*February* 5.—Parliament opened by Commission. In the speech read by the Lord Chancellor (Lord Lyndhurst), his Majesty recommended to the consideration of both Houses improvements in the Courts of Law.

9.—Mr M. A. Taylor moved for certain returns from the Court of Chancery.

12.—The Solicitor-General (Sir E. Sugden) brought in four bills to amend the laws relating to illusory appointments, the payments of debts out of real estates, and the property of infants, *femes covert*, and lunatic and infant trustees and mortgagees.

18.—Mr Peel obtained leave to bring in a bill for regulating the payment of fees to officers in the Courts of Common Law.

*March* 22.—The Lord Chancellor introduced a bill into the House of Lords for the better administration of justice, abolishing the Welsh judicature, and appointing three new judges.

*April* 1.—The Solicitor General introduced a bill for amending the law relative to insolvent debtors.—The Lord Advocate brought in a bill for introducing the trial by jury in the Court of Session in Scotland.

8.—Sir C. Wetherell moved for certain returns from the Court of Chancery.

30.—Mr Brougham moved for leave to bring in a bill for the establishment of Local judicatures.

*May* 10.—The Archbishop of Canterbury introduced a bill into the House of Lords permitting Compositions of Tithes in England.

25.—A bill introduced into the House of Lords to enable his Majesty, in consequence of his indisposition, to dispense with the Sign Manual.—Both Houses of Parliament agreed to an address to the Crown for the removal of Sir Jonah Barrington from the office of Judge of the Court of Admiralty in Ireland.

*June* 4.—The Solicitor General obtained leave to bring in a bill for regulating certain offices in the Court of Chancery.

17.—Mr Brougham brought into the House of Commons a bill for establishing Local Courts.—Common Law Fees Bill passed the House of Commons.

24.—A debate which lasted till four in the morning took place in the House of Commons on the bill for appointing a New Judge in Chancery. It was carried by 133 to 96.

26.—His Majesty George IV. died at Windsor, in the 68th year of his age, and 11th of his reign—The Privy Counsel assembled and gave orders for proclaiming the Duke of Clarence King, under the title of William the Fourth.

*July* 12.—Seven Catholic barristers sworn in King's Counsel at Dublin.

24.—Parliament dissolved.

*October* 26.—The new Parliament met.

*November* 2.—The King opened parliament in person.

4.—Mr Hope appointed Solicitor General for Scotland.

5.—Mr Doherty (Solicitor General for Ireland) introduced a bill for the better Administration of Justice in Ireland.

9.—The Solicitor-General introduced a bill to amend and extend the statute of Frauds.

10.—Mr Brougham, in the House of Commons, moved for leave to bring in a bill for the establishment of Local Judicatures.—Mr M. A Taylor moved for certain returns from the Court of Chancery.

11.—Mr Justice Bayley removed from the King's Bench to the Exchequer.

12.—Lord Tenderden brought into the House of Lords four bills for Reform in the Common Law.—Mr Justice Taunton and Mr Justice Patterson took their seats in the Court of King's Bench, and Mr Justice Alderson in the Common Pleas.

15.—The Lord Chancellor introduced the Regency Bill into the House of Lords.

17.—The three New Judges, Messrs Taunton, Alderson, and Patterson received the honor of knighthood.

18.—The Solicitor-General introduced a bill for amending the law relating to the attestation of Powers.

22.—Lord Lyndhurst resigned the Great Seal, and the Right Honorable Henry Brougham took his seat on the Woolsack in the House of Lords as Lord Chancellor, and afterwards was created Lord Brougham and Vaux.

24.—Thomas Denman, Esquire, was appointed Attorney-General, and William Horne, Esquire, Solicitor-General, and received the honor of Knighthood.

25.—The New Lord Chancellor took his seat in the Court of Chancery.

27.—Special Commissions issued for the trial of the rioters.

*December* 2.—The Lord Chancellor obtained leave to bring in a bill for establishing Local Courts in England.—Mr Law elected Common Serjeant:—

Numbers: Mr Law 118
Mr Hill 100

3.—Mr Jeffrey appointed Lord Advocate for Scotland.—Mr Cockburn appointed Solicitor-General for Scotland.

16—In the House of Commons Mr Campbell introduced a bill for the General Registry of Deeds.—Sir E. B. Sudgen moved for certain returns from the Court of Chancery.

17.—Common Law Commission renewed, Mr Justice Parke, Mr Justice Bosanquet, Mr Justice Alderson, Mr Justice Patterson and Mr Serjeant Stephen, appointed Commissioners.

21.—Lord Wynford introduced into the House of Lords a bill for preventing Frauds upon Creditors.—*Legal Obs.*

## ON THE LAW OF KEEPING DOGS.

To the Editor of the Legal Observer.

SIR,—I beg to call your attention to a case just reported in Moody and Malkin's reports, in which my Lord Chief Justice *Tindal* has perspicuously stated the exact terms on which the law permits a man to keep a dog for the defence of his property. I allude to the case of *Sarch* v. *Blackburn*, 1 Moo. & Mal. 505. S. C. 4 Car. & P. 297., in which an action was brought by a person who, having endeavored to enter by a back way to the house, had been bitten by a dog belonging to the defendant. The direction of *Tindal* C. J. to the jury was as follows:—'There is no case which will exactly apply to this; such cases necessarily depend on their own circumstances, and the question that arises is a very nice one. The plaintiff certainly is not entitled to recover in this action if he was injured by his own fault. On this you will have to consider, whether he had a justifiable and reasonable cause for being where he was bit, such as would naturally induce him to go there, and would be a justification in an action of trespass brought against him for being there (as it would be as a license in law, if it was a way by which persons used to pass to the house;) and whether he was there without notice of his danger. There is no evidence to show why the plaintiff was on the spot in question, whether with a lawful or unlawful object. The law, however, would rather presume a lawful object; and there is no improbability in his having one, for he was on one of the ways to the house itself at mid-day, although certainly it was not the most public and usual way. If he was lawfully there, I do not think the mere fact of the defendant having put up the notice relied on would deprive him of his remedy. The mere putting up of the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognisant of its contents. The plaintiff could not read, the notice therefore furnished no information to him; and there were no circumstance in the way in which the dog was kept to apprise him of his danger. If, therefore, he had a right to be where he was, I see no fault or negligence to deprive him of his remedy. Still the defendant will not be liable unless he is in fault, unless he knows the character of his dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not in this case, I think, excuse him. But it is said he has a right to keep a fierce dog for the protection of his property. He certainly has so, but not, in my opinion, to place it in the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the plaintiff, ignorant of the notice, and going to the house for a lawful purpose, by a way which he was entitled to use, I think that the defendant would not be protected from this action.

On the whole, the only question which I can leave to the jury is, on which side was there negligence? If the plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover; if the defendant was negligent, if he placed the dog where he might injure persons not themselves in fault, he is responsible.'

Yours obediently,
A SPECIAL PLEADER.

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From the Legal Observer.

## LORD KENYON ON THE STUDY OF THE LAW.

The following letter contains some important questions which every young man about to enter on the profession of the law, would most gladly propose to such an exalted character as Lord Kenyon. This is a task which has been already accomplished; and in Lord Kenyon's reply, the young student will not make any great mistake, if he should imagine the letter addressed to himself.

'MY LORD—I am a young man about to enter into the profession at the head of which you preside with such distinguished eminence, and am desirous of moving in the sphere I am placed in, with as much credit as it will admit of. To gain a competent knowledge of the spirit and principles of the law, must be most essentially necessary to the pure practice of it; and I am now induced by the accounts I have always heard of your lordship's goodness, humbly to request that you will be pleased to honor me so much as to communicate to me the course of reading necessary to be perused in order to attain so desirable an end.

'The mind without a guide to direct its exertions is like a traveller on a pathless desert, bewildered and confused; it proceeds without knowing whither, and perhaps sinks in the pursuit of that which, by timely assistance, it might have attained with pleasure.

'Your lordship will certainly be astonished at my presumption, yet I trust you will not wonder at the reason of it. It is natural for a man eager after knowledge, to wish to take it from the purest source. Common sense pointed out your lordship.

'If your lordship should not consider it beneath your dignity to take notice of this letter, I should have reason to consider it the happiest circumstance of my life, to have experienced your condescending goodness. If, on the contrary, you should smile at my folly, or be offended at my presumption, I shall be sufficiently punished by silence and neglect.

'Humbly entreating your lordship's forgiveness for having thus long obtruded on your valuable time, I beg leave to subscribe myself

'Your lordship's
Most devoted and obedient humble servant,
ROBERT CRABTREE.

'*Halesworth, Suffolk.*'

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The following is Lord Kenyon's answer.

'SIR,—I am afraid you have concluded before this time I decline to answer your letter. To say the truth, I had some suspicion that the letter did not come from a real person; but being convinced of that, I do not delay to write to you. I wish it was in my power to propose any plan that you could rely on. The truth is, that, in the study of the law, a mass lies before the student enough to deter young minds, and they are left to hazard in which road to proceed.

'I would advise you to read very carefully Blackstone's Commentaries, and if you have the perseverance to go through it two or three times, I believe it would be of great use. After this, you may, perhaps, with some advantage, read Serjeant Hawkins' Abridgment of Coke's Littleton, and then proceed to Coke's Littleton, accompanying that arduous task with reference to the Abridgment I have mentioned, which will point out to you those points of that vast work which are now rather obsolete. When you have done this, you will read the more modern reports; Sir James Burrows', Mr Douglas', Mr Cowper's, and the Term Reports; and in Equity the 1st vol. of Equity Cases Abridged, Mr Cox's edition of Pere Williams, Hawkin's Reports in the time of Lord Talbot, and Precedents in Chancery. By the time this is done, you will be as good a judge as I am how to go on. If you mean to come to the bar, I would advise you to go to some *able* special pleader; but you will inform yourself who answers that description, as much ignorance now mixes in that profession. Conveyancing will be learned in the office you are placed in, and by referring to Horsman's or other books of precedents; and the poor law and sessions business from Mr Const's late book and Burn's Justice.

'I heartily wish you success, and that you may deserve it by acting honorably in the prosecution of your profession.

'Your humble servant,
'*May 13th*, 1795.' 'KENYON.

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### ESSEX SPRING ASSIZES.

*Attorney.—Client's Privileged Communication.*

In an action of ejectment, the attorney for the plaintiff being called by the plaintiff, was on cross examination asked by

*Platt*, whether a certain deed of conveyance belonging to the lessor of the plaintiff was in his possession?

The witness refused to answer the question, on the ground that he was not obliged to state anything affecting his client, which he knew merely from his client.

*Platt* submitted, that the witness must answer the question, as this case was different from one in which an attorney was called upon to state some fact, which he had learned from his client by means of a confidential communication with him, or to produce the title deeds of his client. It was merely inquired here, whether a certain deed of the client was in possession of the attorney.

*Dowling*, for the plaintiff, contended that the witness was not bound to answer the question. The answer in the negative or the affirmative might be exceedingly important to the lessor of the plaintiff. This might be a mere fishing question, to learn with certainty whether a particular deed was or was not in the possession of the witness, in order to carry on further proceedings at law or in equity. The capability which the witness might possess of answering the questions, was derived from his connexions with his client, and therfore must be viewed as privileged.

*Garrow B.* thought that the question came within the rule as to privileged communications between attorney and client, and therefore, if the witness declined answering, he could not say that he was obliged so to do. *Doe* d. *Cook* v. *Barrett.*

## MORTGAGE.

Continued.

It seems to me, that the preceding remarks dispose of the principal grounds of the argument: but we have ample evidenee that no distinction between mortgages and judgments was ever made in practice. The doubt in the case of an older judgment was, whether anything but the clear resulting interest of the debtor could be sold; and on the theory of those by whom it was entertained, it is singular that it should have arisen. It was a postulate of that theory, that the interest of the older judgment creditor *did not pass by the sheriff's deed*, and in that view it is clear that he would not be entitled to satisfaction, out of what was paid, not as the price of his interest, but of that which had become the fund of the younger judgment creditor by virtue of his lien. To suppose that he might resort to the purchase money or the land at his pleasure, was an evident inconsistency; and an admission of his right to take the purchase money, which seems never to have been doubted, ought at once to have settled the question. The purchase money could be substituted for the land, and distributed among the lien creditors only on the supposition that the sale had divested their right to everything else. At present, however our business is with the evidence which we have, of the earlier practice; and this appears by the manuscript of Mr Justice Shippen, to have been fully developed in Febiger's lessee vs. Craighead, which was tried at Carlisle in 1793. David Hoge, who had been the sheriff of Cumberland county from 1769 to 1772, testified 'that the usage had been *for thirty years*, that when the sheriff knew of a mortgage, he sold subject to it: but that where he had no such knowledge, and the mortgage was not recorded, he sold ABSOLUTELY, and paid off judgments AND MORTGAGES according to their priority. That it was considered that when the land was sold absolutely, it discharged ALL former incumbrances as to the purchaser, and that the sheriff looked to the payment of judgments according to their order.' Samuel Postlethwaite, who had been the sheriff of the same county from 1783 to 1786, testified 'that he *had* sold land subject to a mortgage, in which case the mortgage money was to be paid first.' This short note of his evidence is evidently imperfect, the meaning being that the mortgage was to be paid first, when a clear title was sold; and in this aspect his evidence is consistent with that of sheriff Hoge. Now it is in vain to question the sheriff's right to prescribe the conditions of the sale: if a practice which, according to the account of it there given, has prevailed for seventy years, may not confer it, we have no foundation for many of our most important laws of domestic origin. Mr Hoge's representation of the practice was at the same time corroborated by the testimony of Colonel Hartley, Mr Bowie, and Mr Charles Smith, all professional gentleman of great experience in one or more of the counties of Lancaster, Berks, Cumberland, York, Franklin, Bedford, Mifflin, Huntington, and Northumberland, which then comprised that part of the state which is east of the Alleghany mountains, and west of a line midway between the Susquehanna and Delaware. In addition, when the cause came up in bank, the practice was asserted by Mr Lewis to be general, and this without contradiction from Mr Ingersoll, retained on the other side, or from the judges, who undoubtedly had ample opportunity to become acquainted with it

on their circuits, in every part of the state. No man was better acquainted with the earlier practice and tradition of the law, than Mr Justice Yeates; and it is easy to discover from Keene v. Swaine, (3 Yeates, 561.) what he supposed it to have been in the matter before us. In the counties west of the Alleghany mountains, I am informed by my brother Kennedy, whose experience there reaches thirty years back, that a different impression had been made on the professional mind by the late president Addison, whose opinions were held in deserved respect; yet no one in that part of the state supposed there was a difference between mortgages and judgments, the supposition being that the sheriff could not in *any* case sell more than the resulting interest of the debtor. This impression was, however, gradually effaced by the influence of the judges of this court, on the western circuit, and the matter came to be viewed there as it was elsewhere. That it was the practice in the eastern counties to sell clear of mortgages, appears satisfactorily from Petry v. Beauverlet, (1 Binney, 97.) in which the sheriff of Bucks was allowed poundage for paying judgments and *mortgages*. To say that the point was not presented to the court, the matter having passed *sub silentio*, is to say nothing. What we want is the fact that an instance of the practice passed in this city, unchallenged by the debtor, or the younger lien creditors, who are usually as sharp sighted and true to their interests, as any other parties litigant in our courts. Certainly it would not have passed as a thing of course, had it been considered as great a phenomenon then, as it has been since; nor will it do to say, the payment may have been with the assent of the mortgagee; he had no right to assent to an arrangement that would enable him to pocket the money of the younger lien creditors. A pretence of right on his part to take satisfaction out of the land or purchase money at his pleasure, and thus throw the burden on the purchaser, or younger lien creditors, as his interest or caprice may dictate, would be monstrous; such a right would put him in a situation to make terms that would give him more than his debt. How this pretence, which involves the same inconsistency of opinion that I have already noticed in the case of a prior judgment, came to receive countenance, I know not. The difficulty might have been solved by a simple inquiry into the extent of the interest which passed by the sheriff's deed. The whole drift of the argument here, has been to prove that a sale on a younger judgment passes, not the estate of the older mortgagee, for that is supposed to be reserved, BUT THE EQUITY OF REDEMPTION; in other words, the clear interest of the mortgagor which the judgment bound, *and which the mortgage did* NOT *bind*. It is not easy to see then, how the mortgagee could make pretence of right to what did not pass by his deed; and which being the subject of subsequent hypothecation by the debtor, constituted no part of his security. To give him the benefit of that, would be a gratuity at the expense of the mortgagor and the younger lien creditors. As well might the general creditors of a partnership demand the proceeds of a separate execution of the interest of one of the partners which consists of what may remain after payment of the joint debts; but however inconsistent with the scope of the argument such a right of election would be, it is not more so than the modern practice which is said to prevail here. According to this, the sheriff sells, neither subject to, nor altogether free from, prior mortgages, but subject, where less than the amount of the mortgage is bid, to affirmance or disaffirmance of the sale by the mortgagee; according to which the premises are returned sold or unsold, for want of bidders. The uncertainty of result consequent on this, must necessarily have an unfavorable influence in preventing the attendance of purchasers; but the practice admits the whole converse of the plaintiff's argument. It admits, that when a sale is effected, *the whole estate*, and not the equity of redemption merely, is sold, and that the mortgagee is bound to take satisfaction out of the purchase money. It may be reasonable that a younger lien creditor should not be at liberty to disturb an older incumbrance, where there is no surplus to be got at; and at one time an idea prevailed in the country, on what authority I know not, that the sale might be set aside, if no part of the proceeds were found to reach the execution of the seizing creditor. We give no opinion about that, but it is evident that the same idea has given rise to the practice here, else the mortgagee would be consulted in all cases, whether the proceeds were more than adequate to satisfy his debt or not. But if the land were sold subject to his mortgage, the matter would not depend on his volition, more than it would on that of a stranger: he would be bound to look to the land exclusively, and not take satisfaction in a way to disappoint those who have no fund, but the equity of redemption; and that he may look to the price proves that his estate has been sold, for undoubtedly he can be compensated for nothing else out of the purchase money. A practice then, which has prevailed in every part of the state for more than seventy years, probably from the foundation of the province, ought, one would think, to be received as conclusive evidence of the law. It is said that practice, to be available, ought to be preceded by judicial decision: it seems to me, however, that this would be an inversion of the usual process of formation, judicial decision not being in any case a nucleus for the increment of the law, but, as in the case of the tenant's right to the way-going crop, the recognition of it as a thing already established by the custom of the country.

To be concluded.

## SIR THOMAS MORE AND THE PRESENT MASTER OF THE ROLLS.

SIR Thomas More, when lord chancellor, succeeded in disposing of all the causes that were ready for hearing; and on his desiring the registrar to call the next cause, he was told that none remained on the list, which fact he ordered to be recorded. This event was also commemorated in doggerel, as follows:—

'When More some years had chancellor been,
No more suits did remain;
The same shall never more be seen,
Till More be there again."

The poet was wrong, however. We need not go far for an instance of a living judge to whom the same merit may be as justly ascribed; and a correspondent has enabled us to celebra the circumstance as melodiously:—

'A judge sat on the judgment seat,
A goodly judge was he;
He said unto the registrar,
"Now call a cause to me."
'"There is no cause," said registrar,
And loud laughed he with glee,
"A cunning *Leach* hath despatched them all,
I can call no cause to thee."'

*Legal Observer.*

## CHANCERY REFORM BILL.

Last night Lord Chancellor Brougham brought forward his promised motion, in the House of Lords, respecting the Court of Chancery and its jurisdiction in bankruptcy cases. The motion excited an amazing deal of interest, and, consequently, below the bar was much crowded. His Lordship dwelt at great length on the abuses of the Court, and on the general character of the remedies for them which he proposed to provide. He said he contemplated first a change in the constitution of the Court; but the details of which would be more satisfactorily seen in the Bill. Secondly, to keep apart the administrative Judges and the judicial functionaries. And, thirdly, to substitute vivavoce evidence, where practicable, for depositions. One distinguishing feature of his plans would be, the payment of Judges, Masters, and their dependants by salaries, instead of fees. The evils of fees, he considered as almost indescribable, especially as far as dependants were concerned. The fees to Masters and others, and particularly fees and 'gratuities' to the Masters, clerks (which the public called 'bribes') his Lordship proposed wholly to abolish. He declared that these matters were only to be corrected by the vigorous and uncompromising interference of the head of the Court; and, therefore, so long as he sat on the woolsack, there should be no gratuities, or, what the public called 'bribes;' and while he was on the Bench there should be no sleep, till the grievous abuses of the Court of Chancery were corrected. He admitted that he might fail in his endeavors to achieve what he thought ought to be accomplished, but at all, events, it should not be recorded of him that he had not attempted correction. In speaking of the abuses in the Masters' offices, his Lordship mentioned that as much as *fifty pounds* 'gratuity' had been given to a clerk for a report, where the usual fees did not exceed 7*l*. His Lordship's plan embraces reform of the practice in lunatic cases; among other improvements, to provide that questions respecting the soundness of an individual's mind should be tried before the Judges and a Jury in Westminster Hall, and not by a commission. Another reform is the extinction of the fourteen lists of Bankrupt Commissioners; and providing in their stead ten Judges, which would be of three descriptions. The cases were to be heard before them sitting *in banco*, or before the Chief Judge (or President) and juries, but reserving a power of appeal to the Lord Chancellor. The unsatisfactory character of the present system, and the advantages to be derived from the establishment of Judges in their stead, in will be seen, his Lordship particularly described. His Lordship in the course of his speech, stated that by separating the bankruptcy business from the Court of Chancery, he calculated that the Lord Chancellor's income would be diminished between 7,000 and 8,000*l*. besides losing the patronage of 70 offices and that there would be a reduction of fees receivable by individuals from suitors, &c, to the amount of 73,000*l*. a year. After some remarks from Lord Lyndhurst, who opproved generally of the proposed changes, the Lord Chancellor brought in the first of the three Bills which there will be to effect his projected Chancery reform.—*Morning Herald, Feb.*

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Judge Lomax, who was recently the professor of law at the University of Virginia, intends to open a law school at Fredericksburg.

THE JURISPRUDENT.

BOSTON, SATURDAY, JUNE 11, 1831.

Reports of Cases argued and ruled at Nisi Prius in the Court of King's Bench and Common Pleas and on the Western and Oxford Circuits, from the Sittings after Hilary Term 11 Geo. 4. to the Sittings after Trinity Term 1 Will. 4. By William Moody and Benjamin Heath Malkin. London, J. and W. T. Clarke; and Saunders and Benning.

Lord Redesdale, four years ago, in a pamphlet upon the Chancery Commission, gave it as his opinion, that one great evil of the present state of the law was the number and length of the present law reports. He referred, he said, with pleasure, to Atkyns and Pére Williams, where he found that the exact point decided was stated shortly and correctly; but when he opened the reporters of the present day, he was confused and wearied by long and useless statements of deeds and wills, and the real points of the case overlaid by all the *verbiage* which the Judges had uttered. His Lordship ascribed this unfortunate change in the manner of reporting to law-book-selling being a more profitable trade than formerly. Now, we are not inclined to go the whole length of the learned Lord; we think that there are some reports now published which display great ability and judgment; but we regret to say that there are many which richly deserve the censure which his Lordship passed on them. When it is recollected that the reports of common law alone occupy more than 60,000 pages, we think it is full time that some end should be put to it; and we have long intended to turn our full attention to the subject, and expose what appears to us the most prominent evils of the present system. It would be no difficult matter to show that many of the cases reported are mere specimens of book-making; that they might be conpressed within a quarter of their present space; that the interest of the profession are greatly affected by the present system, not merely in being made to pay four times as much as they should pay, but, what is more important, in not having the knowledge which these works contain presented to them in an accessible form, and the consequent loss of valuable time. These are evils of which we complain, they are universally felt and lamented; and we could, if we pleased, bring together so numerous a list of extracts showing the truth of what we state, that the whole over-grown pile of modern reports would totter to its foundation. We are inclined, however, for the present, to spare ourselves this somewhat painful task: we have now stated the grievances of which we complain; we think we owe it to the profession to do our best to remedy them; we, moreover, promise to do so, having both the power and the will to carry our intention into effect. But we are unwilling to do this without due notice to the parties concerned; we are willing to pass an act of oblivion which shall obliterate from our minds all offences of this nature up to the present day. But, in future, we shall hold any such feelings to be mere signs of weakness: we should abandon the charge that has been committed to our care—the interests of the profession—if we acted otherwise; and we promise, if occasion should require, that we shall not be slow in following up this announcement, be the offender who he may.

We have great pleasure in stating that the reports of Messrs Moody and Malkin do not come in any degree within the limits of our censure. They are models for the *nisi prius* reporter, and are deserving of considerable praise; they are, with some few others, the Abdiels of the host;

——'Among the faithless, faithful only they;
Among innumerable false, unmoved,
Unshaken, unseduced;——
Nor number nor example with them wrought
To swerve from truth, or change their constant mind.'

The points decided are given neatly and correctly; the opinions of the Court condensed and clearly stated; and the subjects well selected. The whole of the cases in this Number will be found shortly stated under their proper heads in the Quarterly Digest. We shall here mention more fully the most important cases.

The first decision which we shall notice, is the case of *Obbard and another* v. *Betham*, p. 483., which establishes an important principle. Where bills are given in payment for goods, if the goods turn our to be worth much less than the estimated price, a doubt arose, whether the whole amount of the bills could be recovered. It is well known that great frauds are frequently committed on distressed persons in this manner. They consent to accept bills, and receive, instead of money, goods which prove to be worth about half the amount of the bills they have accepted. Lord *Tenterden*, however, ruled in this case, that the full amount of such bills may be recovered. 'The cases cited for the plaintiff*,'' said his Lordship, 'have completely established the distinction between an action for the price of the goods, and an action given for the security for them. In the former, the value only can be recovered; in the latter, I take it to have been settled by those cases, and acted upon ever since as law, that the partly holding bills given for the price of goods supplied can recover upon them, unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action.' There was a warranty that the goods were 'of good quality;' but Lord *Tenterden* thought that did not alter the case.—*Legal Obs. of Feb.*

*Morgan* v. *Richardson*, 1 Camp. 40. n. *Tye* v. *Gwynne*, 2 Camp 346. *Heming* v. *Simpson*, Ib. 40. n.

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If the members of the profession might be allowed to utter and publish their own complaints, as well as to set forth those of their clients, the present times would become resonant, even unto redundance and surplusage, with averments and allegations of the want of business in their vocation.

Amid the general and joyous prosperity, which is giving a healthful activity to the community about them, they languish of ennui and inaction, and languishingly do live.

A few favored and gifted ones sail buoyant and prosperously on the current of business, while the thousand and one, who serve to swell the list of *Practising Attornies*, barely make out by sculling their boats against wind and tide, to avoid the snags of poverty, and to keep from swamping.

There is no profession where labor and talent are so poorly rewarded. The industry and capacity, which are found in it, if applied to any other department of business, in our country, would receive a hundred fold more fruits. The harvest is not rich and plenteous enough for the laborers. The material is not equal to the skill and intellect which are brought to operate upon it. Giants would multiply in the profession, if there were giants' labors to be performed.

When we shall have the business of Westminster Hall to be done, we shall have a Brougham, Scarlet, Denman and Chitty, with a host of others such, to do it. But while the business doing can as well be done by moderate men, moderate will do it. And it is a truth which every day makes more painfully apparent, that where there are a hundred Lawyers, who want business, and there is only enough for *ten*, the remaining ninety must either contrive to live by their wits, turn Politicians, or famish in a land of plenty. It seems to us that, on the whole, the last alternative is the least objectionable. It is incontestably the most respectable 'taking of'—; and, although, mayhap a little more sudden, not a whit more certain 'fine of fines' and 'end of 'quiddits and quillets' in articulo mortis.

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Tennessee.—The Penal laws of this state have recently been revised and amended. According to the new code, murder in the first degree is alone punishable with death—and in the second degree, by imprisonment from ten to twentyone years. The crime of stealing a free person of color, or selling a free person as a slave, is liable to from five to fifteen years' imprisonment—stealing slaves the same penalty, and horse stealing from three to ten years' imprisonment.

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We are glad to learn that the Lord Chancellor intends to hold two or more levees annually. We confess a partiality for these professional gatherings, and could wish them even more frequent. During the time of Lord Hardwicke's Chancellorship there were weekly levees on Sunday evenings, which were, of course, numerously attended. They were retained, although given less frequently, by succeeding Chancellors, until the time of Lord Eldon, who after holding one or two during the first years of his Chancellorship discontinued them. Lord Lyndhurst revived the custom in the first year in which he held the great seal, having three levees, but thought proper not to continue it. We hope that the present Chancellor will hold them regularly. They tend greatly to promote a good feeling and better acquaintance between the Chancellor and the bar, which it is very important should subsist. The Lord Chancellor is generally too much removed from the profession. He is different from all other judges; he moves in a different sphere, and is too apt to get separated and isolated from the profession. We think that frequent levees would tend to prevent this, and are therefore anxious for their continuance.—*Legal Observer.*

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M. Lavisse, a wholesale wine-merchant, who died a few days ago at Clermont, left a will containing the following singular clause:—'It is my particular wish that the persons who attend my funeral, on their way to the burial-ground, should stop before the coffee-house kept by M. Marchand,— that there one of them should call me by name three times, and knock on my coffin to know if I am still alive; if I do not answer, it will be certain that I am no longer of this world. Thereupon they shall enter the coffeehouse, and drink 100 bottles of wine, to which biscuits or macaroons may be served, according to the wishes of the attendants. On returning, they shall again enter my house, and empty as many bottles as the attendants may require, commencing by No. 20 to 120, inclusive. They have all *etiquettes* (labels), which I myself put on the bottles; for it should be observed that, although I hated ceremony, I liked *etiquette*.'—*French Paper.*

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Sephocles Tragædiæ.

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THE JURISPRUDENT

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# THE JURISPRUDENT.

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## SHAKSPEARE A LAWYER.

Though great obscurity hangs over the life of Shakspeare, it is certain that his early days were marked by considerable vicissitude. When he left school, it seems probable that he for some time assisted his father in his trade, either of a woolstapler or a glover. But, before he quitted his native country for the metropolis, it has been conjectured and with great plausibility, that he passed some time in the office of an attorney, or the seneschal of some manor court. This conjecture rests principally on the frequent use which Shakspeare makes of legal terms and phrases, his familiarity with which appears to be so great as to indicate a professional acquaintance with the law. Had Mr Malone, with whom the conjecture originated, been content to depend upon the evidence of the poet's works, he would have established a case of great probability; but, he rather weakened than added strength to his cause, by endeavoring to fortify it by something like testimony. Unable to find any directly to his purpose, he sought to avail himself of a tradition that Shakspeare had once been engaged as a schoolmaster; and arguing that such floating traditions, though not perfectly accurate, usually contain 'an adumbration of the truth,' he imagined that Shakspeare having in the manner just mentioned acquired a knowledge of the law, employed himself in teaching it to others. It is strange that this wild fancy should not only have satisfied Malone, but that it should have been adopted by Mr Whiter and Dr Drake. The latter writer supposes that Shakspeare, on his marriage, finding his income insufficient to meet his wants, adopted this method of 'making the pot boil.' The inconsistency of Malone is extreme. Aubrey, from whom the report is borrowed, says —and in the same sentence in which he states Shakspeare to have been a schoolmaster—that he understood Latin pretty well. Malone contends with Dr Farmer that Shakspeare knew so little of Latin that he could not have taught that language; therefore, he must have taught law. But the assumption is perfectly unnecessary: Shakspeare must previously have acquired the knowledge which he is supposed to have communicated—and the question is, not what use did he make of his legal learning, but how did he obtain it. The supposition is improbable, as well as useless, since there is not the slightest reason to believe that there existed such a class of teachers as that to which Shakspeare is supposed to have belonged. The knowledge of the law was obtained then as it is now, in the office of a professional man: and we have no right, without evidence, to assume the existence of seminaries for sucking lawyers. The question must be determined upon other grounds; and it may be presumed that Malone became ashamed of his monstrous conjecture, since, in his life of the poet, prefixed to the edition of 1821, he does not revert to it.

The following passage is quoted by Malone, from an epistle to the gentlemen students of the two universities, by Thomas Nashe, prefixed to Green's Arcadia, which was published in 1589.

'It is a common practice now-a-days among a sort of shifting companions, that run through every art and thrive by none, to leave the trade of *Noverint*, whereto they were born, and busie themselves with the endeavors of art, that could scarcely Latinize their neck verse if they should have the neede; yet English *Seneca* read by candle light yeelds many good sentences, as *bloud is a beggar*, and so forth; and if you intreat him fair in a frosty morning he will affoord you whole *Hamlets*, I should say, Handfuls of tragical speeches.'

Malone says, 'Nashe seems to point at some dramatic writer of that time who had originally been a scrivener or attorney:

'A clerk foredoom'd his father's soul to cross,
Who penn'd a stanza when he should engross;'

who, instead of trancsribing deeds and pleadings, chose to imitate Seneca's plays, of which a translation had been published many years before.'

The allusion is unquestionably to a person educated to the law—*Noverent* referring to the commencement of deeds *Noverint Universi—Know all men, &c.* In some respects it is not inapplicable to Shakspeare, as in the alleged want of scholastic learing. The writer also appears to sneer at the play of Hamlet, which word, in the original, is printed in a different character from the rest. Malone, however, decides that it does not apply to Shakspeare, principally because Shakspeare borrowed nothing from Seneca. The commentator is somewhat annoyed by the word HAMLET, but he is relieved by conjecturing that some one had written a play on the story of Hamlet previous to Shakspeare. And he not only satisfies himself of the play having been written, but even fixes on the author, and speculates on what will probably be found in it, should 'the old play of Hamlet ever be recovered.' To affirm positively that Shakspeare was the writer alluded to by Nashe, would be to imitate Malone in the facility with which he converts fancy into fact; but, perhaps, it would be equally rash to decide, dogmatically, that Shakspeare was not meant; especially as we have no *knowledge* of any play on the story of Hamlet previous to that of Shakspeare. At any rate it is more reasonable to apply this passage to our great bard, than to conclude that he was a lawyer, because it had been said that he was a schoolmaster.

The question of Shakspeare's connexion with the law must, after all, be decided by the internal evidence afforded by his writings; and in them we find the author recurring continually to the language of the law. He uses it with minute propriety, and like a man accustomed to it. The passages which might be produced to prove this are almost innumerable, and those which have been brought forward are neither few nor inclusive. The following are given by Malone.

'—— For what in me was *purchased*,
Falls upon thee in a much fairer sort.'
*K. Hen. IV. P.* ii.

'Purchase is here used in its strict legal sense in contradistinction to an acquisition by descent.

'Unless the devil have him in *fee simple with fine and recovery.*' *Merry W. of Win.*

'He is 'rested *on the case.*' *Comedy of Er.*

'—— With *Bills* on their necks,
Be it known unto all men by these presents.'
*As you Like it.*

'—— who writes himself Armigero,
In any *bill, warrant, quittance, or obligation.*'
*Merry W. of Win.*

'Go with me to a notary, seal me there
Your *single bond*,' *Mer. of Venice.*

'Say for non-payment that the debt should double.'
*Venus and Adonis.*

On a conditional bond's becoming forfeited for non-payment of money borrowed, the whole penalty, which is usually the double of the principal sum lent by the obligee, was formally recoverable at law. To this our poet here alludes.

'But the defendant doth that plea deny;
To 'cide his title, is impannelled
A quest of thoughts.' *Sonnet* xlvi.

'In Much ado about Nothing, Dogberry charges the watch to keep their fellows' counsel and their own. This Shakspeare transferred from the oath of a grand juryman.

'And let my officers of such a nature
Make an *extent* upon his house and lands.'
*As you Like it.*

'He was taken *with the manner.*'
*Love's Labor Lost.*

'*Enfeoff'd* himself to popularity.'
*K. Hen. IV. P. 1.*

'He will seal the fee-simple of his salvation, and cut the entail from all remainders, and a perpetual succession for it perpetually.'
*Alls's Well that Ends Well.*

'Why, let her *accept before accepted.*'
*Twelfth Night.*

'—— Which is four terms, or two actions; and he shall laugh without *intervallums.*'
*K. Hen. IV. P. ii.*

'—— Keep leets and *law-days*. *K. Richard II.*

'*Pray in aid* for kindness.' *Ant. and Cleo.*

No writer but one who had been conversant with the technical language of leases and other conveyances, would have used determination as synonymous to end; Shakspeare frequently uses the word in that sense. See vol. xvii. p. 188, n. 3; and vol. xx. p. 235, n. 8; 'from and after the *determination* of such a term;' is the regular language of conveyancers.

'Humbly complaining to your highness.'
*K. Richard III.*

'Humbly complaining to your lordship, your orator,' &c, are the first words in every Bill in Chancery.

'A kiss in fee-farm! In witness whereof these parties interchangeably have set their hands and seals.' *Troilus and Cressida.*

'Art thou a *feodary* for this act?' *Cymbeline.*

See the note on that passage, vol. xiii. p. 100, n. 6.

'Are those precepts served?' says Shallow to Davy, in K. Henry IV.

Precept in this sense is a word only known in the office of a justice of peace.

'Tell me what state, what dignity, what honor,
Canst thou *demise* to any child of mine.,
*K. Richard III.*

'—— hath demised, granted, and to farm let,' is the constant language of leases. What poet

but Shakspeare has used the word *demised* in this sense ?

'This fellow migh be in his time a great buyer of land, with his statutes, his recognizances, his fines, his *double vouchers*, his recoveries.' *Hamlet.*

The references are made to Boswell's edition of Malone's Shakspeare, 21 vols. n. 1821.

The following are referred to, but not quoted by Malone :

'So should beauty which you hold in *lease*
Find no *determination*.' *Sonnet* xiii.

'Now where is he that will not stay so long,
Till his friend sickness hath *determined* me.'
*K. Henry* IV. *P.* ii.

'O twice, my father! twice am I thy son ;
The life thou gavest me first, was lost and done,
Till, with thy warlike sword, despight of fate,
To my *determined* time thou gav'st new date.'
*K. Henry* VI. *P.* i.

Mr Chalmers, who made it a point of conscience to dissent from Malone in everything, contends that the passage adduced proves nothing, inasmuch as Shakspeare might have acquired all the knowledge which he displays of legal language, from the perusal of three books, 'Totell's Presidents, 1572;' 'Pulton's Statutes, 1578;' and 'Abraham Fraunce's Lawier's Logike, 1588.' Granted, that he might—granted that he had read those books—a question arises, why did he read them? People seldom read such books for amusement, and Shakspeare was not a man to acquire knowledge for the mere purpose of displaying it. His genius placed him above the necessity of such expedients, and the noble simplicity of his mind would have disdained them. He was of those who 'write what they think,' not of those who 'sit down to think what they shall write.' Malone has on this subject expressed himself with culpable carelessness. Speaking of Shakspeare's knowledge of legal terms, 'It has,' says he, 'the appearance of technical skill, and he is so fond of displaying it on all occasions, that there is, I think, some ground for supposing that he was early initiated in at least the forms of law.' Shakspeare indeed displays the knowledge ascribed to him, but he is not *fond* of displaying it. He writes on these, as on all other occasions, from the fulness of his mind. He uses legal language, because early impressions had given his mind a bias which it would have required an effort to control. No one was ever more free from petty vanity. He was not only one of the greatest, but one of the most unpretending of men. His carelessness of his literary reputation attest this. Such a man was not likely to read for the mere purpose of display. He had perhaps read the books named by Mr Chalmers, but if so, he had read them in the course of professional study. Mr Chalmers did not come to the controversy free from prejudice—he was one of the luckless individuals who were deceived by the Ireland forgeries. Malone, either from better judgment, or better fortune, stood aloof; and, when the imposture was exposed, enjoyed his triumph somewhat beyond the bounds of moderation. Mr Chalmers could not bear this, and published an octavo volume, to show, that although the Ireland papers were now proved to be forgeries, he, and his brethren in misfortune, had been quite right in believing them to be genuine. It was in this volume that he sought to account for Shakspeare's legal knowledge in opposition to the opinion of Malone. Anger may sometimes make a man eloquent, but it seldom makes him impartial, and Mr Chalmers was too much irritated to discuss the matter fairly ; not to mention that his belief in the authenticity of the Ireland manuscripts is not peculiary favorable to his character for critical discrimination. It is remarkable, too, that although Malone had published his opinion as early as 1790, Mr Chalmers did not think of disputing it, until he found it necessary to apologise for his credulity seven or eight years afterwards. But dismissing the personal quarrels of Mr Malone and Mr Calmers, it will be useful to advert to two other writers who have maintained the claims of Shakspeare to legal education.

The Rev. Walter Whiter published, in 1794, 'A Specimen of a Commentary upon Shakspeare,' in which he proposed to illustrate the works of the poet by a reference to the doctrine of the association of ideas. His general principle will be found in the following quotation.

'I define therefore the power of this association over the genius of the poet, to consist in supplying him with words, and with ideas, which have been suggested to the mind by a principle of union unperceived by himself, and independent of the subject to which they are applied.

Malone conjectured that Shakspeare had passed a part of his early life in the office of the seneschal of some manor court. Some of this critic's conjectures were extravagant enough, but this was certainly a most happy one, and is sustained by the evidence of a great number of passages. The words 'suit and service' are continually combined in the language of the feudal law, and those two words seem to have been associated by some recondite principle in the mind of Shakspeare. They do not always occur in *immediate* succession, but the former word seems almost constantly to suggest the latter, which follows it within a line or two.

'How in his *suit* he scorn'd you ; but your loves
Thinking upon his *services*'—— *Coriolanus.*

'I know thee well, thou hast obtained thy *suit*.
Shylock, thy master, spoke with me this day,
And hath preferr'd thee, if it be preferment,
To leave a rich Jew's *service*, to become
The follower of so poor a gentleman.'
*Mer. of Venice.*

'*Princess.* Biron did swear himself out of all *suit*.
*Maria.* Dumain was at my *service*, and his sword.'
*Love's Labor Lost.*

'What humble *suit* attends thy answer there ;
Impose some *service* on me for thy love.'
*Love's Labor Lost.*

Mr Whiter's criticisms may be thought somewhat refined, but they emanate from an acute and cultivated mind, and open a new vein of inquiry which deserves to be followed up. Mr Whiter adopts generally the opinion of Malone, and expresses surprise that he had not adduced a greater number of passages in proof of it. The opinion had also the support of Ritson and Stevens.

Dr Drake follows on the same side ; and, without discussing the question, gives the following passages in addition to those furnished by his predecessors :

'Immediately provided in that case.'
*Midsummer Night's Dream.*

'Royally attornied.' *Winter's Tale.*

'That doth *utter* all men's ware-a.' *Ibid.*

Thy title is *affeered*.' *Macbeth.*

'Keep leets and law days, and in sessions sit,'
*Othello.*

Why should calamity be full of words,
Windy *attornies* to their *client* woes.'
*K. Richard* III.

'But when the heart's *attorney* once is mute,
The *client* breaks, as desperate in his suit.'
*Venus and Adonis.*

'So now I haveconfest that he is thine ;
And I, myself am *mortgaged to thy will*.'
*Sonnett* cxxxvi.

'He learn'd but *surety-like* to write for me
*Under that bond, that him as fast doth bind*
The *statute* of thy beauty.' *Sonnet* cxxxiv.

The two following are pointed out by Stevens :

'As it [the hailstone] *determines*, so
Dissolves my life.' *Anthony and Cleopatra.*

'Our high plac'd Macbeth
Shall live the lease of nature.' *Macbeth.*

These which follow, may properly be added to the list :

'I am still
Attornied at your service.' *Meas. for Meas.*

'Shall I be charg'd no farther than this present ?
Must all *determine* here.' *Coriolanus.*

'An I were so apt to quarel as thou art, any man should buy the fee-simple of my life for an hour and a quarter.' *Romeo and Juliet.*

'By the next new moon
The *sealing day* betwixt my love and me
For everlasting *bond* of fellowship.'
*Midsummer Night's Dream.*

'And *seal* the *title* with a lovely kiss.'
*Taming the Shrew.*

'Now must your conscience my *acquittance seal*.'
*Hamlet.*

Such is the present state of the evidence on the subject, and the weight of it clearly inclines to the conclusion, which gives to the law the honor of so illustrious a disciple as Shakspeare. The establishment of this point might be beneficial in dispelling a very foolish prejudice, that the study of the law has a tendency to narrow the mind. Did it narrow the mind of Shakspeare who *probably* received a legal education? Did it narrow the mind of Bacon, who *certainly* did? The study of the law upon enlarged principles must tend to expand and invigorate the mind, and the contrary position is either the dictate of prejudice, or the refuge of indolence.—*Legal Observer.*

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From the Legal Observer.

## ON THE RIGHT OF AN ATTORNEY

### TO WITHDRAW FROM A SUIT.

SIR—Much misunderstanding apparently exists in the profession, as to the circumstances under which an attorney may decline further conducting an action or suit wherein he was once engaged.

The reading to be met with in the books on the subject certainly must be open to some qualification. It cannot be taken literally ; otherwise the law is, that an attorney cannot withdraw himself until the proceedings are determined ; that he *must* proceed, though his client will not furnish him with money! That if he quit his client before trial, an attorney cannot bring an action for his bill : and in chancery, that a solicitor proceeding to a certain length in a cause, shall not leave it there, but *shall* go on. (*Vide* Tidd's Prac. vol. i. p. 86., 9th ed.)

Why this feverish anxiety of the law to *lash* attorneys to their post? Are they notoriously apt to desert professional business? Do the interests of clients require this extraordinary protection? What? it must be asked with surprise, cannot an attorney quit all, or any, of the several suits or actions in which he may have engaged, if his clients will not furnish him with the *necessary* money wherewith to proceed? Must an attorney, who, on an implied, if not an actual, promise by

his clients, to supply him with the needful cash, becomes concerned in their suits, proceed with them until they are determined, at his own expense, and consequently, in very many cases, at his personal risk? for he is not permitted to indemnify himself by taking security for *future* cost. *Jones v. Tripp*, 1 Jac. 322. Let it for a moment be considered how long an action or suit, notwithstanding all possible expedition is used, may be pending; how many contemporary actions or suits an attorney in moderate practice may be concerned in; the necessary disbursements in their various stages; and who can conjecture the amount of capital such an individual must embark, and place very much at hazard? What scale of fees would remunerate an attorney under such circumstances? Would it be politic in the law; is it favorable to honorable practice, thus in effect to make his own all the proceedings in which an attorney may be concerned, by transferring all risk, from the very moment he commences them, from the clients to himself? What is there unreasonable in the supposition that an attorney being called upon to proceed with various suits, may not have the necessary cash immediately required to be disbursed? How MUST he '*go on*' in such a case?

If an attorney cannot withdraw from an action or suit, but must proceed till it is determined, what becomes of his undoubted right, at any time, on his mere request, to withdraw his name from the roll? The affidavit necessary for such purpose only states that 'no proceeding or application is then pending against him, and that he does not expect that any application will be made against him as an attorney.' And why does not the court require information as to whether all his actions and suits are determined?

The client it is well known, may, by leave of court, or by a judge's order, which is never refused, repudiate his attorney *ad libitum*, on payment of his bill. Surely then, the rule that an attorney cannot quit a suit must be susceptible of a qualified interpretation, that he cannot vexatiously, or merely to harass his client, *who has been guilty of defection*, abandon him and his proceedings. But certainly, under any circumstances, a court or judge would, on his application, permit an attorney to withdraw himself, without imposing any such condition as that he shall not bring an action for his costs then incurred, or depriving him of any lien, or other mode by which, had he concluded the proceedings, the law would authorise him to pay himself.

I would pursue this inquiry with reference to his liability in an action for negligence, when an attorney will not proceed with a cause because his client withholds his assistance in the article of cash.

Blackstone (quoting Finch L. 188.) says, an advocate who betrays the cause of his client, or, *being retained*, neglects to appear at the trial, by which the cause miscarries, is liable to an action on the case for a reparation to the injured client. By 'being retained' is doubtless meant *paid his fees. Then* the advocate's absence from the trial would certainly be actionable negligence.

When an attorney *neglected* to fee counsel, whereby his client was nonsuited, the court ordered an attachment against him. Say, 50. To have been guilty of *negligence*, must not the attorney be supposed to have been supplied by his client with the money to pay the fees? Have we any right to presume the attorney possessed sufficient of his own moneys for that purpose? And certainly an attorney, no more than any other person, cannot be said to *neglect* to do that which he has no means to do. Correct language will not express such an idea.

Supposing a client is assured by his attorney, that he really has not sufficient money to pay the fees; a situation not necessarily suppositious, as the most respectable practitioner may have experienced, particularly on such an emergency as the preparation for a heavy assize; and the client, exulting on the reading in Tidd, replies, 'You *must go on*, if you don't I'll bring an action against you for negligence!' Would the law so militate against the plain principles of common honesty and fair dealing as to sanction so palpable a hardship?

These observations were more immediately induced by Mr Justice Bosanquet's decision in the case of *Hoby* v. *Built*, gent. one, &c, tried at Hereford last assizes. It was an action for alleged negligence on the part of the defendant, by reason of his not having delivered briefs with fees to counsel, in a case in which he was concerned for Hoby, whereby Hoby was nonsuited. On the present trial, for the defendant Built, Mr Serjt. Russel* almost ridiculed the idea that an attorney is bound to deliver briefs with counsel's fees, or go on with a suit when his client will not provide him with money for the purpose, which the serjeant stated, and it was not denied, was the defendant's situation when he was concerned for the plaintiff. On the other hand Serjt. Ludlow contended that an attorney under such circumstances is bound to proceed. The learned judge observed, that without saying which of those propositions was correct, *he thought* that if an attorney went on with a cause, and brought the record to an assize town, he was not at liberty, immediately before trial, to say, 'I won't deliver the brief unless I receive some money,' and the verdict was for the plaintiff.

Now, it was admitted that the defendant had applied to the plaintiff for money wherewith to deliver his briefs, and that the plaintiff did not furnish that money, or pretend that the defendant had previously been supplied with sufficient. On that case then, I humbly submit the reasonableness of the request, or in other words, the immediate necessity for 'some money,' and *not* the particular moment at which the request was made, was the material consideration, and that such was the question his Lordship should have left to the jury. Who can doubt the reasonableness of the request for 'some money,' if it were, as appears to have been the case, immediatly required to be disbursed for witnesses, counsel, and court fees? Could it be expected that the defendant should, under these circumstanses, at his own immediate expense, hazard the result of a trial? Could the plaintiff reasonably complain of neglect, or that he was betrayed, or deceived, when he was told by the defendant that without some money the cause could not be tried? Was not the plaintiff bound to know that the disbursements immediately preparatory to the trial must be considerable? And did he not also know that he had not contributed a mite towards those expenses? Then what possible right, either legal, equitable, or *in foro conscientiæ*, could the plaintiff have to compel the continuance of the defendant's services and command his cash?

*The learned Serjeant said he believed it had been decided that an attorney may *give notice* to his client that he will not proceed.

The general principles which regulate all engagements between principal and agent, not particularly specific, must apply to the relation of attorney and client; and in all such engagements if the principal will do that which is clearly reasonable on his part, the agent is absolved, the consideration on which he engaged having failed by the default of the principal.

It is a fact reputable to the profession, that there are very few actions for negligence against attorneys, recorded in the books. But it is therefore important that a decision which may become a precedent, should be strictly investigated, and have an indisputable principle for its basis.

Let this very reasonable rule be remembered: It is not every neglect which will subject an attorney to an action for negligence. He is only bound to use reasonable care and skill in managing the business of his client. He is only liable for *crassa negligentia*, (Selwyn, N. P. vol. i. p. 169., 6th ed.)

Quære then, whether the defendant Built, was, under the circumstances, guilty of 'gross negligence.'

I am Sir,
Your most obedient servant,
T. P.

## MORTGAGE.

Concluded.

The argument *ab inconvenienti*, did the matter rest in discretion, would be inconceivably strong. I have heard with surprise an expression of regret that the law had not been so settled originally, as to subject the land in the hands of the purchaser, even to prior judgments. This must surely have been said without consideration. If each lien creditor were separately permitted to carve for himself, by selling just what might be sufficient to get his money out of the land, a great part of the estate would go among the retainers of the law. Full costs and poundage on every sale, would be just so much taken out of the pockets of the younger lien creditors, who would have come in for a share, had the land been turned into money, by one operation for the benefit of all. Besides, no one would be found willing to purchase except at a prodigous undervalue, with the certainty of being annoyed by a series of executions to enforce the prior liens; and thus the younger lien creditors would be kept at bay: and the same consequences, or one as bad, would result from the sale on the oldest lien. The principle insisted on is, that a creditor can sell no more than he holds by his lien: on no other hypothesis than that all beyond what is necessary to satisfaction belongs to the debtor, could there be a resulting interest in him to answer subsequent incumbrances. What right then would an older incumbrancer have which a younger one has not, to divest the security of any one else farther than may be necessary to produce satisfaction of his debt? The abstract principle fairly carried out would require him to sell an undivided interest to the value of his incumbrance, and to strike it down as soon as enough were obtained to satisfy the debt and costs. This preposterous but necessary consequence of the principle, has been put out of view by the legislature, who foreseeing the inconvenience and confusion that would ensue from selling the estate piecemeal, have invested the purchaser with title to it, as it was held by the debtor. But a most oppressive consequence of the doubt generated by the principle of the argument, and communicated to the public mind

by the imperfect report of Febiger's lessee v. Craighead, in the 4th volume of Mr Dallas' reports has been a sacrifice of property to an incredible amount. It is not too much to compute this at ten per cent on every judicial sale of land that has since been made. Instances are within my knowledge of 30 per cent on the purchase having been offered in confidence of the purchaser's skill, by those who, at the sale, refused to hazard a dollar on their own. Is it not equally the interest of lien creditors, whether by mortgage or judgment, as well as of the debtor himself, and indeed of all but those who speculate in bargains, that the land should go for its value? The public interest at stake is immense; and even if a temporary hardship from the principle of Willard v. Norris were experienced in a particular quarter, it would be greatly more than counterbalanced by the permanent benefit that would result to the community at large. Public convenience, however, is supposed to require that this species of property be set apart and consecrated to investment by those who may be prevented by absence or other causes from attending to their property. If this consideration were imperative, its requirements might be satisfied by the public stocks, which afford all proper facilities; but even if they did not, there is no species of investment that ought to be so sacred as to control the maxim that the public good is the supreme law. But the inconvenience that would have resulted to mortgage creditors from the decision in Willard v. Norris, would have been neither permanent nor great. They would have ceased to invest in lands at a distance; and as to defrauding them by a sham sale at an undervalue, that would have become impracticable the moment it was ascertained that the purchaser was to have an unincumbered title. But they would have suffered no more in this respect, or by reason of the apprehended insecurity of the purchase money in the sheriff's hands, than judgment creditors do at present; and I have heard no complaints by these, of losses from collusive or surreptitious sales by younger judgment creditors. Even if there were just ground of apprehension on this score, further precaution might be taken by the courts. Mortgage creditors have certainly not been treated as having peculiar claims to protection in other matters; as in cases of injury to the premises, under the road law, for which the mortgagor receives compensation, without notice to the mortgagee; and I am unable to see why his interest should be preferred to that of every one else in the matter of a judicial sale.

It will be seen that the preceding remarks are intended for a mortgage not due. As between the mortgagee and purchaser, who, as owner of the equity of redemption, stands in the place of the mortgagor, it is impossible to conceive of an objection to a payment which consists with the letter of the contract; and whatever might be the right of the mortgagor or the intermediate lien creditors to demur to performance of the condition out of the money in the sheriff's hands, it is certain the mortgagee himself could not: but standing in every respect as a judgment creditor, he cannot object to payment even before his debt is due; as has already been determined in the Commonwealth v. Alexander, (16 Sergeant and R. 257.) and intimated in Barnet v. Washabaugh, (id. 410.) and this disposes of the general question which a respect for the opinion of counsel who have doubted the soundness of the principle of Willard v. Norris, has induced to have re-argued on its original ground. It is unnecessary to say that the result is a firm conviction of its solidity. It remains to inquire how far it affects the plaintiff's lien on the whole, or any part, of the mortgaged premises. As to this, my opinion happens not to concide with that of the majority; and the judgment of the court on this part of the case will be pronounced by my brother HUSTON.

## RECENT AMERICAN DECISIONS.

### COVENANT.

A covenant on the part of the lessor to renew a lease for years at the expiration of the term, is a covenant running with the land. *Piggot* v. *Mason*, 1 Paige, 412.

Covenants of warranty and to convey, contained in a lease of real estate, run with the land, and are binding upon the heirs and assignees of the lessor. *Van Horn* v. *Crain*, 1 Paige, 455.

### DEBTOR AND CREDITOR.

Where property is subject to an execution, and a fraudulent obstruction is interposed to prevent the sale, a creditor may file his bill here to remove the obstruction as soon as he has obtained a specific lien upon the property by the issuing of his execution. *Beck* v. *Burditt*, 1 Paige, 305.

But if the property is not a subject of levy and sale on execution, the creditor must show his remedy at law exhausted by an actual return of the execution unsatisfied, before he can file a bill in this court to reach the equitable property of the debtor. *Ib.*

When a debtor in failing circumstances assigns an unreasonable amount of property to satisfy a single creditor, it is evidence of fraud; but if no more than is supposed to be sufficient to satisfy the debt is assigned, a mere hypothetic reservation of the surplus, if any there should be, to the debtor, would not render the asignment void. *Ib.*

A creditor whose execution at law has been returned unsatisfied, may file a bill to reach the equitable estate of the defendants, either in his own name and for his own benefit, or he may join with other creditors standing in the same situation with himself, or he may file a bill in behalf of himself and all others, being judgment creditors, whose executions have been returned unsatisfied, and who may choose to come in under the decree and contribute to the expenses of the suit. *Edmeston* v. *Lyde*, 1 Paige, 637.

Where property has been fraudulently assigned by the debtor, so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party, to enable the court to reach the property in his hands. *Ib.*

The debts, choses in action, and other equitable rights of the defendant, may be assigned or sold under the decree of this court and the purchaser will be protected both in equity and at law. *Ib.*

Under the act of Congress of the 2d of March, 1799, the United States are not entitled to a preference in the payment of bonds given for duties, over the general creditors of the debtor, unless the debtor is actually insolvent, and his insolvency it manifested by some notorious or public act. *Marshall* v. *Barclay*, 1 Paige, 159.

To entitle the United States to this preference, on account of a voluntary assignment of the property of the debtor for the benefit of his creditors, it must appear that the assignment was of all the property of the debtor, or was made with a view to defeat the claim of the United States. *Ib.*

Where, however, a debtor is actually insolvent, and intending to assign his whole property, first makes an assignment of part for the benefit of some of his creditors, and afterwards makes another assignment of the residue of his property for the benefit of his remaining creditors, the two assignments will be considered as one transaction, and the United States will be entitled to a preference. *Ib.*

The depositors of money in a bank are only general creditors of the corporation, and in case of a failure of a bank, they are not entitled to a priority of payment over bill holders or other creditors. *In the matter of the Franklin Bank*, 1 Paige, 249.

When a bank becomes insolvent, the cashier has no lien upon the money in the bank for his deposits therein, or for the payment of his salary. *Bruyn* v. *Receiver of the Middle District Bank*, 1 Paige, 584.

Where the right to a debt due from a third person is in litigation, it cannot with safety be paid to either party after notice; but the debtor will be permitted pending the litigation, to pay it into court to the credit of the cause. *Mills* v. *Pittman*, 1 Paige, 490.

Where a creditor has a lien upon two funds for the payment of his debt, chancery will not compel him first to exhaust the fund which a junior creditor cannot reach, if the senior creditor will thereby be injured, or if he offers to substitute the junior creditor in his place, on being paid the amount of his debt. *Woolcocks* v. *Hart*, 1 Paige, 185.

Where a judgment is given by the principal debtor, to his indorser, to secure the payment of the debt for which they are responsible, and they become insolvent, the creditor is entitled to the benefit of the security. *Heath* v. *Hand*, 1 Paige, 329.

### DOWER.

If the owner of the legal estate purchase in a mortgage executed by both husband and wife, with the intention of protecting himself against the claim of dower to the extent of that incumbrance, the widow can only be endowed of the equity of redemption, and she is bound to contribute her share towards the payment of the mortgage. *Russell* v. *Austin*, 1 Paige, 192.

A defendant continues seized of his real estate sold under a judgment and execution, until the time for redemption expires; and where he dies before the time for redemption expires, his widow will be entitled to arrears of dower. *Ib.*

Where there is an outstanding mortgage upon the premises, the arrears of dower will be computed by deducting from one third of the rents and profits, over and above the necessary repairs, taxes, &c, one third of the interest on the amount due on the mortgage at the time the defendant acquired title to the premises. *Ib.*

Where a mortgage has been executed by husband and wife, she can only be endowed of the equity of redemption. *Ib.*

To entitle the wife to dower, the husband must have been seized during the coveture of a present freehold as well as of an estate of inheritance in the premises. *Dunham* v. *Osborn*, 1 Paige, 634.

Seizin of a vested remainder is not sufficient where the husband dies, or aliens his interest in the premises, during the continuance of the particular estate. *Ib.*

Where lands descend to the son, on the death of the father, and dower is assigned to the mother, if the son dies during the life of the mother, his widow can only be endowed of the remaining two thirds. *Ib.*

Where the estate has been sold on an execution against the husband, who afterwards died leaving a widow entitled to dower, the widow of the purchaser will be entitled to dower in the whole premises, subject to the dower right of the first widow in one third thereof. *Ib.*

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ESCROW.

It is essential to an escrow that it be delivered to a third person to be delivered to the obligee or grantee upon the happening of some event, or upon the performance of some condition. *James* v. *Vanderheyden*, 1 Paige, 385.

Where a bond and mortgage and deed were delivered to a third person, to be kept by him during the pleasure of the parties, and subject to their further order, *held*, that the papers were not escrows, and that he was a mere depositary. *Ib.*

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EVIDENCE.

A receipt is always susceptible of explanation. *Van Rensselaer* v. *Morris*, 1 Paige, 13.

Where the purchaser of mortgaged premises had admitted the existence of the lien within twenty years, and promised to discharge the mortgage, it was held sufficient to rebut the presumption of payment arising from the lapse of time. *Peck* v. *Peck*, 1 Paige, 477.

Where the subject of the devise or legacy is described by reference to some extrinsic fact, extrinsic evidence may be resorted to, to ascertain that fact. *Pritchard* v. *Hicks*, 1 Paige, 270.

So where the words of a will are equally applicable to two persons or two things, parol evidence is admissible to show which person was the object of the testator's bounty, or which article he intended for the legatee. *Ib.*

Where a testator made a bequest to a person by a wrong christian name, parol evidence was admitted to show what person was intended. *Connolly* v. *Pardon*, 1 Paige, 291.

A record cannot be read as evidence in a suit, unless both parties, or those under whom they claim, were parties to the suit in which the record was filed. *Dale* v. *Rosevelt*, 1 Paige, 35.

The laws of other states must be proved, otherwise the courts of this state cannot take notice of them. *Hosford* v. *Nichols*, 1 Paige, 220.

Parol evidence is admissible to show that a deed, absolute in its terms, was intended by the parties as a mortgage. *Whittick* v. *Kane*, 1 Paige, 202.

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EXECUTORS AND ADMINISTRATORS.

Where a testator directed his executors to pay to one of his sons annually $200, and also one fifth of his estate, in case of his reformation from vicious habits, it was *held*, that the executors acted correctly in not paying over the one fifth of the estate, until they were satisfied of the son's complete reformation. *Dustan* v. *Dustan*, 1 Paige, 509.

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FRAUD.

Where a judgment was entered on a bond and warrant, and a specification was filed under the act of April 21st, 1818, and it appeared no such consideration as that stated in the specification existed, the judgment was declared fraudulent and void as against other judgment creditors. *White* v. *Williams*, 1 Paige, 502.

If a judgment is void as against a subsequent judgment creditor, it is also void as against a purchaser under the subsequent judgment. *Ib.*

Pending a treaty of purchase, a third person took a confession of judgment from the vendor, and fraudulently concealed the fact from the vendee until after the sale, for the purpose of enforcing the judgment against the land in his hands. On a bill filed against the judgment creditor and his assignee, they were decreed to release the land from the lien of the judgment. *Webster* v. *Wise*, 1 Paige, 319.

If a purchaser who is insolvent, concealing his insolvency from the vendor, obtains goods from him without intending to pay for them, it is a fraud upon the vendor, and the property in the goods will not be changed. *Durell* v. *Haley*, 1 Paige, 492.

But if the goods have been resold by the fraudulent vendee to a bona fide purchaser, who has actually paid for the same without notice of the fraud, such purchaser will be protected. *Ib.*

Where an insolvent confessed a judgment to his friend, on which an execution immediately issued, and then purchased goods for the purpose of subjecting them to the execution, it was *held* to be a fraud upon the vendor and the judgment, creditor was not permitted to retain the goods which had been purchased in by him upon his execution. *Ib.*

Thomas L. and J. L. were owners of a farm in Orange County, which, in 1811, was, by a fraud upon them, mortgaged to R. The mortgage was foreclosed in chancery, and the farm advertised for sale by a master. Before the sale, B., by an arrangement with Thomas L. and J. L., agreed to purchase in the farm for their benefit, for which he was to receive a stipulated compensation. R., the mortgagee, in order to favor Thomas L. and J. L., agreed with B. that he might bid off the property at $1500, about half the amount of the mortgage. B. at the sale, prevented others bidding, by representing that he intended to buy for Thomas L. and J. L. B. purchased the farm at the master's sale for $1540, about $1000 below its value. Afterwards B. refused to convey the farm to Thomas L. and J. L., or to account to them for the value. although they tendered to him the amount of his bid, with interest, and the sum agreed to be paid for his services. It was *held*, that B. was a trustee for Thomas L. and J. L., and had no other interest in the farm than that of a mortgagee to secure the repayment of the purchase money and the payment of the sum agreed to be allowed him for his services. *Brown* v. *Lynch*, 1 Paige, 147.

Where S. being indebted to several persons, was in September, 1817, sued for a default in paying over moneys received as a commissioner of loans, and judgment was recovered against him on the 31st of January, 1818, and on the 1st of January, 1818, S. conveyed, to L. his farm, and all his personal property for the nominal consideration of $8501 25, $4000 of which was paid in Virginia lands which had been purchased by L. twenty years before, but which he had never seen or possessed, and there was no proof of the payment of the residue of the consideration, and S. continued in possession of the property so conveyed to L. It was *held*, that this conveyance was fraudulent and void as against the creditors of S. *Lee* v. *Hunter*, 1 Paige, 519.

Where the defendant, by a fraudulent over drawing, obtained the complainant's money, and deposited it to his own credit in another institution, *held*, that the title to the property was not changed, and might be reclaimed by the owners. *The Tradesman's Bank and the Chemical Bank* v. *Merritt*, 1 Paige, 302.

A court chancery relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured thereby. *Brown* v. *Lynch*, 1 Paige, 147.

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PATCH THE MURDERER.

We are indebted to Mr Hobler, Jun. for the following anecdote :—' The incident mentioned by Professor *Amos* (inserted in the last number) reminds me of a conversation I had a few years since on Patch's case, with the late Mr Charles Humphreys, well known for his great skill in Crown practice, and who conducted the prosecution against Patch. He related the circumstance nearly in these terms :—He (Mr H.) had examined the premises of Mr Blight who was murdered ; and he had the chair in which he was sitting, and the other things in the room, placed exactly in the positions they were in at the time of the murder : and from the manner, it occurred to him that the pistol must have been fired with the left hand. With this idea, he obtained an interview with Patch at a time when he was at dinner : Mr Humphreys then observed that Patch used the knife with his left hand, which at once confirmed the opinion he had formed, that Patch was the murderer, notwithstanding his protestations of innocence.'—*Legal Obs.*

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A well-known brow-beating barrister was last week cross-examining a witness on Circuit. The man was rather pert and flippant in his answers, which provoked the Counsellor to say, ' If you do not cease your impudent remarks I shall claim the protection of *the Court!*' ' Humph !' rejoined the other, ' from the language I heard from you, I thought I could not be far from some court or *Alley !*' This was too much ; a laugh resounded through the Court, in which even the Judge participated, although he comes from the refined neighborhood of the *Park*.

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During the time when Swing was in all his glory, a country Justice actually committed a poor ploughman for ' being found' under suspicious circumstances, near a hay-rick, ' with intent to set it on fire ;' when the whole of the evidence against the poor man was, that he had been seen near the stack, not with a lighted candle, but with *a pail of water !* This is a fact. The sapient Magistrate still holds the Commission in the county of Berks, where he is as likely as ever *to set the Thames on fire!*

THE JURISPRUDENT.

BOSTON, SATURDAY, JUNE 18, 1831.

## LAW REPORTING.

Reports of Cases argued and determined in the Vice Chancellor's Court. Vol. II. Part 4. By N. Simons, Esq. of Lincoln's Inn, Barrister at Law. Clarkes, 1831.

Our readers will probably remember the observations which we had occasion to make in a recent Number, on the subject of law reporting.* We are not inclined to abandon the task that we there prescribed to ourselves; and we shall from time to time reiterate the objections, which we then made to the present system, and occasionally illustrate our observation by specimens of the mode in which reports are 'got up.' To show that we have not formed a hasty or inconsiderate opinion of the impropriety of the modern practice we shall shortly advert to the former customs in this respect, and if we do not entirely approve of them we infinitely prefer them to the present system.

It is well known that at the earliest period of our legal history, certain persons were appointed by the court to report the decisions. Chief Baron Gilbert, and Mr Justice Blackstone both inform us that the Year Books were thus composed. Their number was limited, and they were at first paid by the king as officers of the court. These official reports seem to have been discontinued about the beginning of the reign of Henry VIII. although they were afterwards revived for a short period. Subsequently to these official reports, the profession had not to depend on the spare time of any gentleman who might choose to give an account of what was passing in the courts, but, on the notes made by the judges themselves. Thus Dyer's Reports consist of the notes made by Sir James Dyer himself, and were published after his death by his executors. Keilwey's Reports were edited by Serjeant Croke, who was afterwards created a judge. Coke's Reports, as is generally known, were the reports of that most learned and eminent person himself, and consisted, as he tells us himself, of 'cases adjudged upon mature deliberation,' and he was requested to continue them by the king. Hobart's Reports have the same authority: they were compiled by that able judge. The subsequent reports were all more or less of the same character, although not of the same authority. They all were, or purported to be notes actually made by judges. They were however so numerous that in the reign of James II. it was thought proper to prohibit the publication of law books, without the license of the Lord Chancellor, the Lord Chief Justice, and Chief Baron, or one or more of them. This lisense appears, with one or two exceptions, in all the reports down to Douglas; when the judges refused to grant it any longer. It became at last indeed a mere form, and was therefore useless.

The new æra of law reporting was commenced in 1786, by the reports known by the name of the *Term Reports*. From this time any person who chooses to employ his time in reporting cases, however inexperienced and unqualified he may be, may, by the assistance of a bookseller send forth his 'reports' of the decisions of the judges. Now this appears to us manifestly absurd and improper. It tends greatly to confuse, and unsettle the law. There is no security for the practitioner. In many cases he cannot be certain that the report is correct, and yet he has no power to act contrary to it. It can only be nullified by the court itself. These are, among others, our reasons for objecting to the present system. We think there should be some persons especially appointed to hand down the decisions of the court. Every facility should be afforded to him and he should devote his time entirely to this important duty. At present the reporter, although properly qualified, may, or may not be in court: he may or may not have it in his power to procure all the papers in the cause; he may or may not have the most ample information on everything connected with it; he may or may not be favored with the judge's notes of his judgment; it is left to accident. The most important case of the Term or Sitting may thus be imperfectly reported or entirely omitted. This state of things should no longer exist. It is one of those practical grievances that may be easily and speedily remedied, and we sincerely hope that it will be attended to.

Mr Simons' reports are, as every one knows, in continuation of those edited by himself and Mr Stuart. We have always considered these last as some of the ablest reports of the present day, and we have no reason to complain of any falling off in them since the whole labor has devolved on Mr Simons.

Some few of the cases are perhaps more fully stated than is necessary, as for instance the *Attorney-General* v. *Mayor &c. of Carlisle*, p. 37., but they are always well selected and accurate. We shall notice some of the most important decisions in this Number, none of which, however, are very striking. Most of the cases are on points of practice and pleading, which we shall not now discuss, but shall pass to those which relate to the principles of equity.

The first of these which we shall notice is the case of *Lear* v. *Leggett*, p. 479., in which a testator bequeathed a certain sum of stock to trustees upon trust for *A.* for life, and after his death in trust for his children, and declares that the interest of *A.* should not be subject to any alienation or disposition by sale, mortgage, or otherwise, or by anticipation of the receipts; and if he should make or attempt to make any alienation of it, then it was limited to other persons,—in this case to the children of *A.*—*A.* became a bankrupt, and the question was whether his interest passed to his assignees, or devolved on his children. The Vice Chancellor held, that it passed to his assignees, and not to his children, and he thus discussed the former cases on the point.

'This is not a case in which I can hold, on the words of this proviso, that the limitation over took effect; and it appears to me that the cases which have been cited in support of the children's claim do not warrant the argument in their favor.

'The words of this will must, as in all cases of the like nature, be construed with great strictness. In *Dommet* v. *Bidford*, 6 T. R. 684., the annuity on which the question arose was given by reference to the annuity given to the niece. There the testator gave the said annuity to his niece, Anne Ireland, and declared that the same should, from time to time, be paid to herself only; and that a receipt under her hand, and no other, should be a sufficient discharge for the payment thereof; his intent being that the said annuity, or any part there of, should not be alienated for the whole term of her life, or for any part of the said term; and that if the same should be so alienated the said annuity should immediately cease and determine. The testator does not say, that if the annuity was alienated by the act of the party it should cease, therefore that is not a case in which the benefit was to go over on an act done by the party. The case of *Cooper* v. *Wyatt*, 5 Madd. 482. is totally different from the one now before me. The Vice Chancellor, in giving judgment, calls in aid his construction of the proviso, the mode in which the benefit is given to the nephew, and says, here is no gift to the nephew, other than a direction that the payment should be made into his proper hands, but not to his assigns, and for his own use and benefit, which expressions naturally import an intention of personal enjoyment by the nephew, and the exclusion of all who attempt to claim through him; and in this sense the words 'his assigns' will as well comprehend the assignees by operation of law as the assignees by his own act; the judgment therefore did not rest on the proviso alone, but on the proviso taken in connexion with the limited words of the gift. [His Honor here read the part of the will in this case in which the trusts were declared, and then proceeded.] Now 'here is a gift totally unlike the gifts in *Dommet* v. *Bidford*, and *Cooper* v. *Wyatt*. The testator there directs that the gifts shall not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever. Now these words alone do not create any forfeiture. The testator then declares, that in case his son or daughters should charge, or attempt to charge, affect, or encounter, &c. Now all these words refer to a voluntary act of the party, and point at a voluntary alienation; and I am of opinion that no act has been done, in this case, which can be said to be a voluntary alienation, or an attempt to alienate; and I must therefore declare that the assignees are entitled to the life interest of Alexander Goudge, the son, in the fund in question.'

The next case which we shall present to our readers is *Hodson* v. *Murray*, p. 515. which we shall give more fully.

'The bill prayed that a promissory note for 8000*l.*, which had been given by the plaintiff to Rowland Stephenson, and which the latter, after it became due, had delivered to the defendant as a security for a debt to a greater amount, due from him to the defendant might be delivered up to be cancelled, and that the defendant might be restrained from proceeding in the action which he had commenced against the plaintiff upon the note. The bill alleged that Stephenson had agreed to advance the 8000*l.* to the plaintiff, to enable him to pay for an estate which he had contracted for; that the contract failed, and consequently that nothing was ever advanced upon the note, and that the note was, from inadvertence, left in Stephenson's hands. The defendant by his answer denied any knowledge of the tranactions between Stephenson and the plaintiff: he admitted, that when Stephenson produced the note to him, Stephenson's indorsement on it was cancelled; that the reason assigned by Stephenson for the cancellation was to prevent the amount being recovered in case the note should be lost, and that Stephenson afterwards reindorsed it.

Mr *Sugden* and Mr *Ching*, for the plaintiff, said, that a person who took a note when it was over-due held it subject to all the equities that it was liable to in the hands of the original hold-

* See Jurisprudent, No. 46.

er : that, although he, the plaintiff, might avail himself of that defence in a court of law, this Court was not ousted of its jurisdiction.

'Mr *Horne*, Mr *Burge*, and Mr *Swann*, for the defendant, said, that the Court could not direct that the bill should be delivered up to be cancelled, as the defendant might sue Stephenson, if he could not sue the plaintiff for the amount ; that the principle on which the plaintiff sought relief was originally established in the courts of law, and was not adopted by them from this court : that the bill sought to oust the courts of law of their jurisdiction in a case where they did complete justice ; and that therefore the plaintiff had no right to apply to this court for its extraordinary interference: that the answer did not show that there was nothing due on the note, as between the plaintiff and Stephenson, but stated that the defendant knew nothing of the transactions between the plaintiff and Stephenson ; and therefore the plaintiff had not proved, as he ought to have done, that there was nothing due from the one to the other : that the plaintiff, by suffering the note to remain in Stephenson's hands, had enabled the latter to commit a fraud upon the defendant, and been guilty of greater negligence than the defendant had : that the defendant, if permitted to go to trial, might be able to prove facts, from which a judge would infer that the plaintiff suffered Stephenson to retain the note for the purpose for which it had been applied, and would thereby get rid of the equity arising from the defendant's having taken it when it was over-due.

'The *Vice chancellor* said :—This is a very suspicious case on the part of the defendant. Although a court of law may not allow a defendant to recover upon this note, it is no reason that this court should be deprived of its jurisdiction. It appears to me to be a question that ought to be further inquired into in this court.—Motion granted.'

The case of *Porter* v. *Clark*, p. 520., is of some importance to Dissenters.

'A chapel and buildings were vested in trustees, upon the following trusts : to permit and suffer the said messuage, meeting-house, buildings, and premises, to be used as and for a place for the worship of Almighty God, by the congregation of protestants dissenting from the church of England, under the denomination of particular baptists, holding the doctrine of personal election, imputation of original sin, effectual calling, free justification, and final perseverance of the saints, and by the members and successors of the same congregation of protestants holding the same doctrines. Shortly before the filing of the bill, difference had arisen in the congregation ; some of the members being desirous of appointing Owen Clark to be co-pastor with Porter, while others were averse to such appointment. However, on the 13th of March, 1828, a church meeting was held, at which it was resolved to invite Clark to preach at the chapel for three months, as a probationer to be co-pastor with Porter. Clark came accordingly, and at the end of that period was elected joint minister with Porter. To this election Porter refused to consent, alleging that the congregation had not the power to appoint a co-pastor without such consent ; further disputes and differences were the consequences of this refusal, and eventually, on the 6th of November, 1828, a church meeting was held, at which it was resolved that Porter should be no longer pastor, and that the defendant Clark should, from that time, be sole pastor ; and on the following Sunday Porter was forcibly prevented from entering the pulpit, and Clark, the defendant, took possession of it.

'There was no endowment for the minister, nor any trust property, except the chapel and premises, nor was the ministers paid by the pew-rents, but solely by the voluntary contributions of persons attending the chapel.

'The bill was filed by Porter, by the trustees of the chapel, and by two of the members of the congregation, on behalf of themselves and all others the members, except such as were made defendants, against Clark and nine of the members, by whose orders Porter had been forcibly expelled. It prayed that the trusts upon which the premises were held might be ascertained and declared, and carried into execution, by and under the direction and decree of the court, so far as it might be deemed proper or necessary ; and that a sufficient number of proper persons might be appointed new trustees, in the room of such as were dead, or desirous of being released from the burden of their trusts ; and that it might be declared that Porter was the lawful pastor and minister of the chapel and congregation, and that he might be quieted in the possession of such rights as appertained to him in that capacity ; and also, that the defendant Clark might be restrained by the injunction of the court from performing the duty of pastor or minister of the chapel and congregation, or officiating or performing divine worship in the chapel, that he and the other defendants might be restrained, in like manner, from impeding, or in any manner interfering with Porter in the exercise of his duties as pastor and minister thereof.

'A motion was now made for an injunction in the terms of the prayer. In support of the motion numerous affidavits, made by dissenting ministers of this denomination, were read, who all agreed, that when a minister has been duly elected to be pastor of a congregation, and has been ordained according to the form usual amongst them, he held this office until he thinks fit to decline it ; and that no person, or body of persons, has power to remove him, or to appoint a co-pastor with him, without his consent.

'The *Vice Chancellor* said, that he had looked into the deed creating the trusts, and that he could find no directions as to the mode of electing ministers, or as to the duration of their office, when elected ; neither could he find that there was any provision made for the minister by the trust deed ; but that he was dependent entirely on the voluntary contributions of the members of the congregation : and he, therefore, could not see that the plaintiff, Porter, had made any case for the interference of the court.

'His Honor added, that independently of the want of jurisdiction, he was of opinion that it was very reasonable that a minister who depended entirely upon voluntary contributions, should be dismissible at will by the persons so voluntary contributing.'—*Legal Observer.*

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LAWYERS IN NAPLES.

'In the kingdom of Naples there are 20,000 lawyers, most of them younger branches of the nobility ; and there is no nation, however large in which so many lawsuits are carried on.'—*Michael Kelly's Memoirs.*

QUALIFICATIONS OF A CHIEF JUSTICE IN HAYTI.

The Grand Judge, Mons. Freshnell, is an infirm man of color, nearly eighty years of age. Until he arrived at middle age, he had been actively and successfully employed in the marauding career of a pirate. His legal knowledge is just what might have been expected from his previous avocation. He is a modest old man, it is true, for when his present appointment was offered to him he declined it, as he said himself, from his incompetency to fill it, and to perform the duties which it required. Boyer, however, insisted on his accepting it, and remarked, 'that it did not require talent or legal knowledge to execute the duties of it ; that he had only to do as he was directed by such orders as he might receive from the *bureaus* of goverment.'—*Franklin's Present State of Hayti.*

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LOCAL COURTS IN HAYTI.

The proceedings in the lower courts are somewhat extraordinary in civil cases. If a creditor institute a suit against a debtor in one district and obtain a verdict, the defendant is permitted to appeal from the sentence to the court of the adjoining district, and so on in succession throughout the whole series of district courts ; and if the last confirm the judgment of the first, the defendant can then move it into the Court of Cassation ; and in the event of that court confirming the judgments of the courts below, he may appeal from it to the president, and apply for a new trial in those courts, so that the contest proceeds *ad infinitum.*—*Franklin's Present State of Hayti.*

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It is said that the excellent Chief Justice of England is about to retire from his station. His Lordship's infirm state of health is of course the only cause of his retirement. Lord Lyndhurst, it is supposed, will succeed to the vacant seat.

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The Lord Chancellor has added four new commissioners to the Common Law Enquiry. They are Messrs *Pollock*, *Starkie*, *Evans* and *Wightman*.

His Lordship has also appointed four of the present Commissioners of Bankrupts, Messrs *Montagu*, *Beames*, *Fonblanque*, junior, and *Fane*, to consider the subject of the Bankrupt laws and to report to him thereon.

He has also appointed four other gentlemen to consider the subject of reform in the court of Chancery, and report thereon. The selection is a very proper one, as it is understood that they are the *Solicitor General*, Mr *Courtenay*, Cler. of Par, Mr *Merivale*, and Mr *Spence*.

Mr Justice James Allan Park, it is said, is about to retire from the Bench.

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During the last two Terms, 219 Attorneys have been admitted on the Rolls of the Court of King's Bench, and 5 additionally in the common Pleas. There were 343 who gave notices of application ; but it seems that of these 116 abandoned their intention.

It is supposed that nearly 800 Attorneys are yearly admitted, or 200 each Term. It has been said deemed material, by a careful search of the original Rolls of the several courts, to correct this mistake. Those who are not admitted within four Terms after notice must repeat it. Many of the applicants renew their Notice at an earl period ; some at a distant one ; and others form a change of views, never apply again.

VALUABLE ENGLISH BOOKS, recently received from Europe, and for sale by *GRAY & BOWEN*, No 141 Washington street.

Browne's Self Interpreting Bible, with notes, references, illustrations, reflections, and a memoir of the author; in one large quarto volume.

The Mirror of Parliament, edited by John Barrow Esq. This work contains a complete account of the doings and debates in the British Parliament, during the last December session ; in eight parts, folio.

Select Views on the River Clyde, engraved by Joseph Swan, with historical and descriptive illustrations; in one quarto volume, with *fortytwo* splendid engravings.

Select Views of the Lakes of Scotland, from original paintings ; in two parts.

Hinton's History and Topography of the United States. This work will be completed in thirty numbers, quarto, with *ninety* engravings; *eight* numbers are already received.

History of the sufferings of the Church of Scotland, from the restoration to the revolution ; by Rev. Robert Wodrow; 4 vols. 8vo.

History and Antiquities of the Doric Race ; by C. O. Müller ; 2 vols. 8vo.

History of Scotland, from the Union ; by John Struthers ; 2 vols. 8vo.

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Mosheim's Ecclesiastical History, complete in two vols. 8vo.

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Six Years' residence in the United States of America ; by Peter Neilson ; 1 vol.

Lardner's Cyclopedia ; complete set as far as published ; 16 vols.

Lardner's Cabinet Library, annual Retrospect of Public Affairs for 1831.

Murphy's Treatise on the art of Weaving; with fifteen engravings ; 1 vol.

Mackenzie on the Diseases of the Eye ; 1 vol.

Spix's Travels in Brazil, with engravings ; 2 vols. 8vo.

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do do do (2d series) 2 vols.

The Atheneum, an original Literary Miscellany ; 1vol.

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Gospel Truth accurately stated and illustrated ; by Rev. John Brown ; 1 vol.

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Aids to Reflection ; by S. T. Coleridge ; 1 vol.

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A Help to Professing Christians ; by Rev. John Barr ; 1 vol.

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The National Minstrel ; a choice selection of popular songs.

Parochial Psalmody ; by J. P. Clarke.

Pinnock's Sacred Geography and History.

Pinnock's Modern Geography and History.

The Caterer ; being a selection of pieces in prose and verse ; 1 vol.

Johnson's Dictionary, *complete* in one imperial 8vo.

Morewood's Essay on Inebriating Liquors.

Dibdin's Library Companion ; 1 vol.

Biblia Hebraica.

Novum Testamentum Græce.

Aristophanes Comædiæ.

Sophocles Tragædiæ.

Pindari Carmina.

Æschyli Tragædiæ. May 21

JUST published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

I. Origin and Progress of the French Language.—1. Choix des Poésies Originales des Troubadours ; par M. Raynouard. 2. Second Mémoire sur l'Origine et les Revolutions de la Langue Françoise ; par M. Duclos.—[In Vol. XVII. of the Mémoires de l'Académie des Inscriptions et Belles Lettres.] 3. Les Poètes François depuis le XII. Siècle jusqu' à Malherbe.

II. Foreign Relations of Mexico. 1. Memoria de la Secretaria de Estado y del Despacho de Relaciones Interiores y Exteriores, leida por el Secretario del ramo el dia 13 de Febrero, de 1830. 2. Memoria del Secretario de Estado y del Despacho universal de Justicia y Negocios Eclesiasticos el dia 22 de Marzo, de 1830.

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VII. The Art of Preserving Beauty. L'Art de conserver et d'augmenter la Beauté. Par L'Ami.

VIII. Memoirs of Oberlin. Memoirs of John Frederic Oberlin, Pastor of Waldbach, in the Ban de la Roche.—Compiled from authentic sources, chiefly in French and German.

IX. Geology. Geological Text Book ; by Amos Eaton, A. M.

X. Imprisonment for Debt. Fifth Annual Report of the Board of Managers of the Prison Discipline Society.

XI. The Water Witch. The Water Witch, or the Skimmer of the Seas—a tale, by the author of the Pilot, Red Rover, &c.

XII. Bank of the United States. April 9.

JUST PUBLISHED, by *GRAY & BOWEN*, The Christian Examiner and General Review, No. XLIV. for May, 1831.

CONTENTS.

ART. I. Theological School in Harvard University. Dr Codman's Speech in the Board of Overseers of Harvard College.

II. President Wayland's Sermon. The Certain Triumph of the Redeemer. A Discourse. By Francis Wayland, D. D.

III. Meaning of Alων. Professor Stuart's Appendix to his Exegetical Essays.

IV. Grimké's Discourses. 1. An Address on the Expediency and Duty of adopting the Bible as a Class Book. By T. S. Grimké. 2. An Oration of the Advantages to be derived from the Introduction of the Bible and of Sacred Literature, as Essential Parts of all Education. By Thomas S. Grimké.

V. Children's Books. 1. The Young Reader. By John Pierpont. 2. Peter Parley's Tales about the Sun, Moon and Stars. 3. Tales of Travels, West of the Mississippi. By Solomon Bell. 4. Cousin Elizabeth. By the Author of 'A Visit to the Sea Side.' 5. The Children's Robinson Crusoe. By a Lady. 6. The Little Girl's Own Book. By Mrs Child.

VI. History of English Baptists. Sermons on Various Important Public Occasions. By Robert Hall, A. M. 3. Memoir of the Life and Writings of the Rev. Andrew Fuller. By J. W. Morris. Editedby Rufus Babcock, Jr. 4. Asiatic Journal for British India.

VII. Sulivan's Political Class Book. The Political Class Book, By William Sullivan. Counsellor at Law. With an Ap pendix, by George B. Emerson.

VIII. Dr Waterhouse's Essay on Junius. An Essay on Junius and his Letters ; embracing a Sketch of the life and character of Wm. Pitt, &c.; with reflections relating to the Affairs of Great Britain and America, from 1763 to1785. By Benjamin Waterhouse, M. D.

IX. The Way of Truth and Union.

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ESSAY ON JUNIUS. Just published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

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# THE JURISPRUDENT.

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VOL. I. BOSTON, SATURDAY, JUNE 25, 1831. NO. XLVIII.

## DISSERTATIONS ON CONVEYANCING.

NO. I.

### DIRECTIONS FOR THE STUDY OF THE LAWS OF REAL PROPERTY.

BLACKSTONE commences his Commentaries by an Introductory Lecture, showing the great importance of the study of the law, not merely to lawyers, but also to all other classes of the community; and it would be easy to prove, that if this be more correct in any particular branch than in the others, it is in the study of the laws of property, or that portion of legal learning which is comprised under the general term *conveyancing*. A man may never bring an action at law or file a bill in equity, during the course of his life, but he is always the possessor of some portion of property, large or small, which he or his relatives have acquired, and which he wishes to enjoy with comfort and security during his life, and to hand down to others on his death. He will probably, without passing through a very eventful or busy existence, become a party to most of the transactions common in conveyancing. He generally either becomes the purchaser of lands, or he rents a house; in the one case a *purchase deed*, in the other a *lease*, will be wanted; he is desirous of raising a sum of money, and a *mortgage* is the security demanded from him; he marries and a *settlement* for the mutual benefit of himself, his wife, and his children, becomes expedient; he is anxious to transmit his property according to his own notions of the manner in which it should be enjoyed, and he finds it necessary to make a *will*.

The importance therefore, of every one possessing some knowledge of all these common-place transactions, will readily be seen and admitted; but if an acquaintance with the laws of property is an agreeable and useful accomplishment to the man of the world, to the legal practitioner, of whatever class, it is indispensable. The principles of the law of property are derived from well known and intelligible sources, and their application in practice is constantly demanded.

At least one half of all the causes which are tried in the courts of justice in England, whether in equity, at common law, or in ecclesiastical courts, arise entirely from disputed questions on the laws of property; and two thirds of the causes so tried involve indirectly some point relating to them. To the barrister, therefore, and to the student for the bar, whether practising, or intending to practise, in the upper or the lower end of Westminister Hall, a familiarity with these laws is absolutely necessary. To the solicitor and attorney, and to those who are qualifying themselves for that branch of the profession, it is at least as requisite. In the difficulties and intricacies of pleading, in the strife and turmoil of a court, the attorney can call in the assistance of others, and may rely almost devotedly on them. So also, on many embarrassing questions depending on the laws of real property, he may obtain the advice of counsel. The abstruse case, the voluminous abstract, the perplexing conveyance, may all be laid before the conveyancer, and the responsibility thrown upon him. But there are many duties, not less important than these, for the discharge of which the attorney must solely rely upon himself and his own sources of information. If employed for a vendor or mortgagor, he must prepare the abstract of the title-deeds, wills, and other documents; if employed for a purchaser or mortgagee, he must compare the abstract delivered, with the original deeds, and other documents abstracted. These duties alone, to be efficiently discharged, require no inconsiderable knowledge of the laws of property, and the formal language of legal instruments; and the solicitor must remember, that he is positively responsible to his client for fulfilling this portion of his labors faithfully and correctly, and that he can in no manner avoid the penalties to which his neglect or ignorance in these particulars will expose him. Thus, where an attorney acts for a client who advances money on the security of legacy given under a will to the borrower, the attorney is not justified in relying upon a partial extract from the will furnished by his client, but must consult the whole of the original will, unless the latter agrees to take the responsibility on himself. *Wilson* v. *Tucker*, 3 *Sark.* N. P. C. 154, S. C. 1 *Dow. and Ry.* N. P. C. So also, where an attorney was employed by a purchaser to inspect the title of an estate, and an abstract was delivered to him on behalf of his client. The attorney laid an abstract before counsel for his opinion, containing only some of the deeds, and omitting others contained in the abstract delivered to him. The opinion of counsel (Mr Preston,) on the abstract delivered to him, was, that the vendor had a good title; but that opinion would not have been given, if the deeds omitted had been stated to him in his abstract; and it was held, that the attorney was personally liable for the damage which the purchaser sustained from the invalidity of the title, Mr Justice Bayley observing, that 'It was the duty of an attorney to take care not to draw wrong conclusions from the deeds laid before him, but to state the deeds to the counsel whom he consults, or he must draw conclusions at his peril.' 3 *Barn. and Cress.* 799.

Now, in these cases, no fraud, no desire to deceive was imputable to the attorney. He was merely held liable from his neglect of the duties of his profession, and they are cited for the purpose of showing how easily a man who will not give himself the trouble of acquiring the proper knowledge, may not only injure the most important interests of his client, but may himself be forced to make good the damage arising from his neglect.

The importance of the knowledge of the laws of property to the professional man being admitted, the next inquiry is into the means of obtaining it. And let it not be supposed that these are very distressing or laborious. The principles of conveyancing, if the student will only enter heartily and earnestly into the inquiry, may now speedily be acquired. At a former period his difficulties were much greater; he had himself to explore, without any guide, the vast but undigested stores contained in Lord Coke's Commentary on Littleton, or Roles' Abridgment. He had to dig his learning himself out of these mines. His task at the present day is much more easy. Elementary books have been written by some of the most eminent men; treatises on every subject abound: he has now nothing to disgust or frighten him in the study; the folio volume has been superseded by the octavo; the black letter has entirely disappeared; the important difficulties are done away; and all that is wanted for the pursuit, is a moderate portion of industry, ability, and perseverance. The blame if the student did not advance, might formerly have fairly been laid to the dryness of the study and its varied and numerous difficulties; at the present day the blame can only attach to himself.

In recommending a course of study upon the laws of property, we shall choose that which we have found answer best in practice; other courses recommended by several eminent men will be pointed out,* but the one to which we shall call the reader's attention will be found to be more short and simple than any of these, and we know that it has been found very extensively serviceable, and has answered the end designed.

In the first place we should advise the student to devote at least six hours daily to reading; 'seven hours at law,' was Sir William Jones' translations of Lord Coke's '*sex horas*,' and the student may so translate it if he will; but six hours, properly employed, are, we think, at first sufficient. They must, however, be given at the best time of the twentyfour, when the mind is most fresh, and most susceptible of acquiring information; they need not be six *consecutive* hours: they had better, in fact, *not* follow each other, but they must be actually devoted to study. It will not be sufficient that the student shall pass the time in company with his books; he must make himself certain that he has actually acquired some knowledge during the intercourse; before commencing his day's study, he must inquire whether he recollects anything of his yesterday's. He should be satisfied that he is in the right course, that he is daily obtaining information: he must reflect on his legal pursuit in his leisure hours, and in his walks; nay, it will not be amiss if he dream a little about them, for that will prove, that his mind is thoroughly engaged in the study.

We have been thus minute, because we know how useless and tiresome mere general rules are; and we shall throughout this course of dissertations, continue to be as minute and particular in our directions and details as possible, because we know it will be of service to the student.

The first book which the student of the laws of real property should take up, is the second volume of Blackstone's Commentaries. Since this work was written, the principles of conveyancing have undergone some variation; the author, moreover, was not a practical conveyancer; and in reducing the large mass of learning contained

*The recommendations of different learned persons as to the study of the law, will be given in our next number.

in the earlier writers into a system, he was occasionally led into error; but, notwithstanding these disadvantages, the second volume of Blackstone will still be the best first book for the student. He will find the principles of the laws of property clearly stated and arranged; he will get a general view of the information which he is to obtain; he will meet with definitions and explanations of all techical phraseology, and he will find the whole written in a language so beautiful and harmonious, that it will be singular if he be not delighted with the study. Besides, on many points, the information which he obtains from Blackstone will be all that he will need.

To the study of this volume, then, the student must devote himself. A modern edition will of course answer better than an old one, but the notes generally appended will not be found of much service,—the text must be the great object of his study. He will go through it chapter by chapter, and master every sentence: the slowness of his progress through the volume is immaterial—let him only fully understand and reflect upon everything he reads; if he cannot fully comprehend it, let him look at the authorities referred to, if there be any, although they will not always help him much; if he is still in doubt, let him ask some competent person the meaning of the passage, but let him never leave it until he is satisfied he fully understands.

Blackstone's second volume should always be read *twice*, and it depends on the manner of the second reading whether it should not be read a third time. If, on a second reading, the student finds he is perfectly familiar with its contents, he may then leave it; but if he finds the subject still fresh to him, and that he does not remember much of it, he should read it again and again, until he almost knows it by heart. The great rule with Blackstone, and other *good* books, is, that you should never leave them without carrying away all they contain, and making it a portion of your own stock of knowledge.

If the student follows these directions, he will have gained this great advantage, that, if he takes up any other work on the laws of property, he will know, before reading it, some portion of its contents. He will be already the proprietor of a little stock of knowledge and he will be continually adding to the head. He will carry with him to the consideration of a fresh branch of the subject, some knowledge of the other branches, which will afford him the greatest assistance. His notions will be precise and accurate. and not mere floating generalities.

The next work to be taken up is Mr Butler's Notes to Lord Coke's Commentary on Littleton, particularly the long and able note upon uses and trusts. Here he will find the most important practical information presented to him clearly and correctly. We think that Lord Coke's Commentary may safely be passed over except as a work of reference. We are thoroughly convinced that it is not the book to be put into a student's hands: the quaintness of the style, the mass of useless matter, the diffusiveness on unimportant points, the entire omission of others now rendered important; all these faults, of which this celebrated work is undoubtedly guilty, disqualify it in our opinion from being a student's book. All the useful information it contains may now be much more easily and readily obtained in other works. We therefore are happy to remove this heavy obstacle from the path of the conveyancing student.

Having fully mastered Mr Butler's notes, we next recommend Mr Sanders' Essay on Uses and Trusts, in which this important learning is ably and perspicuously treated. The following works should then be most attentively read in their order: Cruise's Digest; Sugden's Powers; Fearne on Contingent Remainders; Preston's Treatise on Conveyancing; Powell on Devises; Roberts on Wills; Powell on Mortgages, by Coventry; and the first edition of Preston on Estates. All these are excellent works, and cannot be too well known.

If the student is master of these volumes, he will be now well acquainted with the theory of conveyancing. He will have a competent knowledge of one great branch of property law, and he should then turn his attention to the other great branch, the practice. He must endeavor to get a competent knowledge of abstracts of titles and of deeds. Here he will meet with more difficulty in obtaining his information merely from books. The chambers of a conveyancing counsel, or the office of a solicitor, will be the best places for acquiring this knowledge. These however, may not be open to him; or, if they are, some preparatory information may still be useful, and he may derive benefit from the following observations.

Let him read with the greatest attention Sugden's Vendors, a work repiete with the most useful practical information. He may also peruse more cursorily Preston on Abstracts, a book containing some valuable matter. The fourth vol. of Cruise's Digest should also be carefully perused a second time. The student may also consult with advantage the works containing Precedents in Conveyancing, and make himself master of the legal phraseology, and the usual forms employed in legal instruments. There are now several very valuable collections of these before the profession.

Having mastered all these works, the student will have attained a very tolerable knowledge of conveyancing. His progress will not depend on the number of books read, but on knowing a few good books well, and with the help of those already named, he will be prepared for all ordinary transactions. He may safely add many other modern treatises, which are considered of authority.

At his leisure he may take up the reports, but here he must exercise some discretion. He may, we think, safely leave the elder reporters, and keep them merely as works of reference, but he should read all the cases upon the law of property, in the more modern reporters, beginning with Atkins in the courts of equity, and Lord Raymond in the courts of common law. This of course will be a work of time, and this must be necessarily much disturbed by business, but we should advise its steady pursuit.

We shall now bring our observations to a close. In the first part of his studies the greatest endeavors should be made to acquire clear and precise ideas on the nature and kinds of property, the estate for which it may be granted and held, and the usual manner of alienating property. We shall, in an early number, direct our attention to these subjects, and in the course of these dissertations we shall, from time to time, apply ourselves practically to the difficulties of conveyancing, and endeavor to remove them.

It will, we think, be no slight incentive to the earnest consideration of the subject, for the student to reflect that it will make him master of a science which will be of practical importance in almost every great event of his life, the knowledge of which, to any extent, will be shared with him by a very limited class of persons; and that he will thus acquire a decided and well earned superiority over his fellow citizens.—*Legal Observer.*

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## REMEDY OF ATTORNEYS IN PARTNERSHIP.

To the Editor of the Legal Observer.

Sir—A case involving a question of considerable importance to the profession recently came before the Court of Common Pleas*, to which I would beg to call your attention. I allude to the question as to the right of an attorney, or of attorney partners, after dissolution, to commence an action for the recovery of costs for business done in a suit still pending. The circumstances were these:—The defendant, Brown, a personal friend of Vansandau during his partnership with Tindale, employed him to conduct a suit in Chancery, which was carried on by V. and T. down to the time of their dissolution of partnership, afterwards by Vansandau alone, and then continued by the new partnership of Vansandau and Brown till they dissolved, and then again by Vansandau alone. At the time of the dissolution of the second partnership of Vansandau and Brown, a special case had been directed by the Court of Chancery, and up to that period the defendant had paid a considerable sum on account to Vansandau. Signed bills were delivered to the defendant separately by V. and T. and V. and Brown, with a cash account as between the defendant and the partnerships.

V. and T. and V. and B. arrested the defendant in separate actions, for the amount of each bill, and both causes came on before *Gaselee* J., when a special case was directed for the opinion of the Court.

The objections raised on the part of defendant were, 1st, that he was not liable to be sued until the termination of the suit:—2dly, he denied a joint retainer, and insisted that he was indebted only to Vansandau solely;—and, 3dly, as to the action at the suit of V. and B., he contended that there was no business charged for therein, which had been transacted by Vansandau alone, after his dissolution with Tindale, and prior to the partnership of V. and Brown, and therefore, as to that part, the latter partnership were not entitled to recover.

The defendant gave notice to produce the joint retainers. The plaintiffs' clerks proved that the defendant called repeatedly at the offices of the partnership, and that their names were painted in a conspicuous place upon the door: but on cross examination, the plaintiffs' clerks stated that the defendant had always inquired for Mr Vansandau, and that he had not on any occasion seen Mr Tindale. The defendant's correspondence appeared also to have been always addressed to Mr V. and, not to the partnerships.

On the part of the defendant it was said, that the client had nothing to do with a partnership between attorneys—that a separate retainer could not be converted into a joint one against his consent—and that, as it could not be shown he had ever recognised the partnerships, the plaintiffs could not maintain their joint actions against him. It appeared too, on the trial, that Vansandau was still proceeding with the special case directed in the suit. It was attempted to distinguished partnerships between attorneys, and between others carrying on a *trade*, and that the

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* Vansandau and Tindal v. Brown.

names of the *firm*, in the case of attorneys, did not appear upon the *Roll*, &c.*

It should seem that the defendant had the benefit of the advice and exertions of the partnerships; and it may be observed, that solicitors cannot dissolve as against their client, he being entitled to their united exertions. *Cholmondely* v. *Clinton*, 19 Ves. 273. *Cook* v. *Rhodes*, ib. in note.

And it is questionable, whether the defendant would not have been entitled to sue the partnership for negligence, if any had been committed; and the production of the papers marked in the name of the firm, by the attorneys themselves, would probably have been evidence against them of joint employment. See *Hill* v. *Tucker*, 1 Taunt. 9. *Hellings* v. *Gregory*, 1 C. & P. 627; and *Carne* v. *Legh*, 6 B. & Cres. 124.

As to an attorney's right to withdraw his services, the cases, which are principally in equity lay it down that he cannot do so. I have always thought that such a general rule, under all circumstances, was a hard one: for suppose the attorney to quarrel with his client, because he will not act *improperly*, as the client may require; or the client otherwise misconducts himself; it would be very unjust that the attorney should be *obliged* to continue to act against his inclination.

I understand, however, that Lord *Tenterden* has, at *nisi prius*, in more than one case, decided that an attorney may withdraw *where the client misconducts himself*. Here there is *one* exception to the general rule, and I apprehend other circumstances might arise, which would justify the attorney in declining to act any longer; and wherever he would be so justified, I should think he might clearly sue for the amount of his bill, in whatever stage he might quit the proceedings. Messrs *How* and *Hepinstall* were concerned in an action, wherein Lord *Tenterden* held that an attorney might withdraw his services.

X. D.

* A party can only appoint one attorney, and cannot appear, or plead, in the name of a firm. 4. East, 195. *Ellenborough* C. J.

## DIGEST OF ENGLISH CASES.

### EVIDENCE.

*A.* was indicted for the murder of *H.* It was opened that *A.*, having malice against *P.*, hired *H.* to murder him, and that *H.* did so, and that *H.* being detected, *A.* had murdered *H.* to prevent a discovery of his (*A.*'s) guilt respecting the murder of *P.* Evidence was given of expressions of malice used by *A.* towards *P.*; and it was held that the prosecutor might also give evidence to show that *H.* was in fact the person by whom *P.* had been murdered.

A person charged with murder made confession before the coroner. It appeared that before he made this confession, *B.*, who was both a clergyman and a magistrate, had had an interview with him. Held, that the prosecutors were not bound to call *B.* before they put in the confession, but that it would be fair for them to do so; and that if the prosecutor did not call *B.*, the prisoner might call him before the confession was read to prove that some inducement was held out.

*A.*, a prisoner charged with murder, was visited by *B.*, who was both a clergyman and a magistrate. *B.* told him that if he was not the person who struck the fatal blow, and he would tell all he knew, he (*B.*) would use his endeavors and influence to prevent anything from happening to him: and if he (*A.*) did not make a disclosure, some one else would probably do so. After this *B.* wrote to the secretary of state, who returned answer that mercy could not be extended to *A.*; which answer was communicated by *B.* to *A.* After this *A.* sent for the coroner, and wished to make a statement. The coroner told him that if he did so it would be used as evidence against him. The prisoner made a confession. Held, that this confession was admissible.

If a prisoner in a confession made before a coroner, which is taken down in writing, mention the names of two or more persons who are also charged with the same offence, the confession, when read in evidence, must be read with these names in it just as it is, and the officer of the Court must not say 'another person' and 'a third person,' instead of reading the names.

If a prisoner charged with murder say in his confession, which is read in evidence against him, that he was present at the murder but took no part in the commission of it, this is evidence for him as well as against him; but the Judge will not direct an acquittal, as the jury may believe one part of the confession and disbelieve the other; however, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that. *Rex vs. Clewes*, 4 Car. & Pay. 221.

On an indictment for robbery, the declaration *in articulo mortis* of the party robbed, is not admissible in evidence. *Rex vs. Lloyd and others*, 4 Car. & Pay. 233.

A prisoner being under examination before a magistrate on a charge of felony, a statement was made in his presence by the solicitor for the prosecution which the witness called to prove it said he *believed* had been taken down in writing: Held, that under these circumstances, parol evidence of the statement was not admissible on the trial of such prisoner. *Rex. vs. Holingshead*, 4 Car. & Pay. 242.

### FREIGHT.

A ship-owner having effected a policy on freight, may, in the event of loss, recover from the underwriter the value of the benefit he (the ship-owner) would have derived (if there had been no loss) by carrying his own goods on the voyage insured. The risk on freight does not attach until goods are either actually shipped on board, or until there is an actual contract for shipping them. *Flint vs. Flemyng*, 1 B. & Ad. 45.

An indorsee of a Spanish bill of lading to whom the goods have been delivered under it, is liable in assumpsit for the freight, although the bill of lading is for delivery to the consignees without saying 'or their assigns,' such bill of lading appearing by evidence to be usually passed by indorsement. (*Per* Lord *Tenterden*.) *Beuteira vs. Ruding and another*, 1 Moo. and Mal. 511.

### INDEMNITY.

A promise to indemnify a co-surety need not be in writing. *Thomas vs. Cooke*, 3 M. & R. 444.

### INDICTMENT.

1. If on an indictment for stealing 'one sheep,' it appear that the animal stolen was under a year old, the prisoner must be acquitted, as he ought to have been indicted for stealing 'one lamb.' If an ewe be stolen, it must be so called in the indictment; and so a lamb must be called a lamb; and the term sheep is only proper where the animal stolen is a wether. *Rex vs. Birket*, 4 Car. & Pay. 216.

2. An indictment on the stat. 7 & 8 Geo. 4. c. 30. §§ 2 & 17., for setting fire to a barn and a stack of straw, charged the offences to have been committed 'feloniously, *voluntarily*, and maliciously,' instead of 'feloniously, *unlawfully*, and maliciously.' Held, bad. The prisoners had set fire to a stack of stubble, (which in Cambridgeshire is called haulm); they were indicted on the first indictment for setting fire to 'a stack of straw.' Held, that this was not straw. And on their being again indicted for setting fire to 'a stack of straw, called haulm,' the judge intimated, that to convict upon such a count would not be safe; and the verdict in consequence was taken upon other counts, charging the setting fire to a barn and a wheat stack. *Rex vs. Reader and another*, 4 Car. & Pay. 245.

### LEGACY.

Swinburn's Treatise is a very useful compilation, giving a compendious view of the civil law from the text writers; but he is not to be considered as an authority by our courts of equity.

The distinction between voluntary and compelled payments has been exploded in our courts for more than a century past.

The civil as well as the ecclesiastical law use a latitude in admitting parol evidence, which is wholly repugnant to the genius of our law.

It is of more importance to the public that the rules of construction when settled by solemn decisions should be adhered to by succeeding judges, than that those rules should have been originally adopted on incontrovertible reasons. *Ashe vs. Berry*, 1 Beat. 255.

In an abstract of a will bequeathing legacies bequeathed by will made by the testator, he added in the outer margin to his daughters' legacies, 'I intend to make this up British money.' Held, this is an immediate gift in argumentation of the legacies, and not merely a memorandum indicating intention to argument them by future acts. *Mason vs. Mason*, 1 Beat. 322.

### LIBEL.

1. In an action for libel, where the language is ambiguous, and it is doubtful whether it imputes any injurious matter to the plaintiff, the proper question for the jury is, not whether the intention of the publisher be to injure the plaintiff, but whether the tendency of the matter published be injurious to him. *Fisher vs. Clement*, 10 B. & C. 472.

2. Though a letter written confidentially by the correspondents of a foreign mercantile house contains very strong expressions concerning third persons engaged in mercantile transactions, imputing to such persons 'notoriety for everything but fair dealing and a strict adherence to their engagements,' yet *semble* that these expressions will not, *per se*, take away the privilege which attaches to such a communication, and make the letter a libel. *Ward and another vs. Smith*, 4 Car. & Pay. 302.

### LUNATIC.

In an ejectment against parties in possession

under a deed, the question was whether the deed was void on account of unsoundness of mind in the grantor. The Judge directed the jury that they were to decide whether the party was of unsound mind, or not: that to constitute such unsoundness as should avoid a deed at law, the party executing must be incapable of understanding and acting in the ordinary affairs of life: that it was not necessary he should be without any glimmering of reason; and as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did in executing the deed in question, when its general purport was fully explained to him. But he refused to tell the jury, that in order to avoid the deed at law, the unsoundness of mind must amount to idiocy; and a bill of exceptions was accordingly tendered to him. Held, that the direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions. *Ball vs. Mannin*, 3 Bli. 1.

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NEGLIGENCE.

1. Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which, one of the walls of such adjoining premises rested; It was held, that the party giving the notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old. *Massey vs. Coyder*, 4 Car. & Pay. 161.

2. A tradesman who has a cellar opening upon the public street is bound, when he uses it, to take reasonable care that the flap is so placed and secured as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrongdoer throws it down, the tradesman will not be liable in damages for any injury occasioned by it. In an action for an injury to the person, occasioned by the negligent and careless placing of such flap, the declaration of one defendant, who has suffered judgment by default, cannot be used as evidence against the other defendants. *Daniels vs. Potter and others*, 4 Car. & Pay., 262.

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NEW TRIAL.

1. The judge, in summing up a case, directed the jury, if they came to a certain conclusion, to give the verdict for the plaintiff; but if they came to either of two other conclusion, which he pointed out, to find for the defendant, and state on which ground their judgment was formed. The plaintiff then chose to be nonsuited. Held that he was not entitled to a new trial on the ground of misdirection, if either of the two latter points was rightly put to the jury. *Vacher vs. Cocks, and others*, 1 B. & Ad. 145.

2. The court will not grant a new trial, even on payment of costs, where the defendant or his attorney, having an opportunity of trying, permits a verdict to be taken against him as in an undefended cause. *Breach vs. Casterton and others*, 7 Bing. 224.

3. Where a defendant omitted to appear in an action for crim. con. with his sister-in-law, and the jury gave more damages than were laid in the declaration, the defendant assigning no good reason for not appearing to defend, the court refused to grant a new trial on any terms. *Masters vs. Barnwell*, 7 Bing. 224. n.

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## LIABILITY OF AGENTS.

KING'S BENCH.—GUILDHALL.

Before the Lord Chief Justice and a Special Jury.

*Ridgway* v. *Milne and another.*

Sir *James Scarlet* stated that this was an action to recover a sum of money of the defendants, Messrs Milne and Parry, solicitors of the highest eminence and respectability. In seeking to obtain payment from them of this sum, he was ready to admit that there was not the slightest ground of imputation against them for withholding it. It was a mere question of legal right, whether under the circumstances, they were bound to sustain a loss, occasioned by their having paid a sum of 500*l.* to a person of the name of Kay, an attorney at Bolton, who had since his receiving it become a bankrupt. Some years ago the plaintiff, a gentleman residing in Lancashire, having a sum of 4000*l.* to invest in securities, transmitted it for that purpose, by a bill specially indorsed to the defendants who accordingly advanced a portion to the Duke of *Gordon* and part to another gentleman. These securities were subsequently redeemed, and the sums so advanced, respectively returned by the defendants to Mr Ridgway, with the exception of 500*l.* which they had delivered over to Mr Kay, without the authority of the plaintiff for so doing. Kay had become bankrupt and the plaintiff now called upon the defendants, to account to him for the money they had so paid, in their own wrong. This was the whole of the case, and having proved it, he should of course be entitled to a verdict.

Several witnesses were called upon the part of the plaintiff who proved the general features of the case, but upon their cross-examination it appeared the transaction was conducted through the medium of Mr Kay, who was the friend and confidential solicitor of the plaintiff, and that Messrs Milne and Parry were the agents of Kay, it appeared that Kay being in London, the plaintiff transmitted the 4000*l.* to Kay, by whom it was delivered to the defendants, that the defendant paid the balance of 500*l.* remaining in their hands to Kay, as the accredited agent and immediate solicitor and friend of the plaintiff.

Mr *Frederick Pollock*, upon the facts thus elicited in cross-examination, addressed the jury in favor of the defendants, contending against their liability. He observed that his learned friend had done no more than strict justice, when he admitted, that more respectable and honorable gentlemen were not to be found in the profession; they certainly would be the last men to refuse the payment of any demand for which there was the least pretence. In this case there was none; they considered Kay as the party in whom the plaintiff confided, and to whom he had intrusted the control and management of his pecuniary transactions, not merely upon this occasion, but upon many others; considering Mr Kay in that point of view, they conceived, when they paid the balance in their hands, that they were paying the money to the plaintiff himself. It was three years and upwards before the bankruptcy of Kay, when the payment had been made to him, Kay; and if the plaintiff had not been perfectly satisfied at his having received it, he would undoubtedly have remonstrated with the defendants upon the subject, and insisted upon having it paid to himself, but he had done nothing of the kind; he had acquiesced for a period of three years and upwards; it was not till after this lapse of time, and when Kay had become insolvent and bankrupt, that he turned round upon the defendants, unjustly, to fix them with this sum, which he well knew they had paid, with his own approbation, to the person in whom he reposed confidence at the time, and so continued to do till his bankruptcy.

The Learned Judge shortly addressed the jury, drawing their attention to the points in question in the cause; and the jury, after deliberating a short time, returned their verdict for the defendants.

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## CONSISTORY COURT.

CONDONATION.

Dr Lushington pronounced sentence. After detailing the suit, as instituted originally by Mr William Bramwell against Fanny his wife, for restitution of conjugal rights, which had been met by a suit of divorce, on the ground of adultery and cruelty, alleged by Mrs Bramwell against her husband, he proceeded to observe, that though there had been great familiarity and intimacy between Mr Bramwell and Elizabeth Jeffery from the year 1821; and although there was sufficient room for suspicion, in his placing a young woman of 26 or 27, who had been in his service, in charge of the Castle Inn, Tunbridge, to which he was in the habit of resorting; yet up to a certain period his conduct might be explained in a manner consistent with innocent intentions. But the motive assigned for his resorting there, namely, business, offered no excuse for the improper familiarities which had passed between him and Elizabeth Jeffery, and which were accompanied by circumstances demonstrative of a criminal attachment. In the paper in which Mr Bramwell pledged himself in the most solemn manner to abandon his connexion with Elizabeth Jeffery, the term *connexion* must have one of two meanings; either it was an admission of the adultery, or not. If it was not an admission, it would be difficult to say that the adultery had been condoned at all. Taking the correspondence in conjunction with the familiarities which had been proved and the whole conduct of the parties, he was of opinion that adultery had been consummated between the parties. Upon this a condonation followed; but this was always a conditional pardon, providing there was no repetition of the improper conduct, and the wife possessed a perfect knowledge of all the offences she pardoned. Now it was not difficult to show that Mrs Bramwell was not then aware of the circumstances which came to her knowledge in the letter of the 10th of May, and that, in fact, she was not cognisant of the adultery at all. But, supposing the condonation complete, what was the subsequent conduct of the husband. He undertook to separate himself entirely from Jeffery, and never, 'if possible,' to carry on the least correspondence with her. Shortly after, however, she clandestinely returned to the Castle Inn, was kept concealed in a bedroom, and this fact was desired by Mr Bramwell to be concealed from his wife. If these meetings were for the purpose, as it had been alleged, of settling accounts, it was the duty of Mr Bramwell to have communicated the fact to his wife, and to have had a third

person present. But there was a subsequent return of Miss Jeffery to the Castle Inn; and if the court was to come to a conclusion on that point, what could it conclude but that Mr Bramwell brought her there himself? and where there was so much clandestinity and fraud, guilty intentions must be inferred. He (Dr Lushington) was satisfied that adultery had been committed before May 26th; that it was repeated subsequently and that the condonation was no bar to the suit of the wife.— *Bramwell* v. *Bramwell*. *Consistory Court of Rochester.*

## RECENT AMERICAN DECISIONS.

### CHANCERY.

#### GUARDIAN AND WARD.

An adult husband is entitled to the guardianship of the person of his wife during her minority. *Kettletas* v. *Gardener*, 1 Paige, 488.

The court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. *Stephens* v. *Van Buren*, 1 Paige, 479.

#### HUSBAND AND WIFE.

A wife may compromise a suit brought against her husband for a divorce; and the court will only interfere so far as to see that she is not overreached or imposed upon in the settlement. *Kirby* v. *Kirby*, 1 Paige, 565.

The solicitor for the wife cannot insist upon proceeding with the suit against her consent, upon the ground that his costs are not paid. *Ib.*

An adult husband may file a bill in chancery for the partition of his wife's estate, although she in an infant. *Sears* v. *Hyer*, 1 Paige, 483.

The service of a subpœna upon the wife is only necessary where the proceeding is against her in respect to her separate estate. *Leavitt* v. *Cruger*, 1 Paige, 421.

In a suit brought by either husband or wife for a divorce, on the ground of adultery, the wife prosecutes and defends without a guardian or next friend, as a feme sole; and her affidavit is admissible against the husband, as to any matter or proceeding in the cause. *Kirby* v. *Kirby*, 1 Paige, 261.

An injunction, a receiver, and a writ of *ne exeat*, may all be resorted to in the same suit, to aid the court in doing justice between the parties. *Ib.*

A husband, by committing adultery, subjects himself and his property to the jurisdiction of the court of chancery, so far as to enable the court to order his property to be applied to the support of his family, both during the litigation and afterwards. *Ib.*

And the power of the court extends to compelling the husband to apply a portion of his daily earnings to the same object, during the pendency of the suit. *Ib.*

#### INFANT.

A suit may be commenced in the name of an infant without his knowledge or consent. The court, however, on a proper application, will refer it to a master, to ascertain whether such suit is for the benefit of the infant; and if the master reports that it is not for his benefit, will stay the proceedings. *Fulton* v. *Rosevelt*, 1 Paige, 178.

#### INJUNCTION.

An injunction is not waived by a delay in applying for an attachment for its violation. *Dale* v. *Rosevelt*, 1 Paige, 35.

Where executors obtained a decree for a perpetual injunction, restraining R. from suing or prosecuting any action at law against such executors or other representatives of their testator, for the recovery of the arrears of an annuity; *held*, that the prosecution of a suit at law against the heirs of the testator, who were not parties to the suit in this court, to recover the same annuity, was not a breach of the injunction. There is no privity between an executor and the heir or devisee of the land. *Ib.*

Where the complainant suffered three years to elapse without compelling an answer from one of several defendants, and the other defendants, in their answer charged collusion between the complainant and the defendant who had not answered; it was *held*, that under such circumstances, the fact that all the defendants had not answered, could not be urged as an objection to the dissolution of an injunction, unless the complainant denied upon affidavit, all collusion, and stated sufficient reason for not compelling an answer from all the defendants. *Ward* v. *Van Bokkelen*, 1 Paige, 100.

Where hydraulic works are erected on both banks of a stream, the owners of the works are each entitled to an equal share of the water. If the owner of the mills on either side attempts to deprive the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus to destroy his mills, a preliminary injunction will be granted, as the injury might be irreparable. *Arthur* v. *Case*, 1 Paige, 447.

#### JUDGMENT.

Where certain lands upon which a judgment is a lien, are advertised for sale under such judgment, part of which lands have been previously sold by the debtor, and there are other lands of the debtor unsold, but the lien of the judgment would expire before such other lands could be advertised and sold, the owner of the judgment in such case would not be bound upon the requisition of the purchaser from the debtor to abandon the sale of the lands so advertised. *James* v. *Hubbard*, 1 Paige, 228.

The proper course for such purchaser would be to offer to pay the amount of such judgment and to take an assignment of the same; and then by filing a bill against all the parties in interest before the expiration of the lien of the judgment, it seems such purchaser would be able to preserve the lien so far as to compel contribution upon equitable principles. *Ib.*

A judgment creditor cannot enforce his judgment against the land of a subsequent purchaser, so long as there are other lands of the debtor sufficient to satisfy the judgment. *Ib.*

Where there are successive purchasers there is no contribution, and their lands are chargeable with the judgment against the debtor in the inverse order of alienation; that is, the lands last sold are to be first charged. *Ib.*

A bill filed in the court of chancery against heirs or devisees, has the same effect as the commencement of a suit at law, in preventing the alienation of the estate. But if a judgment at law is obtained before the decree in the court of chancery, the plaintiff in such judgment thereby obtains a prior lien on the legal estate in the hands of the heirs or devisees. *Purdy* v. *Doyle*, 1 Paige, 558.

Where a suit is commenced against five heirs for the debt of their ancestor, and the writ is only served upon three, but the plaintiff proceeds and takes judgment against all as joint debtors, he obtains a lien only upon the estate of those upon whom the process was served. *Ib.*

Where a creditor has obtained a lien upon real estate by a judgment at law, if he subsequently brings an action of debt on his judgment and recovers a new judgment, he will lose his first lien. *Ib.*

In chancery a judgment recovered in a court of law is considered as binding upon the real parties in the suit, although not the nominal parties on the record. *Southgate* v. *Montgomery*, 1 Paige, 41.

#### JURISDICTION.

Although a person has a perfect remedy at law to recover for the breach of an agreement connected with a note, if he cannot avail himself of it as a defence to an action on the note, he can come into chancery to have the note cancelled, and to recover the balance, if any, which may be due him. *Reed* v. *Bank of Newburgh*, 1 Paige, 215.

Where a sheriff, after collecting money on an execution, died insolvent without paying over the same, and no person administered upon his estate, it was *held* that no suit could be sustained in chancery against the sureties of the sheriff upon his bond, to enforce the payment of the amount so collected by him. *Bank of Utica* v. *Dill*, 1 Paige, 466.

Where there existed mutual accounts between M. and E.; and E. sued M. in a foreign court for a settlement, and judgment was rendered against E., and afterwards a suit pending in the Supreme Court of New York, commenced and prosecuted by the assignees of M. in the name of M. against E., was referred to referees, who reported a balance due to E. from M., on which report judgment was entered in favor of E., it was *held*, that the judgment against E. in the foreign court was not binding upon E. as between him and the assignees of M., and that if that judgment was binding upon E., as it was known to the assignees previous to the hearing before the referees, it should have been insisted upon by them at that hearing, and could not afterwards be a ground of relief in this court. *Southgate* v. *Montgomery*, 1 Paige, 41.

This court has jurisdiction to set aside and cancel deeds and other instruments fraudulently obtained, and which are attempted to be set up inequitably. *Thomson* v. *Graham*, 1 Paige, 384.

A court of chancery has jurisdiction to correct mistakes in policies of insurance as well as in all other written instruments. *Phœnix Insurance Company* v. *Gurnee*, 1 Paige, 278.

Where there are difficulties in relation to an offset at law, relief will be granted to the party claiming the off-set in chancery. *McClaren* v. *Pennington*, 1 Paige, 102

#### LEGACY.

Where a testator devised his real and personal estate to two of his sons, provided they should pay certain legacies given in the will, and the legatees filed their bill against them and obtained

a decree for the sale of the real estate to pay the legacies, which, upon being sold, proved insufficient ; and no decree having been asked in that suit, charging the devisees personally with the payment, *held* that the legatees could not file a new bill against them for that purpose. *Cook* v. *Grant*, 1 Paige, 407.

It is a general rule that legacies chargeable upon the real estate and payable at a future day, are not vested, and lapse by the death of the legatee before the time of payment arrives. *Birdsall* v. *Hewlett*, 1 Paige, 32.

But this rule has never been extended to a case where the estate was given to a stranger upon condition that he paid the legacy charged thereon; and the rule has been much limited, even as between the legatees and heirs at law. *Ib.*

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LIEN.

A grantor of lands has an equitable lien on the estate sold for the payment of the purchase money ; and this lien is not waived by the grantor's taking the mere personal security of the purchaser only, unless there is an express agreement between the parties that the equitable lien be waived. But wherever any security is taken on the land sold, or otherwise, for the whole or a part of the purchase money, the equitable lien will be waived, unless there is an express agreement that it shall be retained. *Fish* v. *Howland*, 1 Paige, 20.

So the lien is waived where a note or bond is taken of the vendee for the purchase money, in which a third person joins as security. *Ib.*

Likewise if the vendee sells to a third person, without notice, the lien is lost. *Ib.*

Where upon the sale of lands the negotiable note of the purchaser is given for the purchase money, the vender retains an equitable lien upon the land ; but an indorsee is not, from the mere transfer of the note, entitled to the benefit of such lien, where the indorser has not been made liable upon his indorsement. *White* v. *Williams*, 1 Paige, 502.

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STATUTE OF LIMITATIONS.

Where a legacy to a daughter was payable on her marriage or when she became of age, and she married before arriving at full age, in a suit brought by her and her husband for the legacy. after the lapse of six years, it was *held*, that the statute of limitations did not run against her, she coming within the exception in the statute in favor of femes covert. *Wood and Wife* v. *Ex'rs. of Riker*, 1 Paige, 616.

Where the statute of limitations is a good defence to only a part of the complainant's demand, if pleaded as a bar to the whole, the plea will be bad. *Ib.*

The statute of limitations is a good plea in bar in equity as well as at law. *Stafford* v. *Bryan*, 1 Paige, 239.

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MORTGAGE.

An assignment of a land contract for the security of a debt due the assignee, upon the condition, that if the debt was paid at the time stipulated, the assignee should re-assign the contract, is, in equity, a mortgage, and the assignor has a right of redemption. *Brockway* v. *Wells*, 1 Paige, 617.

Bona fide purchasers without notice, who have actually paid the purchase money, cannot be disturbed in their title to the premises purchased, where the deed intended as a mortgage is absolute on its face. *Whitlick* v. *Kane*, 1 Paige, 202.

In such case, the remedy of the mortgager is personal against the mortgagee and his legal representatives for the moneys received on the sale of the mortgaged premises. *Ib.*

Where the owner of the legal estate takes an assignment of an outstanding mortgage, there will be no merger of the mortgage, unless the owner of the legal estate so intended when he purchased the mortgage. *Russell* v. *Austin*, 1 Paige, 192.

Where a mortgagee obtains a renewal of a lease, or any other advantage in consequence of his situation as such mortgagee, the mortgager coming to redeem, is entitled to the benefit thereof. *Slee* v. *Manhattan Company*, 1 Paige, 48.

If the prior mortgage should not be due, the junior mortgagee will be entitled to a decree for a sale of the mortgaged premises, subject to such prior mortgage. *The Western Ins. Co.* v. *The Eagle Fire Ins. Co.*, 1 Paige, 284.

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NE EXEAT.

If the party against whom the final decree is made, intends to remove beyond the jurisdiction of the court before the decree can be enforced by execution, a *ne exeat* will be granted. *Dunham* v. *Jackson*, 1 Paige, 629.

A *ne exeat* is in the nature of equitable bail, and may be applied for in any stage of the suit. *Ib.*

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NOTICE.

Where a party has sufficient to put him on inquiry, it is equivalent in equity to actual notice. *Pitney* v. *Leonard*, 1 Paige, 461.

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PARTIES.

As a general rule, a mere witness cannot be made a party defendant. *Fulton Bank* v. *Sharon Canal Company*, 1 Paige, 219.

But suits against corporation are exceptions to this rule. As they do not answer upon oath, the only means of obtaining a discovery from them is to make their officers and agents parties, and to compel such officers and agents to answer the bill. *b.*

The former as well as the present officers of a corporation can be made parties to a suit against such corporation, and compelled to make discovery of facts within their knowledge. *Ib.*

Where a trustee prosecutes a claim for the benefit of the cestui que trust, the latter must be made a party. *Fish* v. *Howland*, 1 Paige, 20.

One of two devisees cannot file a bill for an account against one of two executors, where the executors, by the will, have the charge of the real estate, without making the other devisees and executors parties. *Fabre* v. *Colden*, 1 Paige, 166.

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PARTNERSHIP.

A surviving partner has the legal right to the partnership effects. *Case* v. *Abeel*, 1 Paige, 398.

But in equity he is considered merely as a trustee to pay the partnership debts, and to dispose of the partnership property for the benefit of himself and the estate of the deceased partner. *Ib.*

SHERIFF'S RETURN OF 'LANGUIDUS.'

*Jeremy* showed cause against a rule calling on the Sheriff of Berkshire to show cause why his return to a writ of *latitat* should not be quashed. The return was, that he had gone to the lodgings of the defendant, on the 5th of August ; that the lodging consisted of but one room ; that the defendant was then confined to his bed with illness ; that he took him into custody ; that he received a certificate of his illness from the medical man attending him, which declared him to be so ill that it would be dangerous to his life to remove him that on this statement he relinquished the custody of the defendant's body; that he went, a second time, on the 7th of August, when he found that the defendant had removed himself out of the bailiwick. He submitted that it was clear from all the authorities that '*languidus*' was a good return. It appeared on the face of this return, that the defendant was so sick, that the Sheriff would not keep him in custody for fear of the dangerous consequences of removal. That rendered the return sufficient. He cited *Cavenagh* v. *Collett*,* and *Baker* v. *Davenport*,† in support of his argument.

*Steer*, in support of the rule, contended that it was the duty of the Sheriff to keep a defendant in custody, although he might not have him in Court at the return of the writ. He had no right to let him escape, as in the present instance he had. If it were true that the medical man told him that the removal of the defendant from his lodging would be the cause of peril to him, it was not therefore true, that it would have been the cause of peril that the officer should remain there, and keep him in custody. He certainly ought not to have allowed him to remain two days out of custody. In both the cases cited by the other side, the return stated the illness of the defendant at the return of the writ. Here it was not stated how long the illness lasted, and, therefore, it was quite distinguishable.

*J. Parke J.* The return here does not account for the defendant up to the period when the return is made. Now, all returns of '*languidus*' are excuses, not for not taking and keeping the defendant in custody, but for not having him in Court at the return of the writ. Therefore, the illness of the defendant stated in the return is no excuse for not keeping him in custody. But, supposing it was an excuse for not keeping him in custody, yet it was no excuse for not going at an earlier period. Certainly the officer ought to have gone there as soon as it might be reasonably supposed the defendant could be removed with safety. The return must therefore be quashed.—*Rule absolute.*—*Perkins* v. *Meacher*, *K. B. H. T.* 1831.

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* 8 D. & R. 606.
† 4 B. & A 279.

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CHEAP LAW IN THE UNITED STATES.

I visited the high court of justice, where but little talent seems necessary, and where the judge upon the bench, and the counsel, and crier below, all seem upon an easy familiar footing of equality, consulting together tete-a-tete about the time of opening court next day.

* * * *

The judges here have not legal knowledge enough for their station, and of course not weight of character, or dignity sufficient, to fill it well. Counsellors Jones and Key, of '*star bespangled banner*' fame, influence and carry their honors almost as they please. The bar is greater than the bench ! Litigation frequently arises here from

the imaginary independence which one man has, or fancies he has, of others, to show which, on the least slip, a suit is the certain result. *It is bad for the people that law is cheap, as it keeps them constantly in strife with their neighbors, and annihilates that sociability of feeling which so strongly characterizes the English.* From the constant litigation amongst the people of this country, arise that universal apathy, and the want of those kindly feelings of the heart, which show themselves on all occasions in the conduct and character of the people of the old country. There were more suits for debt in Washington county court, in a late Term, (seventeen hundred,) than perhaps in all England. Further comments are left to the reader.—*Faux's Memorable Days in America.*

**THE JURISPRUDENT.**

BOSTON, SATURDAY, JUNE 25, 1831.

## LAW SUMMARY.

By B. L. Oliver, Esq.

The design of this work is 'to furnish a concise view of the law, in relation to certain subjects of frequent occurrence in ordinary business.' The selection of the subjects has been made with reference 'to their practical utility and general application.' It is apparently intended, not so much as a text book for the profession, as to meet the wants of men in business, and make every man, in some sort, 'his own Lawyer.' This effort, as well as many other of a similar character, to place the knowledge of the common and plain principles of law within the reach of the community in general, is entitled to commendation. There is no good reason why every citizen should not understand and become familiar with the general principles of the law under which he lives and acts. They should not be locked up in the grasp of any number or class of individuals. There is no mystery about the law or its teachers, which is not to be approached. It may and it should be open as day to the public mind. If ignorance, credulity or dishonesty have thrown barriers around it, they should be broken down. It should neither be written so high that men cannot read it, nor kept so dark that they cannot see it and learn it.

The obstacle to a general intelligence upon these subjects, heretofore, has not been found so much in a want of books, which were calculated to impart it, as in the prices, which have confined their sale almost entirely to the members of the profession. It has been cheaper to pay a lawyer for such information as was wanted than to buy the books necessary to give it. It is vain to make books to enlighten the public mind, unless the public can buy them. The law may be made as clear as light to every citizen of ordinary capacity, and yet it will avail him nothing, if he must sacrifice more to get at the knowledge than the knowledge is worth.

While the principles of every other science are brought within the ability and means of the humblest citizen, in our community, the first elements of this are unattainable but at an expense which few can bear.

With all the improvements in the art of printing and the increased sales, not one iota is abated in the price of Law Books from *Coke* to the *Law Summary*. Everybody, who has anything to do with their manufacture or sale, complains of the poverty of their profits. The author gets nothing for his labor, the printer for his work, nor the seller for his trouble, and yet the buyer pays double, at least, what the article costs.

By what process of addition or multiplication; by what new principle in arithmetic, is it, that these books sell for two or three times the price of any other publications, and yet nobody is the gainer?

The Massachusetts Reports sell at 4,50 or $5, —the New York and United States at 6 or $7, per volume; while any other books, of the same matter and number of pages, are *marked* at $2 or $2,50, and *sell* for less.

The little volume of Mr Oliver is marked at $2,50 and sold at that price, while it contains only about as much, as a volume of Scott's Novels —or the First Book of History, for which but seventyfive cents are *asked*.

It is said that the editions are small and the sale slow. This is comparatively true, but not strictly so. Probably fifteen hundred copies of the Massachusetts Reports are sold annually; and any work of merit will bear an edition of 1000 copies, and readily sell so as to meet the necessary advances.

Every member of our community should have, at least, a copy of our Laws; and yet how few can afford to give 4 or 5 dollars a volume for them. Other citizens than Lawyers would be glad to know the opinions of the courts. They are public property and should be known; but it is vain to suppose the Reports will be generally bought at their present extravagant prices.

If the evil cannot be otherwise remedied, the competent authorities should interfere, and while they exact obedience to the Laws, should furnish a cheap and practicable way of learning and understanding them.

The following table of the subjects discussed in the *Law Summary* will give some idea of the plan and object of the author.

PART I.

*Of Contracts in General.*

Chapter I.—Definition and essential requisites of all Contracts.

II.—The construction, the performance, and the rescinding of Contracts.

III.—On Contracts with Minors.

IV.—On Contracts with married women, and the liability of their husbands.

V.—Of the Statute of Frauds.

VI.—The Statute of Frauds, continued.

VII.—Of Sales.

VIII.—Of Stoppage in transitu.

IX.—Of Liens.

X.—1. Of the effect of an alteration of written contracts. 2. Of payment. 3. Of acquittances, receipts and releases. 4. Of tender of payment or performance.

PART II.

*Containing an Abstract of the Law on various subjects, viz:*

Chapter I.—Agents and Factors.

II.—Partnership.

III.—Bills of Exchange, Promissory Notes, Checks, Drafts, &c.

IV.—Of insurance against Marine Risks; against Fire; and Life Insurance.

V.—Law of Shipping;—Owners; Masters; Mariners; Bills of Lading; Charter Parties.

VI.—Bottomry and Respondentia.

VII.—The Law of Carriers; of Inns and Travellers.

### CHIEF JUSTICE SAUNDERS.

His character and his beginning were equally strange. He was at first no better than a poor beggar boy, if not a parish foundling, without known parents or relations. He had found a way to live by obsequiousness, (in Clement's Inn, as I remember,) and courting the attorneys' clerks for scraps. The extraordinary observance and diligence of the boy made the society willing to do him good. He appeared very ambitious to learn to write, and one of the attorneys got a board knocked up at the window, on the top of a staircase, and that was his desk, where he sat and wrote after copies of court and other hands the clerks gave him. He made himself so expert a writer that he took in business, and earned some pence by hackney writing; and thus, by degrees, he pushed his faculties, and fell to forms, and by books that were lent him became an exquisite entering clerk; and by the same course of improvement of himself, an able counsel, first in special pleading, then at large; and, after he was called to the bar, had practice in the King's Bench court equal to any there * *. As for his parts, none had them more lively than he; wit and repartee in an affected rusticity, were natural to him; he was ever ready, and never at a loss, and none came so near as he to be a match for Sergeant Maynard. * * With all this, he had a goodness of nature and disposition in so great a degree, that he may be deservedly styled a philanthrope* *. As to his ordinary dealing, he was as honest as the driven snow was white: and why not, having no regard for money, or desire to be rich? and for goodnature and condescension, there was not his fellow. I have seen him for hours and half-hours together, before the court sat, stand at the bar with an audience of students over against him, putting of cases and debating so as suited their capacities, and encouraged their industry. * * While he sat in the court of King's Bench, he gave the rule to the general satisfaction of the lawyers.—*North's Life of Lord Keeper Guilford*, ed. 1826, p. 41-5.

### LORD ELLENBOROUGH.

*Erskine* having been bred to the sea, was thought to have the advantage over *Law* in cases of shipping and insurance, which the latter by no means liked. *Erskine* having vaunted his knowledge in a shipping case at Nisi Prius, *Law* asserted his superiority in the words of Neptune, in the first Æneid, 1, 138.

> 'Non illi imperium pelagi sævumque tridentum,
> Sed mihi sorte datum: tenet ille immania saxa,
> Vestras, Eure, domos: illa se jactet in aula
> Æolus, et clauso ventorum carcere regnet—

Claiming to himself the empire of the sea, allowing his antagonist the dominion of the winds only.—*Legal Observer.*

### MR DUNNING.

The following anecdote confirms the statement that Mr Dunning's early diffidence gave place in after years to assurance. One of the choristers of Exeter cathedral was cross-examined by this celebrated advocate, who put several questions which the witness considered impertinent. At length the witness had occasion to mention the Lord Mayor. Dunning said, 'will you please to give us the gentleman's name, sir?' 'His sir-name,' retorted the witness, 'is Crosby, and if the judge and the jury wish to know his Christian name, they have only to look in your face, where they may read it.' The name was *Brass* Crosby.—*Ib.*

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, JULY 2, 1831. NO. XLIX.

## THE STUDY OF THE LAWS

### OF REAL PROPERTY.

In our last number we made some observations on the importance of the study of the law, more particularly that part of it termed conveyancing. We showed that a minute acquaintance with this branch of the law is essential to the practitioner, and that some knowledge of it is advantageous to every man who inherits, purchases, or alienates property. That the student might not be deterred by the appearance of insuperable difficulty, we displayed the means which modern science has provided for facilitating his progress; and to enable him to use those means beneficially, we pointed out a course of study founded on practical experience. In bringing forward our own plan we adverted to others which have been laid down at different times by persons eminent for legal learning. These we now present to our readers, and we trust that they will be perused with interest. They exhibit the various opinions which have prevailed at different periods of our history, of the steps to be taken to insure a knowledge of the subject; and we give them the more readily, as we differ from most of them, and wish, at the same time, to afford the student the fullest information.

Lord HALE'S advice is as follows. See Pref. Roll. Abr. It is of a more general description than the remarks we have given.

'Touching the method of the study of the common law I shall say thus much. It is necessary for the student to observe method in his reading and study; for though his memory be ever so good, he will never be able to retain all, or even the greatest part, of what he reads to the end of seven years, or even a much shorter time, without the assistance of use or method. Yea, what he has read seven years since, will without that help appear new to him as if he had never read it: this method may be varied according to fancy. I shall therefore propound that which, by some experience, has been found useful; and it is this. 1st. It is proper for a student to spend about two or three years in the diligent reading of *Littleton, Perkins, Doctor and Student, Fitzherbert,* and especially my *Lord Coke's Commentary,* and possibly his reports; this will fit him for exercise, and enable him to improve himself by conversation and discourse with others, and to attend the courts of Westminster. After two or three years thus spent, let him get a large commonplace book, and divide it into alphabetical titles, which he will easily gather by observing the titles of Brooks' Abridgment: or of this book (Roll. Abridg.) Afterwards (among the year books) he may read Edward III., the second part of Henry VI. Edward IV. Henry VII. and so down to Plowden, Dyer, and Coke's Reports, the second time.

'What he gathers in his course of reading, let him enter (in the abstract) under the proper titles, in his commonplace book.'

The advice of Chief Justice REEVE is as follows:

'First read *Wood's Institutes* in a cursory manner, to understand the general divisions of the law, and obtain precise ideas of the terms used in it, for such terms as Wood does not explain, 'L. Termes de la ley,' should be consulted, and for the most full and modern explanation, Jacob's Dictionary; but the authority of this last must not be too implicitly relied on. To understand Wood's Chapter of Conveyancing, call in some practitioners, or consult Bohun's Institut. Legalis, or Jacob's Attorney Companion.

'This done, read Littleton's Tenures, without notes, consider it well and abridge such parts as the books inform you are now law. Thus armed venture upon Coke's Comment on Littleton, which, being well understood, the whole is conquered, and without it a sound common lawyer can never be made; to this all the faculties of the mind must be applied with the heartiest attention: it will not be found very difficult, with the preparation already prescribed; abridge it throughout, and see Hawkins' Abridgment, which will afford much light to my Lord Coke.

'This finished, I would recommend a second careful review of Wood's Institute, in order to digest the several heads of the law for the help of memory, and consult the references, &c.

'During the second stage of study, many books may be brought in for variety, which will be very useful, and not interrupt the main scheme, as Doctor and Student, Noy's Maxims, Office of Executors, Hale's History of the Common Law, and Rolle's Abridgment. It will about this time, and not much sooner, be proper to give diligent attendance on the courts of Westminster, and to begin reading in order the several reports, which must be read and commonplaced as you will find best by considering the nature of the study.

'My whole scheme, without naming the books, is this:

'1st. Obtain precise ideas of the terms or general meaning of the law.

'2d. Learn the general ideas of the terms, and general meaning of the law.

'3d. From some authentic system, collect the great leading points of the law in their natural order, as the first heads and divisions of your future inquiry.

'4th. Collect the several particular points as they occur, and range them under their generals, and as you find you can best digest them.

'And, whereas law must be considered in a twofold light:

'1st. As a rule of action.

'2d. As the art of procuring redress.

'When this rule is violated, the study in each of them may be easily regulated by the foregoing method, and the books so recommended will so carry on the joint work, that with this course, so finished, the student may pursue each branch of either to its utmost extent, or return to the centre of his general knowledge without confusion, which is the only way of rendering things easy to the memory.'

The course of reading recommended by the celebrated Mr DUNNING was as follows:

Hume's History of England, particularly observing the rise, progress, and declension of the feudal system; minutely a tend to the Saxon government that preceded it and dwell on the reigns of Edward I., Henry VI., Henry VII., Henry VIII., James I., Charles I., Charles II., and James II., Blackstone's Commentaries,—on the second reading turn to the references; Wright's Treatise on Tenures; Coke on Littleton, especially every work of Fee Simple, Fee Tail, and Tenant in Tail; Coke's Institutes, more particularly the 2d of Sergeant Hawkins' Compendium; Coke's Reports; Plowden's Commentaries; Bacon's Abridgment, and First Principles of Equity; Piggott on Recoveries: Reports of Croke, Burrows, Raymond, Saunders, Strange, and P. Williams; Paley's Maxims, and Lord Bacon's Elements of the Common Law.

Mr CHITTY'S advice in a lecture, delivered December 14, 1813, in Lincoln's Inn Hall, is as follows:

'The student must labor to acquire a regular established system of legal knowledge, and not depend on accidental fragments and scraps. The study of the law is much less complex and difficult than has been represented. It will be proper to employ as much as ten hours daily in study, but of these, six hours are sufficient for law; the remaining four must be usefully employed in general study, as it will promote habits of regular application. But the student must not flag, or become irregular in this course of study. The vacation, in particular, must be devoted to study, reserving the *Terms* for acquiring *practical* knowledge.'

Mr Chitty recommends common placing and refers to a method in North's Life of Lord Keeper Guilbert, p. 20. The following are the books he recommends:

I. Preparatory Reading; 1st, Blackstone's Commentaries; 2. Woodeson's Vinerian Lectures: 3. Sullivan's Lectures; 4. Eunomus; 5. Brown's Civil Law; 6. Hale's History of the Common Law. II. Reading with a view to Practice; 1. Butler's Nisi Prius; 2. Espinasse's Nisi Prius; 3. Selwyn's ditto. N. B. read Butler's Nisi Prius and the same heads in Espinasse and Selwyn's concurrently, and after reading all the heads in Butler, with those in Espinasse and Selwyn, read the remaining heads in the latter work. III. Then proceed to particular branches of the law, as Rights of Persons, Holt, Starkie, and George on Slander: information on other heads by retracing Blackstone's Commentaries, 119 to 143; Buller's Nisi Prius, 3 to 24, and Selwyn's Nisi Prius, titles Assault, Imprisonment, and Adultery; and read the appropriate titles in Bacon's Abridgment and Comyn's Digest.

II. Personal Property and Commercial Law; 1. Blackstone's Commentaries, from chap. 23 to the end; 2. Powell's Law of Contracts; 4. Newland on Contracts; 4. Roberts on Statute of Frauds 104 to 240; 5. Jones' Law of Bailments; 6. Bayley on Bills of Exchequer; 7. Chitty on ditto

8. Abbot's Law on Shipping; 9. Park on Insurances: 10. Marshall on ditto; 11. Chitty on Apprentices; 12. Watson on Partnership; 13. Paley's Law of Principal and Agent. 14. Whittaker on Stoppage in Transitu and Liens; 15. Cullen's Bankrupt Laws examined with Cooke's and Montague's Bankrupt Laws; 16. Kyd on Awards; 17. Kyd on Corporations: 18. Toller's Laws of Executors; 19. Roper on Legacies.

III. Real Property, and Landlord and Tenant Law. 1. Blackstone's Commentaries, 2d vol. to the end of chap. 23: 2. Cruise's Digest; 3. Coke on Littleton, parts not obsolete; 4. Watkins on Copyholds; 4. Woodfalls' Law of Landlord and Tenant; 6. Roberts on statute of Frauds, 241 to 287; 7. Gilbert's Distresses, by Hunt; 8. Bradby on Distresses; 9. Sugden's Law of Vendors and Purchasers; 10. Sanders on Uses and Trusts; 11. Preston on Estates, &c; 12. Adams on Ejectment; 13. Runnington on ditto.

IV. Pleading. 1. Blackstone's Commentaries, vol. 3. ch. 8. to 21; 2. Summary of Pleading; 3. Lawes on ditto; Chitty on ditto; 5. Saunders' Reports and Notes.

V. Evidence. 1. Peake's Law of Evidence; 2. Gilbert's ditto, old edit.; Philipps' ditto.

VI. Practice of Common Law Courts. 1. Crompton's Introduction; 2. Tidd's Practice with the Forms; 3. Sellon and Impey, together with the Rules; 4. Gilbert's History of the Court of Exchequer.

VII. Criminal and Poor Laws. 1. Retrace 4 Blackstone's Commentaries; 2. Hale's Pleas of the Crown; 3. Hawkins' ditto: 4. East's ditto; 5. Foster's Crown Law; 6. Hand's Practice; 7. Introduction to Crown Circuit Companion; 8. Nolan's Poor Laws, examined with Bott.

VIII. Equity Law, Pleadings, and Practice. 1. Retrace 3 Blackstone's Commentaries, chap. 27; 2. Fonblanque's Treatise on Equity; 3. Mitford's Pleadings; 4. Newland's Chancery Practice.

Mr Butler's advice is as follows: (see Reminiscences, p. 60.)

'The student should begin by reading Littleton's Tenures with extreme attention, abstaining from commentary, but perusing Gilbert's Tenures. After this, Wright's Tenures and Watkins' Treatise on Descents; and then Littleton a second time, then a third time, with Coke's Commentary; afterwards read Sheppard's Touchstone, Preston's edition. Then the notes on feuds, uses, and trusts, in the last edition of Coke upon Lyttleton; and then, once more, Coke upon Lyttleton, and the notes of the last edition. Then, with profound attention, Sander's Treatise on Uses and Trusts, and Preston on Fines and Recoveries. Fearne's Essay on Contingent Remainders, and Sugden on Powers. Then Plowden's Commentaries for Equity; the article 'Chancery' in Comyn, comparing it with P. Williams' Reports.'—*Obs.*

## MR DUNNING'S LETTER

### ON THE STUDY OF THE LAW.

Designed as our work is, in a considerable degree, for the benefit of the junior part of the profession, we have been urged by several correspondents to devote a due proportion of our space to articles on the study of the law. Some of our readers, probably, may think that we have been already sufficiently attentive to this part of our duty; but, having received from two several correspondents, a copy of Mr Dunning's celebrated letter to a student of the law, who had requested the favor of his advice upon the most eligible course of reading, we insert it as an appendix to the memoir of that distinguished individual. It will be found replete with valuable suggestions. The list of works to which reference is made in the letter, is comprised in the article 'on the Study of the Laws.' —*Legal Obs.*

Lincoln's Inn, March 3, 1779.

Dear Sir,

'The habits of intercourse in which I have lived with your family, joined to the regard which I entertain for yourself, make me solicitous, in compliance with your request, to give you some hints concerning the study of the law.

'Our profession is generally ridiculed as being dry and uninteresting, but a mind anxious for the discovery of truth and information will be amply gratified for the toil in investigating the origin and progress of a jurisprudence which has the good of the people for its basis, and the accumulated wisdom and experience of ages for its improvement. Nor is the study itself so intricate as has been imagined, more especially since the labors of some modern writers have giving it a more regular and scientific form: without industry, however, it is impossible to arrive at any eminence in practice: and the man who shall be bold enough to attempt excellence by abilities alone, will soon find himself foiled by many who have inferior understandings, but better attainments. On the other hand, the most painful plodder can never arrive at celebrity by mere reading; a man calculated for success must add to a native genius, an instinctive faculty in the discovery and retention of that knowledge only, which can be at once useful and productive.

'I imagine that a considerable degree of learning is absolutely necessary; the elder authors frequently wrote in Latin, and the foreign jurists continue the practice to this day. Besides this, classical attainments contribute much to the refinement of the understanding, and the embellishment of the style. The utility of grammar, rhetoric, and logic, are known and felt by every one. Geometry will afford the most apposite examples of close and pointed reasoning; and geography is so very necessary in common life, that there is less credit in knowing, than dishonor in being unacquainted with it. But it is history, and more particularly that of his own country, which will occupy the attention and attract the regard of the great lawyer. A minute knowledge of the political revolutions and judicial decisions of our predecessors, whether in the more ancient or modern eras of our government, is equally useful and interesting. This will include a narrative of all the material alterations in the common law, and the reasons and exigencies on which they were founded. I would also recommend a diligent attendance on the courts of justice, as by that means the practice of them (a circumstance of great moment,) will be easily and naturally acquired. Besides this, a much stronger impression will be made on the mind by the statement of the cause, and the pleadings of the counsel, than from a cold uninteresting detail of it in a report. But, above all, a trial at bar, or a special argument, should never be neglected. As it is usual on these occasions to take notes, a knowledge of short-hand will give such facility to your labors, as to enable you to follow the most rapid speaker with certainty and precision.

'Commonplace books are convenient and useful, and, as they are generally lettered, a reference may be had to them in a moment. It is usual to acquire some insight into real business under an eminent special pleader, previous to actual practice at the bar; this idea I beg leave strongly to second and indeed I have known but few great men who have not possessed this advantage. Wishing that you may add to a successful practice that integrity which can alone make you worthy of it,

I am, dear Sir,

Your most obedient humble servent,

John Dunning.

## THE UNIVERSITY OF LONDON,

### LAW CLASS.

#### LECTURES OF MR THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

In the first Lecture, beginning with the definition of the contract of surety, and a brief notice of the corollaries that result from it, the lecturer proceeded to notice the different modes in which the obligation of surety may be contracted. These, he observed, are three: 1. By acknowledgment made before a Judge or other public officer. Acknowledgments so made are commonly called recognizances, and in some cases statutes, and when enrolled of record, the obligation raised by them has the force of *res judicata*. 2. By deed. 3. By simple contract, or parol. The class of simple contracts includes written as well as verbal agreements; but by the statute of frauds, 29 Car. 2. c. 3. & 4., a simple contract of guarantee is required to be in writing.

Postponing the consideration of the peculiar consequences which take place when the obligation of surety is contracted by record, or by deed, the requisites of a simple contract of guarantee were next considered. 1st, with reference to the common law; 2d, with reference to the statute. 1. By the common law a consideration is necessary for the validity of a parol agreement; whatever would be sufficient as a consideration in the case of any other kind of parol agreement would be so in the case of a parol agreement of guarantee. In general, said the lecturer, any act by which the person who promises, or any other person at his request, has benefit, or by which the person to whom the promise is made has trouble or detriment, is sufficient; and the amount of benefit or trouble, or its comparative value in relation to the promise, is immaterial. But the act intended to be the consideration of a promise must be of some legal value. Of this qualification on the previous rule the lecturer gave the following illustration: — forbearance to sue is an act of no legal value, if the person to whom suit is foreborne is not liable in an action, and therefore, in that case, would not be a sufficient consideration; as for instance, forbearance to sue an heir on the bond of his ancestor, in which the heir is not named, is not a sufficient consideration to support a promise to pay the bond, made either by the heir himself, or by any other person as his surety. Definiteness and certainty, as opposed to the vague and general, were also stated to be requisite in every consideration. Therefore forbearance to sue for a time, for some time, for a little time, are insufficient considerations, although any time however short, would be sufficient, were its duration specified. The consideration, also, must be either wholly or in part executory at the time the promise is made, unless the act which constitutes the consideration was done at the re-

quest of the promiser, in which case, though past, and executed when the promise is made, it is sufficient. Each of these rules were illustrated by examples appropriate to the contract of surety, and for other illustrations, and a fuller statement of cases on this subject, practical treatises were referred to and finally the lecturer remarked, that a minute attention to the consideration was pre-eminently necessary in respect of guarantees, two out of three of which he stated from his experience, to be bad in this particular. 2. With reference to the statute of frauds, the lecturer said, it had been decided, that the promise alone being in writing is not sufficient. The statute requires the *agreement* to be in writing; and as the promise and consideration together constitute the agreement, both must be in writing; for which *Wain* v. *Walters**, *Saunders* v. *Wakefield*†, *Jenkins* v. *Reynolds*‡, *Britten* v. *Webb*§, and *Lush* v. *Whitcomb*‖, were cited. The rule contained in these cases was a departure from the interpretation which had prevailed for nearly a century; and from its remoteness from the appprehension of men of business was likely to occasion extensive practical mischief, in which view it had been repeatedly censured in the courts of equity; but the mischief anticipated had been lessened by the laxity with which the courts enforce it. 'If,' said Mr Theobald, 'a shadow of a consideration is expressed, it is sufficient.' In illustration of which position he reviewed *Stadt* v. *Lill*¶, *Borlem* v. *Campbell***, *Marley* v. *Boothby*††, *Newbury* v. *Armstrong*.‡‡ In the last case, *Tindal* Ch. J. said, 'If by fair construction we can, as it were, spell out from the contract the consideration, it is enough. The *dictum* contained in *Wain* v. *Warlters*, and the other similar cases, has been carried to the extreme edge of the law.'

Next, as to the writing. There is no prescribed form: but a note or memorandum is sufficient, if it contains all the terms of the agreement. A letter containing the terms is sufficient; or if it does not itself contain them, but refers to an insignia paper, alleging that that does, the letter and paper together are sufficient. From these decisions it appears the courts regard the writing, not as a constituent part of the agreement, but merely as necessary evidence, and therefore it is immaterial whether the writing takes place at the same time as the agreement, or whether it is made with the view of authenticating the agreement. A letter addressed by the party to his own agent, or to a stranger, is sufficient. An agreement once in writing, but afterwards receded from, may be revived by parol; as also might an agreement which was bound by the statute of limitations,§§ previous to Lord Tenterden's act, 9 Geo. 4. c. 14.

'The statute,' the lecturer proceeded, 'requires a writing signed either by the party himself, or by his agent thereunto lawfully authorised. With respect to agents under this provision, the law prescribes no particular mode of authorisation; an agent, therefore, may be appointed verbally; but an express authorisation is not necessary. The existence of an authority to act as an agent, either for general or particular purposes, may be inferred; and from the inference results as complete a liability on the side of the principal, as if he had made an express appointment. In an action upon a guarantee it appeared that the guarantee was in the handwriting of the defendant's son, who was a minor, evidence was given of the son having, in three or four instances, signed for his father, and this Lord Ellenborough thought sufficient evidence of the son being authorised, and the plaintiff had a verdict.*'

The ratification of the act of another is equivalent in effect to a prior authority. In its application to a guarantee this rule is illustrated in *Busby* v. *Culvinnatt*.† Persons incapacitated from contracting on their own account are competent to be agents. Several cases were next referred to, in which persons contracting under the style of agents were held to be liable as principals. The rules respecting guarantees given by and to one of several partners were also considered. A guarantee given by one of a firm, in the course of a transaction which had been adopted by the firm, or of which the firm was cognisant, would bind the firm, though the transaction was not within the regular scope of the partnership business, and though the guarantee itself was not actually known to have been given.‡ The converse of this proposition was illustrated by *Duncan* v. *Lowndes*.§ With respect to guarantees given to one of several partners, the lecturer referred to *Garrett* v. *Handley*.‖

In the above sketch we have chiefly wished to follow the delineation of topics pursued by the lecturer; more our limits will not allow our attempting, and in our next Number we hope to be able to give the second lecture.—*Legal Observer.*

* 5 East 10.; † 4 Barn. & Ald. 595.
‡ 7 T. B. Moore, 86.
§ 2 Barn. & Cres. 483. ‖ 5 Bing. 34.
¶ 9 East. 348. ** 3 T. B. Moore 15.
†† 3 Bing. 107. ‡‡ Moody & Mal. N. P. C. 389.
§§ *Gibbons* v. *M'Casland*, 1 Barn. & Ald. 660.

* *Walkins* v. *Vince*, 2 Stark. N. P. C. 368.
† 8 Barn. & Cres. 448.
‡ *Sandilands* v. *Marsh*, 2 Barn. & Ald. 673
§ 3 Camp N. P. C. 477.
‖ 3 Barn. & Cres. 462.; and 4 Barn. & C res. 664.

From the Legal Observer.

## ATTORNEYS.

It has been the fashion of late years to decry attorneys—to attribute to them every mischief and evil arising from the mal-administartion of the law.—Is the expense of law proceedings the subject of discourse? the extortion of attorneys is pronounced to be the cause.—Is the delay of justice spoken of? it arises, say one and all, from the interested motives of lawyers.—Does a man lose an action which he has, against the advice of his attorney, carried to trial, and for the institution of which he had no earthly ground? again, it is the lawyer's fault. Thus manifold are the sins imputed to attorneys. Every fresh conversation begets new sbujects of complaint, and each day strengthens the unjust prejudice. What was at first doubted, is, by dint of continual repetition, looked upon as unquestionably true; and the lawyer is considered by many as evil personified. This prejudice has been carefully fostered and disseminated by those whose duty it was to disabuse the public mind—and why? to keep in the back ground the real offenders. The consequence has been, that attorneys have been considered as the *originators* of those very abuses, of which they, in common with their clients, have been the *victims*, and which they could neither prevent nor control.

Had the curse pronounced against the descendants of Ishmael extended to them, they could not be a more persecuted race. If they happen to complain of their grievances, they are met with scorn and derision; and the expression of honest indignation is denounced as hypocritical and groundless. Attorneys are not placed in elevated and influential situations, where they may peculate with impunity, abuse their trusts in the most perfect security, and complain, with a studied appearance of innocence, of well founded accusations, which they possess the power of voting frivolous and untrue. They have, however, the satisfaction ever attendant upon the discharge of their duty—the approbation of their own consciences, in spite of the vexations which meet them at every step. Unhappily for them, they are the only persons with whom the public has to do. They are the only persons consulted—the only persons on whom care, and anxiety, and responsibility devolve. The client knows nothing, and will not be informed, of the idlers who batten on the spoil to which accidental circumstances have entitled them—*who receive their money at all events*, for the attorney pays at the time, and runs the risk of being reimbursed. No! the client only knows his attorney in the matter: if the business in which he employs him should end successfully, it is only justice done—the services of the attorney are considered nothing;—if otherwise, the attorney is the cause of the failure.

The bill of cost is paid, if the parties be solvent, by his own client, or by the adverse party, as the case may be:—if by his own client, *he* looks at its gross amount, and remarks that it is 'a good deal of money;' if the professional man attempt to explain how little of it comes into his own pocket, though he has had all the work to do, how much is paid to indolence,—he is heard with incredulity, and his statement considered as an ingenious excuse for his own rapacity,—as an attempt to blind his client to the enormity of professional profits. On the other hand, if the costs are paid by the adverse party, the attorney is stigmatized as a trickster, and a perverter of justice. Thus he who is often forced to conduct actions and defences against his decided conviction, and which he has expressed to his client, becomes after the trial, the object upon which all the revengeful and bad passions are let loose. The hostility which existed between the parties to the suit is directed into a new channel, and the lawyer has to stand the brunt of the most false and malignant attacks. Add to this, that in the conduct of the business he has, as I have shown, to advance considerable sums out of his own pocket, which, if both plaintiff and defendant happen to be insolvent, he irrecoverably loses. Nor is this all, for he is subjected to an action for negligence, if he commit any error. Consider these circumstances, and I think you will feel satisfied that his is not an enviable situation.

Consider, too, the confidence which persons are obliged to place in attorneys, and the valuable property they feel it necessary to entrust to their care. Consider that all men are frail, and extremely liable to fall into temptation;—note the few instances of betrayal of confidence, abuse of trust, and fraudulent appropriation of their clients' property, which the utmost efforts of the most determined hostility can produce,—and then pronounce upon the moral character of attorneys.

I am, sir,
Your most obedient servant,
AN ATTORNEY.

*December* 9th, 1830.

From the Legal Observer.

## PLEASANTRIES OF THE LAW REPORTS.

In Mr Matthew's entertainment called 'A Trip to America' he relates that a tall, grave, thin old person was constantly following him, and asking him with great solemnity, 'Pray, Mr Matthews, what do you think of American fun?' I dare say that the readers of the Legal Observer will think that the connexion between fun and the Law Reports is as preposterous, as between this old gentleman and fun in America. I intend however, to undeceive them on this point: I am a joker by birth, and look upon everything in the world as capable of affording fun. Life is altogether a joke, and law one of its subdivisions; and the Law Reports, if rightly understood, are, in fact mere supplements to Joe Miller. I do not care what they are, ancient or modern, Coke or Vesey, Law or Equity, you may extract fun from them all. An apothecary views mankind merely as so many empty medicine bottles, which are to be filled as full as they can hold. Every man's mind is tinged by his occupation; and my occupation being to make jokes it is of no consequence to me whether I take up Rabelais or the Term Reports. I shall, therefore, from time to time, produce a few samples of fun from the Law Reports. The next, I dare say will be better than the present, which are not, by any means, the best of the sort. However, I have set down a few of them.

The rules as to the legal measure of abuse which you may give a person may be first mentioned.

It is actionable to call a counsellor 'a daffy-down-dilly,' 1 Rol. Ab. 55., if there be an averment that the words signify an ambidexters; or to say of an attorney, that he hath no more law, *than Mr C.'s bull,*' Sid. 327., S. C. 2 Keb. 202. even although Mr C. actually have no bull; for if that be the case, as Keeling C. J. observed, the scandal is the greater.' And it is quite clear that to say that a lawyer has 'no more law than a goose,' is actionable, Sid. 127.; and the reporter adds a quære, Whether it be not actionable to say a lawyer 'hath no more law than the man in the moon!'

So also to say to a man, 'You enchanted my bull,' Sid. 424., or 'Thou art a witch' or that 'a person, bewitched my husband to death,' Cro. Eliz. 312., is clearly actionable. Quære, Whether it be not actionable to say to or of a young lady, 'You enchanted me,' or 'She enchanted me,' or, as the case may be, , She enchanted my brother, my dog,' &c, or 'She's a bewitching creature, or to put the exact point, 'She's quite bewitched poor Tom.'

On the other hand, you may say, if you please, of another, 'That he is a great rogue, and deserves to be hanged as well as G. who was hanged at Newgate:' because this is a mere expression of opinion; and perhaps you might think that G. did not deserve hanging. T. Jones. 157. So also you may say of any Mr Smith, that you know, 'Mr Smith, struck his cook on the head with a cleaver, and cleaved his head; the one lay on the one side, and the other on the other;' because it is only to be *inferred* that thereby the cook of Mr Smith died and this in the reported case was not averred. Cro. Jac. 181. *A fortiori*, you may say, 'Mr Smith threw his wife into the Thames, and she never came up again;' or 'Mr Smith cut off Tom's head, and walked with it to Worcester;' because this is all inference; and his cook, wife, or Tom, as the case may be, for all that the Court knows, may be still alive.

Wills and testaments are a great source of fun. There is a case in 6 Vesey, p. 194., *Townley* v. *Bedwell*, in which the Lord Chancellor (Eldon) held that the trust of real and personal estate by will, for the purpose of establishing a Botanical Garden, was void, for a rather singular reason, as it appears in the report, viz. because the testator expressed that 'he trusted it would be a public benefit!' The Solicitor-General (Sir William Grant) and Mr Romilly compared it to the case of a gift of a piece of land for the purpose of erecting monuments of the naval victories of this country. The *Lord Chancellor* said in that case the heir might *pull them down*, and in this he might destroy the garden; but his Lordship thought, upon the expression of the testator, that he trusted *it would be a public benefit*, he might venture to declare it void! The reason was of course, that it was within the statutes of mortmain. In the case of *Moggridge* v. *Thackwell*, 7 Ves. 38., we are told of a maiden lady of the name of Ann Cam, who desired her trustee to dispose of the residue of the property 'in recommending poor clergymen who have large families and good characters,' and a reference was made to the Master by Lord Thurlow, to approve of the scheme.

In the case of *Isaac* v. *Gompertz*, cited 7 Ves. 61., Lord Thurlow declared an annuity given for the support and maintenance of the Jewish synagogue in *Magpie Alley*, to be void,—a highly proper decree. A similar fate was awarded to a bequest for the dissemination of *Baxter's Call to the Unconverted*. Ves. 52.

Swinburne, part 4, sect. 6. art. 2. mentions a bequest of a legacy to a person, on condition of his drinking up all the water in the sea; and it was held, that, as this condition *could not be performed*, it was void. The condition *to go to Rome in a day*, which Blackstone mentions in his Commentaries as void, as impossible to be performed, may soon, perhaps cease to be so, and consequently become good, if rail-roads are introduced upon the Continent.

In 1 Rol. Ab. 45. it appears that in the country, when men passed cattle, it is usual to say, 'God bless them!' *otherwise they are taken for witches.* This reminds me of the salutation in Bohemia, where, if you meet a peasant, you pass for a heathen unless you say to him 'Gesegnet sey der Herr!' * or, in case he salutes you thus, unless you answer, 'In wigkeit, Amen!' †

I shall soon be able to give a further specimen of this sort of pleasantry.

JEKYLL JUNIOR.

* 'Blessed be the Lord!'
† 'In eternity, Amen!'

## DIGEST OF ENGLISH CASES.

### POLICY OF ASSURANCE.

1. A merchant resident at Sydney shipped goods for England on board the ship *C.*, and, by another ship that sailed after her wrote to an agent in England and desired him if he received that letter before the *C.* arrived, to wait for thirty days in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received; and the agent having waited more than 30 days, employed a broker to effect an insurance and handed the letter to him. The broker told the underwriters when the *C.* sailed, and when the letter ordering the insurance was written; but he did not state when it was received, nor the order to wait thirty days after the receipt of it before the insurance was affected. The *C.* never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but several underwriters were called for the defendant, who stated, that in their opinion, the matters not communicated were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the defendant. Held, that the evidence of the underwriters' opinion was properly received, and that even without it, the jury would have been bound to find that the part of the letter not communicated to the underwriters was material, and that, consequently, the policy was void. *Rickards vs. Murdock*, 10 B. & C. 527.

2. A policy duly stamped was effected on a voyage at and from Liverpool to Quebec. The ship being detained beyond the intended time of sailing, the following memorandum was indorsed on the policy: 'The Hebe being unavoidably detained beyond the intended time of sailing to Quebec, the voyage is changed, and the vessels proceeds from Liverpool to St John's, New Brunswick, at and from thence back to London; and, in consideration of one guinea per cent additional, the underwriters agree to continue on the risk until the vessel should be arrived back in London or her port of discharge in the United Kingdom.' Held, that the changed destination of the ship provided for by the memorandum, was an alteration in the terms and condition of the policy, within the meaning of the 35 G. 3. c. 63. § 13.; and therefore, the policy so altered by the memorandum did not require a new stamp. *Brocklebank vs. Sugrue*, 1 B. & Ad. 81.

3. An assignment of a policy of assurance without notice to the office will not take it out of the disposition of the assignor, and it will therefore pass to his assignees. Ex parte *Colville*, 1 L. O. 174.; and see acc. *Williams vs. Thorp*, 2 Sim. 257.

### PRINCIPAL AND AGENT.

An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, and insisted upon holding it in his own right. Decreed to convey to his client the plaintiff. *Lees vs. Nuttall and another*, 1 Russ. & Myl. 53. Tam. 282. 1 L. O. 13.

### SHIP.

The captain of an insured ship, which has been injured by perils of the seas, is not justified in selling the ship instead of repairing it, unless he either has not the means of getting the repairs done at the place where the vessel is obliged to put in; or cannot get them done, except at such an expense as would render it undoubtedly improper to repair if the ship were not insured; or has not money in his possession sufficient to pay for the repairs, nor is in a situation to raise it by loan or otherwise, except at such an extravagant rate as would prevent a prudent man, in the exercise of a sound and vigorous judgment, from undertaking the repairs under such circumstances. *Somes vs. Sugrue*, 4 Car. & Pay. 276.

### SHIP OWNER.

In an action against one of the owners for work done to a vessel by the order of the ship's husband, such owner will be liable, unless it be

shown that the person who directed the work to be done should be looked to exclusively. *Thompson vs. Finden*, 4 Car. & Pay. 158.

WARRANTY.

A party selling a horse, and saying that the horse is sound to the best of his knowledge, is liable on a promise that he is so, although he adds the words 'but I will not warrant.' (*Per Lord Tenterden.*) *Wood vs. Smith*, 1 Moo. & Mal. 539.

If a witness give evidence of a conversation with a prisoner in which that prisoner says something implicating another prisoner, the witness in giving his evidence must not omit the name of such other prisoner, and say 'another person,' but must give the conversation exactly as it occurred, and the Judge will tell the jury that it is not evidence against such other prisoner. *Rex vs. Hearne and others*, 4 Car. & Pay. 215.

In a criminal case, a person who is present in the court, when called as a witness, is bound to be sworn and give evidence, although he has not been subpœnaed. An indictment for stopping a way is a criminal case for this purpose.' *Rex vs. Sadler and others*, 4 Car. & Pay. 218.

## RECENT AMERICAN DECISIONS.

### CHANCERY.

PLEADINGS.

Where three kinds of relief are prayed for in the bill, and the complainant is entitled to one of them, the defendant cannot demur. *The Western Ins. Co.* v. *The Eagle Fire Ins. Co.*, 1 Paige, 284.

A bill of discovery will be sustained to aid the prosecution or defence of a civil suit in a foreign tribunal. *Mitchell* v. *Smith*, 1 Paige, 287.

If it appears upon the face of the supplemental bill that all the matters alleged therein arose previous to the commencement of the suit, and might have been inserted in the original bill by way of amendment, the defendant may demur. But if this irregularity does not appear upon the face of the supplemental bill, the facts may be brought before the court by plea. *Stafford* v. *Howlett*, 1 Paige, 200.

In a bill of discovery against a corporation, the corporation ought to be permitted to put in a separate answer, in order to make offers and admissions, and to deny facts which the officers may suppose do exist. *Vermilyea* v. *The Fulton Bank*, 1 Paige, 37.

Where matters charged in the bill, as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them if they ever took place, a positive answer is, in general, required. *Hall* v. *Wood*, 1 Paige, 404.

But where the facts are such that it is probable he cannot recollect them so as to answer more positively, a denial of the facts, according to his knowledge, recollection, and belief, will be sufficient. *Ib.*

Where one of two defendants denies in his answer all knowledge of the facts alleged in the complainant's bill, the complainant in order to give such defendant an opportunity to litigate his rights, must file a replication to his answer. *Elliot* v. *Pell*, 1 Paige, 263.

PRACTICE.

If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon matters which have subsequently taken place. *Candler* v. *Petit*, 1 Paige, 168.

Facts which existed before the filing of the original bill should be inserted therein by way of amendment. *Ib.*

But if the original bill was sufficient for one kind of relief, and facts afterwards occur which entitle the complainant to other or more extensive relief, he may have such relief by setting out the new matter in a supplemental bill. *Ib.*

A party must be an object of charity, otherwise the privilege of prosecuting *in forma pauperis* will not be granted to him. *Isnard* v. *Casseaux*, 1 Paige, 39.

No exceptions can be taken to a master's report, which are not founded upon objections distinctly taken before the master. *Byington* v. *Wood*, 1 Paige, 145.

In the case of a reference to state an account, the objections to the report are taken and argued after the draft of the report is prepared. *Ib.*

A party, who cannot be presumed to have positive knowledge of a fact, may swear according to his information and belief; and if it be not denied by the adverse party, who can swear positively upon the subject, it will be deemed as admitted. *Attorney General* v. *Bank of Columbia*, 1 Paige, 511.

Where a defendant in his answer only denies a fact charged in the bill, according to the best of his knowledge and belief, a single witness on on the part of the complainant is sufficient to establish the fact. *Knickerbacker* v. *Harris*, 1 Paige, 209.

If the complainant wishes to compel the defendant to state the new matter set up by way of defence with more particularity, he should amend his bill and state the matter by way of pretences, and call upon the defendant to answer as to the particulars. *Spencer* v. *Van Duzen*, 1 Paige, 555.

If the complainant wishes to prove any fact on the hearing, and not admitted by the answer, he must file a replication to the answer. *Mills* v. *Pittman*, 1 Paige, 490.

A decree can only be questioned by a bill of review. *Elliott* v. *Pell*, 1 Paige, 263.

A suit cannot be brought in the name of a feme covert without her consent; and when brought with her consent the prochein amy may be changed on her application, the person substituted giving security for the costs already accrued. *Fulton* v. *Rosevelt*, 1 Paige, 178.

SALE.

Where a merchant contracted for goods, the price to be secured by his note indorsed by B. and C., and the goods in the meantime were forwarded to his residence, *held*, that the property was not changed until the delivery of the note, and that B. and C. to whom he had assigned the goods to secure an antecedent debt, could not hold them against the vendor. *Keelor* v. *Field*, 1 Paige, 312.

SET OFF.

Where bills of a bank are obtained by one of its debtors after it stops payment, they cannot be set off by such debtor against the debt he owes the bank. *In the matter of the Receiver of the Middle District Bank*, 1 Paige, 585.

A party cannot set off a judgment, unless he is the beneficial, as well as the nominal owner of it. *Aikin* v. *Satterlee*, 1 Paige, 289.

TRUST AND TRUSTEE.

Where money was awarded by the Florida commissioners upon the memorial of one of two joint owners, and the applicant claimed in his memorial the whole to himself, without naming his joint owner, it was *held* that the joint owner not named was not bound to put in his claim and contest his right before the commissioners; that the person who received the money awarded was a trustee, and accountable in equity to the real parties interested in the fund. *Delafield* v. *Colden*, 1 Paige, 134.

WILL.

Where there is a limitation over of an annuity upon the failure of issue, at the death of the annuitant, the limitation over is good, being in the nature of an executory devise. *Bradhurst* v. *Bradhurst*, 1 Paige, 381.

Where A. by his will devised the use of his farm to his son and nephew for three years, and directed his executors at the expiration of the term to sell the farm and divide the proceeds among his five children; and also declared in his will that if any one of his children died before him, leaving no children, or should die after his decease, leaving no children, without having disposed of his or her share, that the share of such child should go the survivors; but if any of the testator's children should die leaving children, then such children were to have the share of their parent in the same manner as such parent, if living, would have taken the same, and the son died within the three years, leaving children: it was *held*, that the children took under the will and not as heirs of their father, and that their mother was not entitled to dower in the farm, and that the creditors of the son had no claim upon that share of the estate for the payment of their debts. The death of the son, before the expiration of the three years, and before the executors were authorized to sell, divested his interest, and the executory limitation over to his children immediately took effect. *Adams* v. *Beekman*, 1 Paige, 631.

A person to be capable of making a will, must be possessed of a sound and disposing mind and memory, so as to be able to make a testamentary disposition of his property with sense and judgment in reference to the situation and amount of such property and the relative claims of the different persons who are or might be the objects of his bounty. *Clark* v. *Fisher*, 1 Paige, 171.

Where the derangement or loss of the powers of mind some time previous to the making of the will, is established, it devolves upon the party who seeks to maintain the will, to show that such incapacity had ceased at the time it was executed. *Ib.*

In forming an opinion of the state of the testator's mind, it is proper to take into consideration the reasonableness of the will in reference to the amount of his property and the situation of his relatives. *Ib.*

WITNESS.

Where M. purchased the interest of C. in certain mortgaged promises under a judgment and execution, in a suit by M. against H. who pretended to hold a subsisting mortgage against the premises given by C it was *held*, that C. on being released by M. was a competent witness to prove that the mortgage had been paid. *McClaren* v. *Hopkins*, 1 Paige, 18.

A purchaser with full knowledge of the claim of third persons, is an incompetent witness for the vendor in a suit between him and such persons. *Brown* v. *Lynch*, 1 Paige, 148.

## WOUNDING WITH A BLUNT INSTRUMENT.

To the Editor of the Legal Observer—

MR EDITOR—You are, no doubt, aware that a man was convicted at the late Special Commission, holden at Salisbury, on an indictment under the 9. G. 4. c. 31. s. 12., for wounding a magistrate with a hammer, intending to do him some grievous bodily harm. The case was referred to the Judges for their opinion, whether the wounding with such an instrument as a hammer was sufficient to sustain an indictment on that statute. The Judges were of opinion that wounding with any blunt instrument was sufficient.

Sir,—I live in a country where people are not so cool and collected as they are in yours, and, therefore, the effect of this decision will be felt more strongly here than with you. 'Any blunt instrument' will include an appalling restriction on the laudable disposition to punish impertinence. If I just beat a man with a cudgel; if I knock down an insolent rascal who has affronted a female; if I even pull his nose, and the skin be in the least removed; since that is a wounding, and my stick, or finger and thumb, are blunt instrument, then there is 'a wounding with a blunt instrument,' and therefore I am liable to be hanged! Why, Sir, can such things be? They talk of the laws of Draco, and the Black Act, but this construction of the 9. G. 4. c. 31. is infinitely more merciless. If this could have been the intention of Lord Lansdown, when he brought in the bill, he ought to be called Lord Moloch! Sir,—when once such a construction is admitted, there is no knowing how far it will go. 'Blunt instrument!'—why, sometimes Mr O'Connell's speeches are blunt instruments, and inflict wounds: so he is liable to be hanged, according to this construction.

Though I am only a poor Irishman, perhaps, Sir, you will have no objection to put this in your very clever publication, to oblige

Your obedient servant,

*Sackville Street, Dublin.* O'M.

## HOW A NAME MAY BE CHANGED.

To the Editor of the Legal Observer—

SIR,—As the circulation of your journal is not confined to the legal branches of the community, I think I shall at least serve the general reader, by calling his attention to a little point of law, which may be particularly interesting to him. We all know, that by the accident of birth, or by some other capricious circumstance, many persons undergo much mortification and annoyance, from bearing some absurd or unpronounceable (if there be such a word) surname. There are some of these which are sometimes a decided hindrance to the advancement of a man in the world, and were I inclined to do so, it would be easy to relate some whimsical proofs of this; but no doubt the truth of what I assert is well known to most of your readers.

Now, Sir, the purpose of this letter is to point out to this class of persons a remedy for the annoyance, I might almost say misfortune, to which they are subject without any fault of their own. It has sometimes been thought that an act of parliament, or at least a license from the crown is necessary, in order effectually to change a name. This is a mistake. An act of parliament or license may be necessary in certain cases, where it is distinctly directed by deed or will to be obtained; but in all other cases *a person may change his name at his own pleasure without any expense whatever.* Thus, if a person inherit by birth a particular name, it is quite clear he may change it whenever he pleases. I shall only notice two of the authorities on the point. In the case of Barlow v. Bateman, 3 *P. Will.* 66: Sir Joseph Jekyll, M. R., says, 'Surnames are not of very great antiquity, for in ancient times, the appellation of persons were by their christian names, and the places of their habitations, as Thomas of Dale; viz. the place where he lived.* I am satisfied the usage of passing acts of parliaments, for the taking upon one a surname, is but modern, and that any person may take upon him what surname and as many surnames as he pleases without an act of parliament.' The same opinion has been lately expressed by Lord Tenterden in the case of Doe v. Yates, 5 *Barn. & Ald.* 544.: 'A name assumed by the voluntary act of a young man,' said his Lordship, 'at his outset into life, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an act of parliament.' It is proper to observe that the case of Barlow v. Bateman, 2 *Bro. Parl. Ca.* 272., although it reversed Sir Joseph Jekyll's decision, does not interfere with this principle, but was decided upon its special circumstances. See Leigh v. Leigh, 15 *Ves.* 100. 111.; 1 *Roper on Legacies*, 725.

It may therefore be laid down, that any person who chooses to change his name may do so; and if he do it when young, so much the more complete will be the alteration.

Under these circumstances, I seriously suggest to all persons whose surnames are not either to their own liking, or the liking of the world, which is rather fastidious in such matters, that they should change them, which they may do by writing to all their friends and acquaintances, and informing them of their intention, and constantly signing the name which they may think proper to select.

I am, Sir,

Your obedient servant,

And subscriber,

A CHANCERY BARRISTER,

*Lincoln's Inn, Feb.* 1 1831.

* See Camden's Remains, ed. 1637, 141.; 3 B. & A. 552. n. A singular custom exists to this day in Wales amongst the lower orders. If John Thomas have a son named David, he is called David *John*, (and not David *Thomas*,) after the *Christian* name of his father.

LORD ERSKINE AT HOLKHAM.—'I had frequently had an opportunity of meeting with Lord Erskine at Holkham, and other agricultural fetes, where, though he knew nothing of husbandry, his wit and eloquence insured him a cordial reception. At one of those meetings; he pleasantly said "that he had formerly studied Coke at Westminster, and that he was now studying Coke at Holkham; that Coke, the agriculturist was as great in his line as Coke the lawyer in judicial questions."' *Sir John Sinclair.*

SIR WILLIAM JONES ON SPECIAL PLEADING.—I shall not easily be induced to wish for a change of our present forms, how intricate soever they may seem to those who are ignorant of their utility. Our science of special pleading is an excellent logic, it is admirably calculated for the purposes of analysing a cause, of extricating, like the roots of an equation, the true points in dispute, and referring them, with all imaginable simplicity to the court or the jury: it is reducible to the strictest rules of pure dialectic, and if it were scientifically taught in our public seminaries of learning would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding, as effectually as the famed Peripatetic system, which, how ingenious and subtle soever, is not so honorable, so laudable, or so profitable, as the science in which *Littleton* exhorts his sons to employ their *courage and care.* It may unquestionably be perverted to very bad purposes; but so may the noblest arts, and even eloquence itself which many virtuous men have for that reason decried; there is no fear, however, that either the *contracted fist*, as Zeno used to call it, or the *expanded palm*, can do any real mischief, while their blows are directed and restrained by the superintending power of a court.—*Prefatory Discourse to the Speeches Isæus, by Sir William Jones*, p. xxv.

The opinion of this able and accomplished man, on the science of special pleadings, seems to have differed widely from that of some modern authorities.

STATUTE OF LIMITATIONS, CONDITIONAL PROMISE.

Money had and received,—plea, statute of limitations,—replication, promise in writing. The promise was contained in a letter, by which the defendant promised to pay the debt as soon as he was able. The plaintiff was nonsuited at the trial, on the ground that there was a conditional promise, and that the defendant's ability to pay should have been proved. The court on motion to set aside the nonsuit, held the promise to be conditional, and after argument discharged the rule. *Eden*, assignee, v. *Williams*, Com. Pl. M. T. 1830.

EVIDENCE OF SLAVES.

Both in Greece and Rome nothing was so common in all trials, both civil and criminal, as to resort to the evidence of slaves, which was always extorted by the most exquisite torments. Demosthenes says, (in Oratorem, orat. i.) that when it was possible to produce for the same fact either freemen or slaves as witness, the judges always preferred the torturing of slaves as a more certain evidence. Cicero, however, seems to think this evidence not so certain as the testimony of free citizens. Orat. pro. Cælio.

JUDGE ROOKE.

Judge Rooke, in going the Western circuit, had a large stone thrown at his head; but from the circumstance of his stooping very much, it passed over him. 'You see,' said he to his friends, 'that had I been an upright judge, I might have been killed.'

THE JURISPRUDENT.

BOSTON, SATURDAY, JULY 2, 1831.

A practical Treatise on the Law of Partnership, with an Appendix of Precedents. By NEIL GOW, Esq. of Lincoln's Inn, Barrister at Law. The 3d Edit. With considerable Alterations and Additions. London, 1830.

THE Law of Partnership has of late years become so important and interesting, that there are now no want of treatises on the subject. The first systematic publication was by Mr Watson. In 1815, Mr Montagu published his treatise, and this subject has been further elucidated by the present writer; and there is another treatise by Mr Cary.

We have no hesitation in saying that Mr Gow's treatise is the best of all these. We have examined it with very considerable attention; and although in one or two points we are inclined to disagree with the learned author, yet as a whole we have found it accurate, well arranged, and perspicuous. We are not entirely satisfied with the precedents which he has appended to his treatise:—we think there are better forms in print before the profession.

We consider Mr Gow incorrect when he says that one partner may by an action of assumpsit enforce from his co-partner contribution towards a debt which he might have discharged, but to which they were jointly liable; p. 79. Now the general rule as to this is that one partner cannot maintain an action of assumpsit against his co-partners for money expended on account of the partnership. *Per* Abbot C. J. Holmer v. Higgins, 1 *B. & C.* 76.; and see also Milburn v. Codd and another, 7 *B. & C.* 419.; and we do not think, on a close examination, that the cases cited by the learned author sufficiently support his position, or make out an exception. But these are almost the only points on which we can object to the work, of which we shall now give some account.

The first chapter is devoted to the consideration of the contract of partnership. The learned author thus considers the question whether partners can depart from the original objects for which their partnership was formed.

'When the object or purpose the partners have in view, in forming a partnership, is clearly and distinctly defined, and the contract of partnership does not expressly or impliedly confer upon some the power of binding all to the adoption of different projects, it is not competent to any number of the partners, short of the whole of them, to engage the partnership in adventures which are incompatible with the declared object or purpose; because, if it were so, an individual, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. Each partner, therefore, has the power of insisting that the original contract of partnership shall not be contravened by an extension of its purposes; and he is not deprived of that power, notwithstanding the other partners offer to indemnify him against the loss that may be sustained by their embarking in transactions which were not, in the first instance, intended to form a part of the partnership concern: for, whilst the partnership continues, the right of a partner is to hold his co-partners to the specified purposes of their association, and not to rest upon indemnities, with respect to what he has not contracted to engage in.* And this principle (upon which a court of equity will act in the case of a common partnership) applies with equal force to all companies or societies whose objects are, at the time of their institution, defined, and who are not purposely invested with a power of binding the body by a majority, or any select part of it. Such companies, if there be one dissentient member, cannot embark in undertakings not originally contemplated; nor can they compel that member to retire from the company on receiving his subscribed capital and interest, in order thereby to leave them at liberty to pursue their extended operations. And it is not a sufficient answer to the requisition of the shareholder who calls upon the company to observe the objects for which the company was formed, to urge, that he may dispose of his shares at a price considerably beyond what he gave for them; because, for that very reason, coupled with having the partnership concern carried on according to the contract, he may expect augmented improvement in the value of his shares.† A covenant, in articles of partnership, that none of the partners shall carry on, for their respective private benefit, that branch of commerce in which they are jointly engaged, is not only allowed, but is the constant course.‡ Indeed, the principles of a court of equity will not permit that parties bound to each other, by express or implied agreement, to promote an undertaking for their common benefit, should any of them engage in another concern, which necessarily gives them an interest directly adverse to their original undertaking.'§

The interest of partners in the stock of trade is then treated of, and the rules clearly and concisely stated; but as these rules have been considered as settled for some time past, little novelty could be introduced into their discussion.

'The author next enters upon the important and numerous classes of cases relating to the acts, by which one partner may bind the firm; and we cannot give a better specimen of Mr Gow's labors than the portion of this chapter in which he considers the power of one partner to bind the firm by note or bill.

The signature of one partner, as the maker of a joint promissory note, or the drawer of a bill of exchange in respect of a joint transaction, is therefore binding upon his co-partner,‖ and equally binding is his acceptance of a bill of exchange¶; for, the bill being drawn upon them jointly, the acceptance of a single partner, in the names of both, is in legal effect a joint acceptance.** So *primâ facie*, the indorsement of a bill or note by one partner, in the name of the partnership, binds all the firm.†† Even where one partner indorses a bill in a different name from that of the actual firm, such an indorsement will be binding, if it be proved that the partner was in the habit of issuing bills into the world indorsed under the former designation: because such evidence would establish an acting by procuration, and there seems to be no doubt but that one partner may so act for the whole firm.* Nor in the case of a note or bill does it form any valid objection to their enforcement against a firm, that the former is made, or the latter accepted, by one partner in his individual name, if it appear from the securitiies themselves that it was intended they should have a joint operation: in such cases the holder may, at his election, enforce payment either jointly against the firm, or separately against the party whose signature is attached.† Thus, a promissory note, by which the maker individually, but on the behalf of himself and his partners, engaged to pay a stipulated sum, has been held to affect the whole firm; and it is not to be considered as a mere personal undertaking, by the individual partner, to pay a debt due from himself and his co-partners.‡

[To be continued.]

* Natusce v. Irving, Appendix, *post*. † Id. Ibid.

‡ Morris v. Coleman, 18 Ves. 438.

§ Glassington v. Thwaites, 1 Sim. & Stu. 133. And see Burton v. Woolley, 6 Mad. 367.

‖ Smith v. Baily, 11 Mod. 401. Lane v. Willams, 2 Vern, 277. B. C. 16 Vin. Abr. 243.

¶ Anon. Styles, 370. Bull, Nisi Prius, 279

** Anon. Holt. 67. Pinkney v. Hall, 1 Salk. 126. S. C. 1 Ld. Raym. 175.

†† Wells v. Masterman, 2 Esp. N. P. C. 731. Swan v. Steele, 7 East, 210. Ridley v, Taylor, 13 East, 175. Where a bill or note is payable to several persons, not in partnership, the right to transfer it is in all collectively, not in any individually; and an indorsement by and in the name of one only will not give the indorsee a right to sue. Carvick v. Vickery, Dougl. 653. n. So, where a bill is drawn on two persons, who are not partners, if it is only accepted by one it must be protested. Holt, 297. Mar. 64. Beawes, pl. 228.

*Williamson v. Johnson, 1 B. & C. 146.

†Hall v. Smith, 1 B. & C. 407. See Clark v. Blackstock, Holt's N. P. C. 474. March v. Ward. Peake's N. P. C. 130. Wilks v. Back, 2 East, 264.

‡ Lord Galway v. Matthew, 1 Campb. 403. In Hall v. Smith, 1 B. & C. 497., it was held that a promissory note beginning 'I promise to pay,' signed by one member of a firm for himself and his partners, was binding upon the party signing as a several note, or as a joint note was binding upon the firm.

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The President has appointed R. B. TANEY, Esq. of Baltimore, Attorney General of the United States, to succeed John Macpherson Berrien, Esq. Mr T. has accepted the appointment.

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Mr Harvey, during his canvass, was asked, whether he was not a supporter of *taxation*. 'Sir,' replied the worthy candidate, 'I am an *attorney*, and I defy you to point out one of the profession to whom the very word "taxation" is not hateful!'

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LORD THURLOW AND LAVATER.

Lavater, on being shown a picture of Lord Thurlow, examined it for a moment, and said, 'Whether this man be on earth or on hell, I know not; but wherever he is, he is a tyrant and will rule if he can.'—*Lardner's Cyclopedia.*

VALUABLE ENGLISH BOOKS, recently received from Europe, and for sale by *GRAY & BOWEN*, No 141 Washington street.

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The Mirror of Parliament, edited by John Barrow Esq. This work contains a complete account of the doings and debates in the British Parliament, during the last December session ; in eight parts, folio.

Select Views on the River Clyde, engraved by Joseph Swan, with historical and descriptive illustrations; in one quarto volume, with *fortytwo* splendid engravings.

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Hinton's History and Topography of the United States. This work will be completed in thirty numbers, quarto, with *ninety* engravings; *eight* numbers are already received.

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History and Antiquities of the Doric Race ; by C. O. Müller ; 2 vols. 8vo.

History of Scotland, from the Union; by John Struthers ; 2 vols. 8vo.

A Selection from the Papers of the Earls of Marchmont ; illustrative of events from 1685 to 1750 ; 3 vols. 8vo.

Mosheim's Ecclesiastical History, complete in two vols. 8vo.

A System of Geography, popular and scientific ; illustrated by a complete series of maps and other engravings; by James Bell ; 3 vols. 8vo.

McUre's History of Glasgow, with plates and illustrations ; 1 vol.

History of Modern Greece ; by James Emerson ; 2 vols. 8vo.

Rollins' Ancient History, with Life, notes and numerous maps and plates ; 3 vols. 8vo.

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Six Years' residence in the United States of America ; by Peter Neilson ; 1 vol.

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Lardner's Cabinet Library, annual Retrospect of Public Affairs for 1831.

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Mackenzie on the Diseases of the Eye ; 1 vol.

Spix's Travels in Brazil, with engravings; 2 vols. 8vo.

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do do do (2d series) 2 vols.

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Dibdin's Library Companion ; 1 vol.

Biblia Hebraica.

Novum Testamentum Græce.

Aristophanes Comædiæ.

Sophocles Tragædiæ.

Pindari Carmina.

Æschyli Tragædiæ. May 21

THIS DAY published by GRAY & BOWEN, 141 Washington street, the North American Review, No. LXXII.

*Contents.*

Art I. The Laws of Population and Wages.

1. Two Lectures on Population, delivered before the University of Oxford in Easter Term, 1828. By Nassau William Senior, late Fellow of Magdalen College, A. M. Professor of Political Economy. To which is added a Correspondence between the Author and the Rev T. R Malthus.

II. Poetry and Romance of the Italians.

1. Della Letteratura Italiana, Di Camillo Ugoni.

2. Storia della Letteratura Italiana. Del cavaliere Giuseppe Maffei.

3. Storia della Letteratura Italiana nel secolo XVIII di Antonio Lombardi.

III. Origin and Progress of the Useful Arts.

The Frugal Housewife. By the Author of Hobomok.

IV. Pennsylvania Biography.

Memoirs of the Historical Society of Pennsylvania. Part II.

V. Defence of Mechanical Philosophy.

Signs of the Times.—Article VII. in the Ninety-eighth Number of the Edinburgh Review, for June, 1829.

VI. The Cherokee Case.

1. Opinion of the Supreme Court of the United States on an Application made by the Cherokee Indians for a Writ of Injunction against the State of Georgia, delivered by Mr Chief Justice Marshall, at the January Term held at Washington, 1831.

VII. The Prospect of Reform in Europe.

L'Avenir. Par M. J. L. Sismondi. Extrait de la Revue Encyclopedique.

VIII. Popular Sports and Festivals.

The Sports and Pastimes of the people of England. By Joseph Strutt. A New Edition, with a Copious Index. By William Hone.

IX. Harvard University

Letter to Governor Lincoln in relation to Harvard University. By F. C. Gray. Second Edition, with an Appendix.

X. Life and Character of Henry Brougham.

1. Speech of Henry Brougham, M. P. on the Present state of the Law.

2. Practical Observations on Popular Education. By H. Brougham, Esq. M. P. F. R. S.

3. Publications of the society for the Diffusion of Useful Knowledge.

XI. North Eastern and Northern Boundary.

1. Decision of His Majesty the King of the Netherlands, on the Questions submitted to him by the Governments of the United States and Great Britain, for determining the Boundary Line between the United States and the British Provinces. July 2.

JUST PUBLISHED, by GRAY & BOWEN,

Peter Parley's Tales about the Islands in the Pacific Ocean.

Peter Parley's Tales of the Sea.

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April 9.

ESSAY ON JUNIUS. Just published by GRAY & BOWEN, an Essay on Junius and his Letters; embracing a sketch of the Life and character of William Pitt, Earl of Chatham, and memoirs of certain other distinguished individuals; with reflections Historical, Personal and Political, relating to the affairs of Great Britain and America, from 1763 to 1785, by Benjamin Waterhouse, M. D.

'As to the book itself, it can say this in its behalf, that it does not merely confine itself to what its title promises, but expatiates freely into whatever is collateral.'—*Harris' Hermes.* April 9.

THIS DAY PUBLISHED, by *GRAY & BOWEN*, No. 141; Washington Sreet, The Christian Examiner and General Review, No. XLV.

CONTENTS.

I. Religion in France. Vues sur le Protestantism en France. Par J. L. S. Vincent, l'un des Pasteurs de l'Eglise Reformee de Nismes.

II. May's Letters to Hawes. Letters to the Rev. Joel Hawes, D. D. in Review to his 'Tribute to the memory of the Pilgrims.' By Samuel J. May, Pastor of the first Church in Brooklyn, Connecticut.

III. Life and Writings of Origen. Origenis Opera Omnia, quæ Græce vel Latine tantum extant, et ejus Nomine circumferuntur. Opera et studio Caroli Delarue.

IV. On the morality of our Political situation.

V. German Rationalism. The Biblical Repository, January, 1831. Conducted by Edward Robinson, Professor Extraordinary in the Theological Seminary at Andover.

VI. Harmonies of the Gospels. A Harmony of the Gospels, on the plan proposed by Lant Carpenter, LL. D.

VII. Mr Whitman and his Reviewers.

1. Review of Mr Whitman's Letters to Professor Stuart on Religious Liberty. [From 'The Spirit of the Pilgrims.'] With an Appendix not before published.

2. A Reply to the Review of Whitman's Letters to Professor Stuart in 'The Spirit of Pilgrims' for March 1834. By Bernard Whitman.

VII. Translation of the Scriptures at Serampore.

IX. Books on Practical Religion. On the Formation of the Christian Character. Addressed to those who are seeking to lead a religious Life. By Henry Ware, Jr. Professor of Pulpit Eloquence, and the Pastoral Care in Harvard University. July 2.

TALES OF TRAVELS.—Recently published by GRAY & BOWEN, TALES OF TRAVELS in Central Africa, and Tales of Travels West of the Mississippi, with Maps and numerous Engravings, by Solomon Bell, late keeper of the Traveller's Library, Province House Court, Boston. These volumes are the first of a series which are intended to supply to the Children of the United States, an entertaining abstract of the most popular books of Travels which have lately appeared.

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Peter Parley's Geography for Children. April 9.

SPLENDID BIBLE. Just published by GRAY & BOWEN, a superb Bible, without note or comment, in two volumes, Imperial octavo. It was the design of the publishers, in this work, to produce the most perfect specimen of typography of which the American Press is capable. The paper is of the finest quality, the type new, large and open. The work has been carefully collated with the best Oxford editions, and great attention has been paid to accuracy. March 19.

HARMONY OF THE GOSPELS. Just published by GRAY & BOWEN, No. 141 Washington Street, 'A Harmony of the Gospels,' on the plan proposed by Lant Carpenter, LL. D. Feb. 19.

WEBSTER'S WRITINGS. Just published by GRAY & BOWEN, No. 141, Washington-street—Speeches and Forensic Arguments by Daniel Webster, with a highly finished portrait drawn from life, and engraved on steel, by J. B. Longacre.

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THE JURISPRUDENT

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, JULY 9, 1831. NO. L.

## MEDICAL JURISPRUDENCE.

### PRESUMPTION OF SURVIVORSHIP.

Disputed identities, like appearances of ghosts, have grown more rare as knowledge and civilization have advanced, and the taste for what is true, superseded the preference for what is marvellous. Some stories of this kind, however, which puzzled the wisest judges of the time, are so curious and well authenticated, as to deserve a short consideration. France, fertile in other physical marvels, appears pre-eminent for this species of anomaly. The case of Martin Guerre, decided by the parliament of Tholouse, in 1560, is the most curious, perhaps with one exception, to be met with of the kind.

Martin Guerre, was compelled by circumstances to remain absent from his home for the space of eight years. An adventurer, Arnauld Dutille by name, formed the bold design of representing him, and actually succeeded in imposing himself on the wife of Martin, as her husband, and took unopposed possession of the property. By this union he had children, and continued resident for three years in the family, with four sisters and two brothers-in-law of the absent man, without any suspicion of his identity arising. At length some doubt was thrown on the real character of the impostor, and the question was referred to the courts. Of several hundred witnesses examined, thirty or forty swore that Dutille was the true Martin Guerre, about the same number that he was Arnauld Dutille, and the remainder deposed that the resemblance between the two men was so great, that they felt it impossible to decide between them. The perplexity of the judges was extreme on this occasion, and they were on the point of deciding, from some preponderence, as they esteemed it, of evidence, in the impostor's favor, when the real Martin Guerre appeared. Even when they were confronted, so great was the resemblance, and such the effrontery and composure of Dutille, that many remained in doubt, until the brothers and sisters of the long absent person fully and decidedly recognised him.

The more recent tale of Francis Noiseu, presents a case of gross deceit, rather than of extraordinary similarity between two persons, but it was otherwise decided by the courts who reviewed it, and is therefore worth our notice.

Francis Noiseu, was born at Paris, on the twentysecond of December, 1762, and put to nurse in Normandy. Three years and eight months after his birth, this child was lost, until the 15th of June, 1768, when his godmother, seeing two children pass by, was struck with the voice of one of them. She called him to her, and after a careful observation became convinced that she had found her godson. On the other hand, the widow Labrie, claimed the boy as her son. The reasons for allowing the godmother's claim were, besides general resemblance, a mark in the right arm, and a cicatrix on the inner side of the left knee, both of which had existed in the lost child, who had been bled when about sixteen months old, and undergone an application of caustics for a gathering in the leg. These two resemblances, the widow Labrie, accounted for as accidental abrasions received in nursing, but she denied that bleeding or caustics had ever been employed. It was also contended for her, that the child was marked with the small pox, whereas the other claimant never maintained that her lost godson had suffered that disease. Many witnesses also swore that it was the young Labrie. The courts so decided, certainly not with the wisdom of Solomon.

Foderé, who has collected most cases on this subject, impugns this judgment with much justice. He points out how easy it would have been for surgeons to decide, whether the cicatrices in question were the effect of bleeding and caustics, or the result of slight tumor or abrasion. Yet those examined, contradicted one another on this point. Again, the circumstances that a child lost for two years, should have the smallpox in the interval, appears by no means improbable.

In our country, a dispute respecting identity, far more wonderful than these, or any other, occurred in the proceedings against Elizabeth Canning, for perjury, which are recorded at length in the state trials. That superlatively interesting inquiry, arose, as our readers may remember, from an accusation of kidnapping and robbery, previously brought by Canning, against one Wells, who kept a house of no extraordinary reputation at Enfield Wash, some gipsies of the name of Squires, and others, unknown. We have no space to enter into the details of this long and complicated case, which as much, perhaps as any upon record, will reward attentive perusal. It is sufficient to state here, that certain circumstances having thrown a doubt upon the statements of the prosecutrix, she was indicted for perjury, at the Old Bailey. One of the chief facts endeavored to be proved against her was, that these Squires, whom she swore to have seen on the first of January, in the house at Enfield Wash, to which she was conveyed, were then, and for long after in a different part of England. For this purpose thirtyeight witnesses, against whose character no exception was taken, appeared and swore, that from the latter end of December, to the twentyfourth of January, the whole family of the Squires were travelling gradually from Dorsetshire to London. Their progress was proved in evidence from day to day, without one omission, and their place of rest for every night accounted for. On behalf of Elizabeth Canning, came twentyseven respectable witnesses, quite unconnected with, and uninterested for her, who deposed to having seen the mother, Mary Squires, and some of them the whole party, both shortly before and after the first of January, in the neighborhood of Enfield Wash. The wonder of this conflicting testimony was much heightened by the fact that Mary Squires was a woman of most singular and frightful aspect, so that many of the witnesses who swore to her identity declared, 'That they did not believe God had made two such objects in the world,—that they should know her among ten thousand,—that those who had once seen her could not forget her until their dying day,' and similar strong expressions. The balance of credibility seems to incline against the thirtyeight, who appeared in favor of the Squires, but the case still remains a most doubtful and perplexing one. Elizabeth Canning was convicted and sentenced to transportation, but there were other stronger grounds of suspicion against her. There was probably perjury on both sides.

Of another but equally marvellous description is that difficulty which sometimes has occurred in ascertaining the identity of an individual quite changed by time and hardships. The learned Paolo Zacchia, the compiler and augmenter of all the knowledge extant in his time on those subjects of medical jurisprudence, which are most obscene and least profitable, has preserved one or two strange cases of this sort, once submitted to his much revered arbitrament. He thus analyses and sums up the causes of the difficulty in his sixtyfirst *Consilium*: 'Causæ igitur tantæ mutationis restringi possunt ad ætatem, ad insignes aeris mutationes, ad vitæ genus maxime a consueto diversum, ad animi vehementes, improvisas, ac repentinas, vel etiam longo tempore detinentes passiones, ad morbos aut maximé acutos, aut malignos, aut maxime diuturnos.' One of his narratives much abridged will satisfy our present object.

Andrea Cassali, a noble Bolognese, left his country at an early age to engage in military enterprises. It was generally supposed that he had fallen in battle; but after the lapse of thirty years from his departure, he returned and claimed his property, which his heirs had already appropriated. Although some marks appeared to identify him, the change in his appearence was so great, that none who remembered the youth were able or willing to acknowledge the man. He was seized and imprisoned as a fraudulent impostor. The judges in their perplexity applied to Zacchia to inform them, whether the human countenance could be so changed as to make it impossible to recognise. He decided in the affirmative, for the reasons above stated. The judges, on receiving this reply, called on the heirs of Cassali to produce evidence of his death, and they being unable to prove it, a restoration of his titles and estates was decreed to him.

Inquiries regarding the presumption of survivorship may seem at first rather amusing than profitable or important, and, as such, little deserving of serious attention from us. Yet they have not been thought unworthy of care and consideration in all countries highly civilized, while, from their difficulty, they have baffled the wisdom of legislators, and puzzled the ingenuity of lawyers. Notwithstanding this research, no great benefit has resulted to society, as there seem insuperable difficulties to prevent the attainment of any definite and rational regulations on this perplexing subject. An extract from the 'Code Napoléon' will give the best idea of the pains that have been taken, and, we think, of their futility. Under the title, 'De l'ouverture des saisins, et de la saisine des héritiers,' we find the following enactments:

Art. 720.—'Si plusieurs personnes respectivement appellées à la succession l'une de l'autre, périssent dans une méme evénement, sans qu'on puisse reconnâitre laquelle est décédée la premiére la présomption de survie est déterminée par les circonstances du fait, et â leur défaut par la force de l'âge et de sexe.'

Art 721. 'Si ceux qui ont pèri ensemble avaient moins de quinze ans, le plus âgé sera présumé avoir survécu.'

'S'ils étaient tous au dessus de soixante ans, le moins âgé sera présumé survècu.'

'Si les uns avaient moins de quinze ans et les autres plus de soixante, les premiers seront présumés avoir survécu.'

Art. 722. 'Si ceux qui ont péri ensemble avaient quinze ans accomplis et moins de soixante, le mâle est toujours présumé avoir survécu, lorsqu'ily a égalité d'âge, ou si la différence qui existe n'exceda pas une année.'

'S'ils etaient du même sexe la présomption de survie qui donne ouverture à la succession dans l'ordre de la nature doit être admise ; ainsi le plus jeune est présumé avoir survécu au plus âgé.'

These provisions are clearly founded on principles of correct physiology, and yet how easy is it to find just fault with them. Beck following Fodéré points out the high absurdity of the seven hundred and twentyfirst article, in giving to infants of a month or even day a preference before all persons above sixty. But his further criticism is trifling and unfair, when he objects that the code takes no notice of the case in which persons under fifteen and under sixty perish together; for though we find no express clause to that purport, the others imply it beyond the possibility of mistake.

The old French law, before the construction of the code Napoleon, followed the simpler provisions of the digest in giving the benefit of presumption of survivorship to the eldest of the deceased up to the age of puberty, and to the youngest afterwards. The French system, however, gave one addition and, indeed, improvement to the Roman, by admitting its application in those cases only where the disputed property passed by descent. If the parties who perished were the possessor and his next heir, the legal tribunals were willing to entertain the hypothesis of survivorship : but if the one was legatee only of the other, the estate of the testator passed to *his* heirs without dispute. Thus, where the captain and lieutenant of a vessel perished together at sea, and the latter before sailing had bequeathed to his superior officer a considerable sum of money, the courts refused to listen to the claim made for the legacy by the heirs of the captain. It seems no irrational distinction to show greater favor to heirs than legatees in such circumstances, but the rule, if enforced in this country, might press very severely on remaindermen, for whose benefit the testator might frequently have been more solicitous to provide by his will than for that of the devisee for life who perished with him. Although not recognised by English judges, this principle was much urged on one side in the case of Mason and Mason,* of which some account will presently be given.

Zacchia is as laborious and as fanciful as elsewhere on this perplexing sort of hypothesis. Two cases recorded in his Consilia will give the best notion of his mode of judging. The first is that of a father and son who were overwhelmed by the fall of a building, their respective ages being sixty and thirty at the time. The bodies were found about ten hours afterwards. That of the father was uninjured, but there was a severe wound on the head of the son. The heirs of each put forward their claims, and Zacchia was appointed referee by the judges. After a long and diligent investigation of the parties' strength and state of health, he came to the conclusion that the son survived the father. He put the wound on the head out of the question, on the ground that it would not necessarily have proved mortal, and at any rate was not of a nature to produce immediate death, while suffocation, on the other hand, must have taken place so speedily, that the father, old and valetudinarian, in all probability first perished.

His other tale is of a man and his family who had eaten very copiously of mushrooms, which proved poisonous. They were all taken violently ill, and the domestics sent to procure assistance. Before their return with medical aid, the husband and wife had expired. Two years previous, this couple had agreed that the survivor should possess the sum of two thousand crowns, and the heirs of each contested the right to it. Zacchia, when consulted, gave his opinion that the man had lived longest. His reasons were, the robust and healthy state of the husband, although sixty years old, and the fact deposed to by his servants, that he had eaten fewer of the mushrooms. The wife, on the contrary, was asthmatic, and subject to stomachic complaints: it appeared, too, that she had partaken largely of the fatal dish, besides other indigestible food. She was, however, only forty. But a poison, he thought, which acted violently on the respiratory organs, must sooner destroy one already diseased in those parts. This theory respecting the operation of such poisons, it must be observed, is altogether fanciful, but the learned schoolman seems right on the whole.

We hope the reader will not deem us tiresome or puerile, if we mention two more foreign cases, before coming to the most remarkable that have occurred in our own country. The one is curious from its facts, and the other from the theories which it gave rise to. We are indebted for the first to the Advocate Ricard, a celebrated pleader of the seventeenth century.

'At the famous battle of Dunes, in 1658, there fell together a father and son. On the same day, at noon, the daughter and sister took the vail, and become thereby dead in law. This was the hour at which the battle commenced. In the inquiry respecting survivorship, it was soon settled, that the nun died first, for her vows were consummated in a few minutes, whereas the father and the son might linger long after receiving their mortal wounds. Between the last, the Roman law then recognised in France, furnished easy means of decision, and the younger man was declared the survivor.'

In 1751, the celebrated Dr Lorry was called on to give an opinion in the following case. A merchant, aged fiftyeight, his wife, fifty, and his daughter, twentyseven, were drowned, whilst attempting to cross the Seine in a small boat. No other fact having transpired respecting their death, the heirs contested the property. That the daughter died first, was sought to be established by Lorry. Three causes, he observed, would conspire to accelerate death, namely, the fright, the extreme coldness of the water, and the presence of certain diseases. His whole argument assumes the rather curious supposition, nowhere stated in the case, that the younger female was menstruating, and that the cold water would hasten her dissolution by checking the discharge. Supposing that he had private means of knowing her state, it seems very questionable whether the presence of such a disorder would accelerate suffocation. And that such a hypothesis should counterbalance the important difference of age between the parties with a sensible man, is so absurd, that we can scarcely give him credit for having dealt fairly with the subject. The parliament of Paris very properly admitted the presumption of survivorship to rest with the daughter, by their decree of the seventh of September, 1752, and ordered a disposition of the property accordingly.

[To be continued.]

* 1 Merivale Rep. 308.

## ORIGINAL LETTER OF JUSTICE BLACKSTONE.

The following letter of Chief Justice Blackstone, appears to have been addressed to a relation, soon after the young candidate for legal honors had commenced his professional studies in London, and exhibits, if I mistake not, the germ of that singularly beautiful style which afterwards adorned his Commentaries.—*Legal Obs.*

Dear Sir,—You have been so kind as to tell me, yt. a Line now & then from me wd. not be unacceptable to you. 'Tis this that has drawn upon You ye. present Trouble, for wch. You have Nobody but Yourself to blame.

I have been in Town about ten Days, & am tolerably well settled in my new Habitation (wch. is at Mr Stokes's a Limner in Arundel-Street.) The People of ye. House seem honest, civil, & industrious ; & my Lodgins are in themselves chearful, retired, &, as every Body tells me, extremely reasonable. Nor do I want Opportunities of Gallantry (if I have inclination to improve them) there is lodging in ye. same House a young Lady of extraordinary Accomplishments & a very ample Fortune ; but alas ! She has, together with ye. Riches, ye. Complexion also of a Jew. So that She is not like to prove a very formidable Rival to — — Coke upon Littleton.

Coke I have not yet ventured to attack, but have (according to Ch. J. Reeves's Plan) begun with Littleton only. Two together wd. be too much for a Hercules, but I am in great Hopes of managing them one after ye. other. I have stormed one Book of Littleton, & opened my Trenches before ye. 2d ; and I can with pleasure say I have met with no Difficulty of Consequence ; There is one thing indeed, & but one, I cd. not understand in ye. first Book, wch. is a mere matter of Speculation: & is in short this. The Donees in Frank-Marriage shall do no Service (but that of Fealty) to ye. Donor or his heirs till ye. 4th Degree be past. Of wch. 4 Degrees ye. Donee shall be said to be yc. first. § 20. To prove wch. last Assertion, Littleton produces a Writ of Right of ward (as you may see Pag. 23. b.) Now with me ye. Question is, how the Writ wch. he produces proves ye. Point he wd. have it do, viz. that ye. Donee in Frank-Marriage is ye. first of ye. four Degrees. You will observe that this is a Point of mere Curiosity, Frank-Marriage being now out of Use. But I don't love to march into an unknown Country, without securing every Post behind me : & it is a greater Slur upon a General to leave a slight Place untaken, than one more hard of Access. Besides, in my apprehension,

and I shd. be glad to know your opinion of ye. matter) ye. Learning out of use is as necessary to a Beginner as that of every Day's Practice. There seems in ye. modern Law to be so many References to ye. ancient Tenures & Services, that a Man who wd. understand ye. Reasons, ye. Grounds & Original of what is Law at this Day must look back to what it was formerly ; otherwise his Learning will be both confused & superficial.

I have sometimes thought that ye. Common Law, as it stood in Littleton's Days, resembled a regular Edifice : where ye. Apartments were properly disposed, leading one into another without Confusion, where every part was subservient to ye. whole, all uniting in one beatiful Symmetry : & every Room had its distinct Office allotted to it. But as it is now, swoln, shrunk, curtailed, enlarged, altered, & mangled, by various & contradictory Statutes, &c ; it resembles ye. same Edifice, with many of its most useful Parts pulled down, with preposterous Additions in other Places, of different Materials and coarse workmanship : according to ye. Whim, or Prejudice, or private Convenience of ye. Builders. By wch. means the Communication of ye. Parts is destroyed, and their Harmony quite annihilated ; & now it remains a huge, irregular Pile, with many noble Apartments, tho' awkwardly put together, & some of them of no visible Use at present. But if one desires to know why they were built, to what End or Use, how they communicated with ye. rest, and ye. like ; he must necessarily carry in his Head ye. Model of ye. old House, wch. will be ye. only Clew to guide him thro' this new Labyrinth.

I have trespassed so far on yr. Patience, that I am almost afraid to venture any farther. But I happen'd t'other day upon a Case in a Civil Law Book, wch. I should be glad to know how you imagine Chancery wd. decide. A Man dies & leaves his Wife with Child : & by his Will ordains that, if his Wife brought forth a Son ; ye. Son shd. have 2 3ds. & ye Mother one 3d of the Estate : If a Daughter, then ye. Wife to have 2, & ye. Daughter 1 3d. The Wife brought Twins, a Boy & a Girl. Qu. How shall ye. Estate be divided ? N. B. We must suppose a Jointure, or something, in Bar of Dower.

We are quite in ye. Dark as to Intelligence here in Town; You must observe what strange, perplexed, incoherent Accts. ye. Gazette affords us. I fear our Loss in Scotland was greater than they care to own. But at ye. same time, even Victory must lessen ye. Number of ye. Rebels, while we are continually recruiting. There is a Talk of assessing all personal Estate, & raising thereby 3 millions. If so ye. Assessment must run high.

I was sensibly concerned at hearing of Mar. Richmond's Illness ; but hope, by not hearing lately any thing further, that all is well again. My hearty Good wishes attend him, & my Cousin, who I shd. think might take a Trip to Town this Spring. My Aunt of Worting will be at Lincolns inn-fields about Easter ; and probably wd. be glad of a companion to partake of some of ye. gay Diversions.

Excuse, Sir, this tedious Length, wch. I promise never to be guilty of again, & when You have an idle hour, be so good as do think of, Sir,

Your most obliged humble Servant.

WILL. BLACKSTONE.

*Arundel-Street, Jan.* 28, 1745.

(Superscribed)

To MR RICHMOND,

at Sparsholt, near Wantage, Berks.

## THE UNIVERSITY OF LONDON.

### LAW CLASS.

### LECTURES OF MR THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

The chief subject announced for consideration in this lecture was, the extent or meaning of the words 'special promise to answer for the debt, default, or miscarriage of another person,' with the view to determine in what cases a compliance with the enactment relative to that description of promise is necessary.

From a review and minute critical examination of several of the earlier cases Mr Theobald inferred, that at first the words quoted were understood by the courts to apply to promises of guarantee exclusively. Thus in *Buckmyr* v. *Darnell**, the defendant's promise, namely, that if the plaintiff would lend his horse to *A. B.*, *A. B.* should return it safe, was held to be within the statute 'because, (says Salkeld, abridging the reasoning of the court) the promise came in aid only (that is, he was an accessory or surety, and not a principal) to procure a credit (that is, loan of the horse) to the party, and there is remedy against both according to their distinct engagements.' In *Read* v. *Nash*†, on the contrary, where it appeared that no other person was obliged as principal debtor, and therefore that the defendant was a surety, the case was held not within the statute. Now, said the lecturer, had it not been previously determined that the statute applied to guarantees only, the consideration that the promise in the former case was a guarantee, and that that in the latter was not, would not have been decisive of the question, whether those promises were within the statute. The lecturer next adverted to the recent cases of *Kirkham* v. *Martyr*.‡ There the defendant's son was alleged to have ridden to death the plaintiff's horse, and the defendant promised him a sum of money in compensation. The material facts in this case were identical with those in *Read* v. *Nash*. In both cases an injury had been, or was alleged to have been, committed ; in both, a third person promised a compensation ; in neither was the person who committed the injury a party to the agreement for a compensation ; yet, in the latter case (*Kirkham* v. *Martyr*) the court decided the defendant's promise to be within the statute, on the ground that it was a promise to answer for a 'miscarriage.' *Read* v. *Nash* therefore is overruled, and in future, not only promises of guarantee, but promises to answer for the *torts* of others, must be in writing.

We have not space for more than an illustration of Mr Theobald's views respecting the policy of this decision. While, said he, the words alluded to were understood in their most probable sense as applicable to guarantees only, principle and harmony prevailed in the decisions ; but, from giving the word 'miscarriage' a literal interpretation, without regard to the context, the question arises, whether a literal interpretation should not be applied to the rest of the enactment ; and if not two inconsistent rules of interpretation exist concurrently, according to one of which many cases which have been excluded from the statute ought to be included, and according to the other, many included which ought to be excluded. For instance, upon a literal interpretation of the words, 'promise to answer for the debt of another,' *Goodman* v. *Chase*§, and many analogous cases which have been excepted from the statute, would be within it ; because, although the defendant was not a surety by reason of the effect of his agreement in extinguishing the liability of the principal debtor, still, at the time his promise was made, the debt was not his own, but strictly and literally, the debt of another.'

Mr Theobald next reviewed the cases taken by judicial decision out of the statute. *Goodman* v. *Chase**, *Browning* v. *Stallard*†, *Tomlinson* v. *Gill*‡, *Anstey* v. *Marden*§, *Williams* v. *Leper*‖, *Bampton* v. *Paulin*¶, *Burrell* v. *Trussell***, *Houlditch* v. *Milne*††, and *Castling* v. *Aubert*‡‡, were the chief of those cited ; and the results of which he stated to be that the following agreements are not within the statute : 1. Agreements, by the express terms of which the creditor lose his right to recover against this original debtor. 2. Agreements, by the legal operation of which the creditor loses his right to recover against his original debtor. 3. Agreements, accompanied with a relinquishment by the creditor to the surety or promiser of any securities of any kind, on which he has a lien for the sum promised. 4. Wherever the creditor sells his debt, the promise of the purchaser to pay the price is not within the statute.

Referring to *Gall* v. *Comber*§§, and *Grove* v. *Dubois*‖‖, Mr Theobald next discussed, whether the guarantee of a broker on a *delcredere* comission was within the statute, and he concluded by announcing for his next lecture, the subject of the extent and the construction of the obligation of surety.

*1 Salkeld, 27.
† 1 Wils. 305.
‡ 2 Barn. & Ald. 613.
§ 1 Barn. Ald. 297.

* 1 Barn. & Ald. 297.
† Ambler, 330.
‡ 3 Burr. 1887.
§ 4 Taunt. 118.
‖ 2 East ,325.
¶ 1 Term R. 115.
** 5 Taunt. 450.
†† 1 New R. 127.
‡‡ 4 Bing .264.
§§ 3 Esp. N. P. C. 86.
‖‖ 1 J. B. Moore, 279.

## CASES IN POINT.

'CAN you produce any authority for that position ?' inquires his lordship of the learned counsellor X., who, conscious of the unfavorable aspect of the cases, is indulging in a few ipse-dixits, with an emphasis proportioned to the badness of his cause, and spinning some distinctions so ingenious, subtle, and refined, that it is quite a pity they they are not to be found in any of 'the books.'

'Please your ludship,' replies Mr X., 'I confess that I am not prepared with a bead roll of cases at my fingers' ends : but, my lud, I argue upon principle ;' whereby the learned gentleman merely means, that it is his principle to decry the cases to the extent of his abilities and his lungs, whenever they happen to make against the cause which he advocates, though he is always a great stickler for them if they are favorable to his clients.

But the 'simple laity,' as the old lawyers were wont politely to designate all the rest of the world except themselves, not being in the secret of the learned gentleman's distaste for the authorities, will be apt to applaud so liberal and enlightened a disavowal of the narrow prejudices of his profession ; and the young apprentice of Themis, just entered into a solicitor's office, or commencing his *status pupillaris* in chambers, having already had a slight taste of the horrors of looking up cases in point, sympathizes with so convenient a disregard of black-letter law, as he scornfully designates all law which has had the misfortune to be printed. Indeed, inexperi

ence or indolence will generally be found at the bottom of the vulgar outcry against precedent: inexperience, which is not aware that a strict adherence to foregoing decisions is the landmark of property, and indolence, that would fain jump to conclusions, instead of arriving at them by the more tedious, but safer route, provided by the stepping stones of established authorities.

In the profession itself there are put few principle-mongers; for a diligent study of the law will almost infallibly lead to a conviction of the vital importance of certainty, so far as it can be attained, in the rules by which the multifarious transactions between man and man are to be regulated, and the general mischief and confusion that must ensue, if such rules might be altered or modified in order to suit individual notions of natural equity in particular cases. But, no doubt, it is a very prevalent notion with that part of the public whose avocations have not led them to pay particular attention to the subject, that the reverence for precedent is carried by lawyers to an absurd and mischievous extent; and that, in submitting a question to the test of judicial rules and decisions, the essence of justice often evaporates in the process. It is supposed that there is the common-sense view of a case, (such is the popular phrase,) as distinguished from the light in which that case is placed by the refined subtleties of the law. The error consists in a party's assuming, as a matter of course, that his own particular opinion is necessarily the only one compatible with common sense; much in the spirit of the learned divine, who defined orthodoxy to mean his own doxy, and heterodoxy the doxy of any other man. If the suffrages of those who profess to be guided by the dictates of common sense alone were to be collected on any complicated question, common sense would be found strangely inconsistent with itself. On the other hand, where, after a full, deliberate, and impartial investigation, of all the circumstances of a case, and after everything has been stated, *pro et con*, which ingenuity or experience can suggest, a decision has been pronounced by a competent person, whom the nature of his pursuits has peculiarly fitted for giving the proper weight to every fact and every argument which is urged upon his attention, is there any thing absurd or unnatural in being guided by such a decision, in preference to listening to the crude and self sufficient *dicta* so complacently referred by their authors to reason and principle, though they will generally be found, on a strict examination to be opposed to both? As for the niceties and refinements ascribed to the law, they spring out of circumstances; and it is as unfair to charge them upon the members of the profession, as it would be to taunt an astronomer for descending into the minute and intrinsic calculation rendered necessary by the nature of the sublime science to which he is devoted.

The young student at the commencement of his noviciate, is naturally impatient of the restraint which is imposed by a continual reference to the opinions of others, and irritated at the nice and troublesome scrupulosity which exacts a case in point for every position. But, upon consulting the authorities to which his attention is directed he finds the question on which he is inclined to come to a hasty conclusion placed in so many new and important points of view, so many difficulties to be encountered, and consequences to be obviated, which had never suggested themselves to his inexperience, that, if he be possessed of any degree of intelligence, he begins at length to suspect his own infallibility, and to entertain some respect for opinions which are the result of knowledge and experience. He gradually becomes expert in applying the principles of former decisions to every case which is brought under the notice, and the habit of investigation will moreover enable him to consider a subject in all its bearings, and to grapple with its difficulties even where the authorities fail him: his judgment becomes matured, and he has laid in all the elements of a sound lawyer. The 'enlightened public,' or that class of persons who styles themselves such, will probably represent him as having now become thoroughly imbued with the prejudices of his profession: but he will be consoled by the consciousness of having qualified himself to discharge the most important and responsible duties of that profession with credit to himself and advantage to the community.—*Ib.*

## THE LAW INSTITUTION.

The Inns of Court and Chancery, which constituted a species of law university, where the members possessed the advantage of extensive libraries, and the means of improving themselves, by legal and forensic exercises, were anciently not confined to the graduates of the bar, but included the attorneys at law, who like the rest of the members, assembled in commons at stated parts of each term.

Amongst the alterations which time has wrought in the legal profession, we may notice the disuse of the ancient regulations with regard to attorneys, by which they were required 'to come into commons, according to the custom and orders of those societies, *to their great ease in transacting causes one with another.*'*

The circumstances under which these rules were permitted to be disregarded, it is needless in this place to investigate; but it appears that the profession soon felt the importance of establishing a substitute for those venerable associations; and accordingly, in the year 1739, the *Law Society* was formed expressly, for the purpose of supporting the honor and independence of the profesion, promoting fair and liberal practice, and preventing unnecessary expense and delay to suitors.' About ten years ago, another association for similar objects was instituted, called the *Metropolitan Law Society*, and numerous *clubs* of solicitors, both in London and in different parts of the country, have also, from time to time, been established for the furtherance of the respectability of the profession. These at length have been followed by the *Law Institution*, which has been framed upon a larger scale of utility.

The following is an account of its *origin*, and in a future number we shall detail its various important *objects* and advantages.

The plan of the Institution originated with some individuals in the profession, who were desirous of increasing its respectability, and promoting the general convenience and advantage of its members.

It appeared to them singular, that whilst the various public bodies and commercial classes in the metropolis, and indeed in many of the principal towns in the kingdom, had long possessed places of general resort, for the more convenient transaction of their business; and while numerous Institutions for promoting Literature and Science amongst all ranks of society had been long established, and others were daily springing up, the attorneys and solicitors should still be without an establishment in London, calculated to afford them similar advantages.

To supply this desideratum, and afford other professional facilities, the present Institution was suggested. The outline of it having been in the first instance submitted to the consideration of the more immediate friends of the parties with whom the plan originated, and from whom it received the most unequivocal proof of approbation, measures were adopted for submitting the plan to the profession at large. A meeting accordingly took place, at which the subject was discussed and referred to the consideration of a provisional committee, who having made their report, a general meeting was held, at which the measure was finally approved, and a Committee of Management appointed to carry it into execution.

For effecting the purposes of the Institution, it was considered necessary to raise a fund of £50,000, in shares of £25 each, payable by instalments, no one being permitted to take more than twenty shares. The plan having been generally announced to the profession, a large proportion of the shares were immediately subscribed for, so that no doubt remained of the success of the design, and the committee therefore directed inquiries to be made for a site for the intended building, and succeeded in obtaining an eligible one in *Chancery lane*, nearly opposite to the Rolls Court, and extending to Bell yard; thus having the advantage of two frontages, and, from its contiguity to the Law Offices and Inns of Court, being peculiarly adapted to the objects of the Institution.—*Legal Obs.*

* The last rule of court on this subject was in 1704.

### SLANDER—SPECIAL DAMAGE—VARIANCE.

Action for slander. The words were, 'he is a rogue and a swindler.' The declaration alleged special damage, as occasioned by the uttering of these words by the defendant. Brier was called to prove that in consequence of having heard these words, he refused to trust the plaintiff. Brier heard these words from Brice, in whose presence they had been spoken by the defendant. Brice gave up the name of the defendant.

Mr Justice *Bosanquet*, who tried the cause nonsuited the plaintiff, on the ground that, as the words were not actionable in themselves, but are alleged to have been uttered by the defendant, and thereby to have been the cause of special damage, the plaintiff should have shown that they were spoken to Brier either by the defendant or by his authority. The repetition of them by Brice was the act of that person, and not of the defendant, and the latter could not therefore be answerable. A rule was obtained to set aside the nonsuit, and it was contended that if an action had been commenced against Brice, his proof that he had uttered the words on the credit of the defendant, would have been a sufficient answer to it as he would thereby have given the plaintiff an action against the original slanderer. The resolution in Lord Northampton's case was cited in support of the argument.

The *Court*, however, discharged the rule. The special damage was not proved as laid, for the words which prevented Brier from trusting the plaintiff, were uttered by Brice of his own accord, and not by the authority of Brier. As to the resolution in Lord Northampton's case, it had often been doubted, but, might now be considered as overruled by the decision in *M' Pherson* v. *Daniel*. —*Warde* v. *Weekes*, Com. Pl. M. T. 1830.

### APPEALS IN GERMANY.

The judicial faculty in every German university forms a court of appeal for the whole confederation. In all the states the losing party in a cause had the right of appealing to a university: this right was confirmed by the act of confederation; and even the native form, if it find difficulties which require the assistance of more profound jurisconsults, may send the case for judgment to an university. In all these appeals the members of the juridical faculty become judges; receive no salary for this part of their duty, but they are entitled to certain fees paid by the litigants, which at Jena I have heard estimated as at least equal to the professional salary. To this union of the bench with the chair are undoubtedly to be ascribed in some measure the distinguished legal talents which have at all times adorned the German universities, and which in the present day are far from being extinct. The theoretical studies of the academician are thus daily brought to the test of practice, and he sees at every moment how his logical deductions work in the affairs of ordinary life.—*Russell's Tour in Germany.*

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ANCIENT LECTURES ON JURISPRUDENCE.—In the fourteenth century, lectures upon the science of jurisprudence were given in the University of Bologna, in Itaty, by *Giovanni Andria*, a celebrated professor. His daughter, the accomplished *Novella*, was often prevailed upon by her father to take his chair; but in order that her consummate beauty might not distract the attention of the pupils, a veil was drawn before her, which, concealed her from the public gaze.

This interesting incident is thus related by *Christina* of *Pisa*:—'In regard to his amiable and beautiful daughter, whom he so affectionately loves, she is so thoroughly skilled both in letters and law, that when he is himself engaged she pronounces her lectures, with a light curtain drawn before her.'—*Citta del Donne.*

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### BARRISTERS AND ATTORNEYS.

A Bill, 'for the better management of the Poor in the several parishes and hamlets of the city of Norwich, and county of the same city,' was lately presented to the House of commons and has been printed. The principal objects appear to be, to get rid of the corporation guardians * * * * * The disfranchising principles of the bill however, do not stop there: among the persons who are *not* to be eligible to the office of Guardian are the mayor, recorder, steward, the justices of the peace, sheriffs, aldermen, the several officers of the corporation, *and practising Barristers, attorneys, and solicitors!!* Now the gentlemen of the legal profession generally live in good houses and are large payers to the rates; and what in the name of wonder has the whole body done that they may not be trusted to act in the guardianship of the poor?—*Norfolk Chronicle, March* 29.

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### BISHOP WARBURTON ON LAW AND LAWYERS.

To suppose that consummate knowledge of the laws by which civilized societies are governed, can give no one good quality to the mind, is making Ethics, of which public laws are so considerable a part, a very unprofitable study. The best division of the sciences is that old one of Plato, in Ethics, Physics, and Logic. The severe philosophers condemned a total application to the two latter, because they have no tendency to mend the heart, and recommended the first as our principal study, for its efficacy in this important service. And sure, if any human speculations have this effect, they must be those which have man for their object, as a reasonable, a social, and a civil being. And these are all included under ETHICS, whether you call the science *morality*, or *law*. With regard to the common law of England, we may justly apply to it what Tully says of the law of the twelve tables. 'Fremont omnes licet, dican quod sentio: bibliothecas mehercule omnium philosophorum unum mihi videtur pandectarum volumen et authoritatis pondere et utilitatis ubertat superare. But the best evidence of its moral efficacy, is the manners of its professors: *and these, in every age, have been such as were the first improved, and the last corrupted.—Pope.*

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### LAW AND POPULAR FEELING.

The law, in all vicissitudes of government, fluctuations of passions, or flights of enthusiasm, will preserve a steady undeviating course: it will not bend to the uncertain wishes, imaginations, and wanton tempers of men. To use the words of a great and worthy man, I mean Algernon Sidney, who, from his earliest infancy, sought a tranquil retirement under the shadow of the tree of liberty, with his tongue, his pen, and his sword; 'The law,' says he, 'no passion can disturb: it is void of desire and fear, lust and anger; it is *mens sine affecen*, written reason; retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but, without any regard to persons, commands that which is good, and punishes evil in all, whether rich or poor, high or low. It is deaf, inexorable, inflexible. Yes; on the one hand, it is inexorable to the cries and lamentations of the prisoners; on the other, it is deaf, deaf as an adder, to the clamors of the populace.'—*From a speech by President John Adams.*

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### ANCIENT NUMBER OF JUDGES.

Formerly the number of judges in each court appears to have been uncertain. From the special commission granted by Henry III. in the forty-second year of his reign, to the justices of the King's Bench, to hold that court at Westminster till he should otherwise determine, it would appear that the number of judges of that court was then three; namely, *Roger de Thurkelby, Gilbert de Preston, and Nicholas Handlo. Dugdale's Orig. Jurid.* c. 17.

The number of judges in the Common Pleas varied considerably. Previous to the reign of Edward II. the number was three. At the commencement of his reign the number was increased to six, on account of the increase of business. They sat in two separate places, but for how long this practice continued is uncertain. Three years after, 6 Edward II. there were seven; but no more than six in any subsequent year of that reign, nor until 7 Edward III; then the number of seven was resumed. In 11 and 12 Edward III. they were increased to eight, and by 14 Edward III. Trinity term, they amounted to nine. This appears by the fines levied before them. Afterwards, during the remainder of Edward III., Richard II. Henry IV. and Henry V. there were only five. Henry VI. increased them to seven. After that, the number was reduced, and there were seldom more than five, until 27 Henry VI; then they were increased to six, and that number remained till 29 Henry VI. In that year, and till 32, they were seven, and then eight. In 33, six; then, and until the latter end of the reign of Edward IV., seven. Then they were reduced to four; and so they remained till the end of Henry VII. It is to be observed, that some of these justices were, at the same time, chief barons of the Exchequer. *Dug. Orig. Jur.* c. 18.

In the Exchequer, under Henry III. three spiritual and three temporal barons sat with *Ranulph de Glanvill*, at that time justice of England. *Dug. Orig. Jur.* c. 19.

The power to increase the number of judges is new, as a legislative enactment. It, however, appears to have been exerted as a matter of prerogative by James I. during the greater part of his reign, for the benefit of a casting voice, in case of a difference of opinion, and that the circuits might at all times be supplied with judges of the superior courts. In subsequent reigns, upon the permanent indisposition of a judge, a fifth has been sometimes appointed. (*Bl. Com.* vol. 3, p. 41, note *n.*) Sir Thomas *Raymond* mentions the death of Sir Thomas *Twisden*, one of the justices of the King's Bench, in the first week in January, 1682, *grandævus senectute.* He continued judge till his death, but was dispensed with from sitting in court by reason of his age and infirmity. *T. Ray. Rep.* p. 475.

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### VULGAR ERRORS.

That leases are made for 999 years, because lease for 1000 years would create a freehold.

That deeds executed on a Sunday are void.

That in order to disinherit an heir-at-law it is necessary to give him a shilling by the will, for that otherwise he would be entitled to the whole property.

That a funeral passing over any place makes it a public highway.

That the body of a debtor may be taken in execution after his death.

That a man marrying a woman who is in debt, if he take her from the hands of the priest clothed only in her shift, will not be liable for her engagements.

That those who are born at sea belong to Stepney parish.

That second consins may not marry though first cousins may.

That a husband has the power of divorcing his wife by selling her in open market with a halter round her neck.

That a woman's marrying a man under the gallows will save him from execution.

That if a criminal has been hung and revives, he cannot afterwards be executed.

That the owners of asses are obliged to crop their ears, lest the length of them should frighten the horses.— *Barrington's Observations on Ancient Statutes* (1775) *p.* 474-5, *note.—Retrospective Review, Vol. p.* 265-3.

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### LIABILITY OF TRUSTEES.

The members of the profession are so frequently appointed trustees and executors in important matters, that it may be useful to notice the following case, which is liberal construction of their responsibility.

A bill was filed to make executors liable for a sum produced by the sale of £3000 Navy 5 per

cents, which had been deposited with country bankers, who had failed.

It appeared the testator had kept large sums in the hands of the same bankers till the time of his death, and had employed one of the banker's clerks as his confidential agent. The executor employed the same person. In the execution of their trust they contracted for the purchase of an estate, and believing it would be immediately completed they sold stock, and deposited the money with the bankers. Delays occurred in the investigation of the title, and before it was perfected, the bankers failed.

It was urged that the stock was sold out before it was wanted, and that the executor's agent, the banker's clerk, must have known the insolvency of the house. However, the executors were wholly unacquainted with it. A reference had taken place to the master, and he had reported in favor of the executors. Exceptions were taken to his report.

The *Master of the rolls* said that nothing would be more injurious to the interests of society than the allowance of these exceptions. The notice to the agent must be in the character of agent, in order to render the principal liable. The trustees having received satisfactory answers to most of the inquiries, and in order that no time might be lost, sold the stock in August. From circumstances, the conveyance was not completed till February, and before that time the bankers had failed. It would prevent persons from becoming trustees were he to allow the exceptions.

He therefore overruled them. 1 *Tamlyn*, 172.


# THE JURISPRUDENT.

BOSTON, SATURDAY, JULY 9, 1831.


A practical Treatise on the Law of Partnership, with an Appendix of Precedents. By Neil Gow, Esq. of Lincoln Inn, Barrister at Law. The 3d Edit. With considerable Alterations and Additions. London, 1830.

(Concluded.)

In like manner, a bill of exchange drawn upon a firm, but accepted by one in the name of the other partner, is binding upon the firm, because the mere acceptance, as indicating an intention to be bound by the terms of the request in the bill, would be sufficient to give the bill validity, and the effect of that acceptance cannot therefore be controlled by the addition of the name of an individual partner.* And although the indorsement of one partner, which cannot be treated as the indorsement of the firm, will not render the firm liable notwithstanding the money thereby raised be applied to partnership purposes †; yet it is clear that a firm, consisting of several, may carry on business in the name of an individual partner, and then the whole firm will be bound by acts done by him as representing the firm.‡ Thus, where one partner of a firm in England proceeded to a foreign country for the purpose of establishing a branch concern, to be carried on in his individual name, with strict instructions that the names of the firm should appear as little as possible on paper, and that no greater than a stated sum should at any time be risked on partnership speculations; he, however, against those instructions, entered into risks greatly exceeding that sum, and indorsed bills in the course of such dealings in his own name, the firm in England subsequently sanctioning them, and the transaction being for the benefit of the partnership; it was determined that such indorsements were to be deemed the indorsements of the firm, in the name used by them for the purposes of the foreign business, and that they were liable upon those bills.* And it is indisputable, that in every case in which a firm becomes, through the instrumentality of a single member, a party to a negotiable security, and the transaction which occasioned the giving the security was *bona fide*, and fairly referable to the partnership concerns, the act of the single partner, in pledging the joint credit, will have a conclusive binding operation upon all the partners collectively. And cases exist in which one partner may enter into a joint engagement in a transaction not relating to the partnership, and it will be binding upon the firm if it have received either their express or implied sanction. In many cases of partnership it is frequently necessary for its salvation, that the private demand of one partner should be satisfied at the moment, as the ruin of the one might affect the other partners; and therefore the firm, to avert such a possible evil, would rather allow the individual partner to liberate himself by dealing with it than expose themselves to the consequences which might ensue from their non-acquiescence.† In these cases the joint liability depends upon the degree of evidence adduced to prove the authority, the mere relation of partners not of itself being sufficient to confer upon each the power of binding the firm in separate transactions.‡ The nature of the entries in the books, or the appropriation of the money to the partnership or to a separate account, or the privity and silence of the firm, would be evidence of an authority delegated to the single partner.§ Previous authority is not the only criterion by which to determine the joint liability of the partners under such circumstances; subsequent approbation being for this purpose of equal efficacy: for a strong case of subsequent approbation by all the partners raises an inference of their previous positive authority having been given to the particular partner to sign the partnership name to a bill, or to negotiate it, and will subject the partners to liability in a transaction where they would not have been chargeable without such subsequent assent.‖ In instances of this description, the act of the partner must be ascribed rather to his character of agent than of partner: and, the agency being established, of course the partnership would be as firmly bound by his separate acts, as they would have been had they expressly and personally concurred in them. But where no such agency exists, and a joint security is pledged in a transaction unconnected with the partnership, if it be manifest to the person advancing money upon it that it is sent into circulation upon the separate account of the individual partner, and, consequently, that it is against good faith that he should in such a case pledge the firm, it must be shown that he had authority to bind them; for the law does not imply an authority in individual partners over the joint fund, except in matters which affect the partnership concerns.* In the hands of a person aware of, and collusively partaking in the fraud committed upon the partnership by the individual partner pledging the firm in a separate transaction, the joint security would not be available. In such a case it would be the same as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion that he had authority to do so: if he had such authority the pledge would be good, but the creditor would take it at the peril of proving that authority, if it were afterwards denied. The power possessed by one partner of binding his co-partners in joint transactions, without their knowledge or consent, bears in many instances sufficiently hard upon them; but it would be carrying their liability for each other's acts to most unjust extent, if it were suffered that, in a separate transaction, one partner could pledge the credit of the firm. This subject has frequently fallen under judicial consideration, and the doctrine stated has uniformly received the sanction and support of the different judges before whom it has been questioned. It is indeed indisputably settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void.† Therefore, if a man, who has dealings with one partner only, draws a bill of exchange upon the partnership on account of those dealings, he is guilty of a fraud; and in his hands, the acceptance made by the partner on the behalf of the firm would be void.‡ So, where a bill was drawn by one partner, in the joint name, to the order of his separate creditor, it was held that the latter could not recover in an action upon the bill against the firm, notwithstanding that he had not notice of the non-con-

*Mason v. Rumsey, 1 Campb. 384. Wells v. Masterman. supra. In the case of Thomas v. Clarke, 2 Stark. N. P. C. 451., Lord C. J. *Abbott* held, that a partner who executed a charterparty of affreightment, and in the commencement of it professed to contract for himself and his co-partner, thereby bound the latter, although all the stipulations and obligations in remaining part of the instrument were made in the name of the said *freighter*.

†*Ex parte* Emly, 1 Rose 61. Emly v. Lye, 15 East 7.

‡ *Ex parte* Bolitho. Buck, 100.

* South Carolina Bank v. Case, 8 B. & C. 427, S. C. 2 Man. & Ryl. 459.

† *Per* Lord *Eldon*, *Ex parte* Bonbonus, 8 Vesey, 580.

‡ *Ex parte* Peele, 6 Vesey, 600. 'If a man gives a partnership engagement, in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say, that though in its nature not a partnership transaction, yet there was some authority beyond the mere circumstance of partnership, to enter into that contract, so as to bind the partnership. *Per* Lord *Eldon*, Id. Ibid.

§ *Ex parte* Bonbonus, *supra*.

‖ Id. Ibid.

‡ *Ex parte* Agace, 2 Cox's Ca. 312. In transactions unconected with the joint trade, no liability will be entailed upon a dormant partner, where his responsibility was not originally regarded, and the fact of his being a partner was unknown at the time the claim arose. Therefore, where one partner accepted a bill in the name of his firm, but not in a partnership transaction, it was held that an indorsee could not maintain an action on such acceptance against a dormant partner whose name did not appear, and who was not known to be a partner, nor the bill taken on his credit. Lloyd v. Ashby, 2 Carr. & Pa. N. P. C. 138.

* *Per* Lord *Ellenborough*, Swan v. Steel, 7 East 210. S. C. 3 Smith, 109.

† Wells v. Masterman, 2 Esp. N. P. C, 731. In *Ex-parte* Goulding, in the matter of O'Neil and Martin bankrupts, before the Vice Chancellor, sittings after Trinity term, 1826, a question arose whether the joint estate of the bankrupts was liable for a bill accepted by one of them, in the name of the firm, but for his own individual debt, and without the knowledge of his co-partner. The Vice Chancellor, on account of the importance of the question, took time to consider it; and afterwards said, 'I am of opinion, that where one partner gives an acceptance in the name of the firm in satisfaction of his own private debt, and without the knowledge of his co-partner, such an acceptance cannot bind the joint estate.' MSS. S. C. 2 Glyn & James, 118.

currence of the co-partner, and was not apprized that the consideration would be disputed.'*

The power to bind the firm by simple contract, by a guarantee, by deed, by a release, by a receipt, in legal proceedings, by a submission to arbitration, and in bankruptcy, are then severally and ably considered.

Mr Gow next mentions the legal and equitable remedies between partners. It has been thought that a partner cannot file a bill against another for an account, without also praying a dissolution. *Per* Forman *v.* Homfray, 2 *Ves. & Bea.* 329.; and Waters *v.* Taylor, 15 *Ves.* 10. Mr Gow, however, p. 95., says, that this doctrine has been denied, and cites a contrary decision of Sir John Leach, V. C. in Harrison *v.* Armitage, 4 *Madd.* 143.; and we confess we have always thought the principle a very strange one, as in many cases, it would leave the parties entirely without remedy; and in addition to the case mentioned by Mr Gow, we may also refer to Glassington *v.* Thwaites. 1 *Sim. & Stu.* 124. In chapter iii. the legal and equitable remdies for partners against strangers are amply considered, and all the late decisions stated: and in chapter iv. the legal and equitable remedies against partners are discussed. We must find room for a short extract from this chapter.

'Actions of tort may likewise, in some cases, be effectually sustained against partners. Their responsibility in actions of this description may be exemplified by the familiar instances of action brought against them for driving against carriages or running down ships. In those cases, if the carriage or ship occasioning the injury be the joint property of partners it is immaterial whether it be under the direction or guidance of one of the partners or of their servant, because the maxim of law is *qui facit per alium facit per se*; and partners, like individuals, are responsible for the negligence of their servants.† And where it appeared that A and B were partners in the business of public carriers, and that by agreement between them A provided horses and drivers for certain stages, and B for the remainder; it was holden, that, notwithstanding this division of the concern between them, they were responsible for the misconduct and negligence of their drivers and servants throughout the whole distance: and that it was not any defence to B that the servant, through whose negligence an injury had been committed, had been hired and was paid by A alone.* So, in an action of trover, it is not necessary that there should be a joint conversion in fact, in order to implicate all the partners; for such a conversion may arise by construction of law. Thus, an assent by some of the partners to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded the conversion: in such a case, the rule of *omnis ratihabitio retrotrahitur et mandato æquiparatur* applies.† And if co-partners are engaged in smuggling, which is a species of tort, on an information filed for the penalty, they are jointly as well as separately liable.‡ Indeed, in the instances of libels, an anomalous case, a bookseller or the proprietor of a newspaper is answerable for the acts of his agent or co-partner, not only civilly but criminally.§ But, except in these cases, partners are not generally responsible for the wrongs of each other. If they all join in one trespass or tort, of course they may all be sued and compelled to make compensation for the injury they have committed; but an action for such a misfeasance would arise from their personal misconduct, and not from the relation of partnership subsisting between them. With regard to matters quite unconnected with the partnership trade or business, there cannot be a doubt but that a joint responsibility would not be incurred for a tort committed by an individual partner. And, in general, acts done in the course of the partnership trade or business, in violation of the law will only implicate those who are guilty of them. If one of two bankers in partnership should commit usury in discounting bills, or if one of two surgeons in partnership should wantonly ill-treat a patient, the innocent copartners would not be liable to an action for penalties or damages. But if an attorney be in partnership with another who has not taken out his certificate, and their joint names are put on their papers in causes in their office, it has been ruled that either of them is liable to the penalties imposed ‖ for practising as an attorney without obtaining a certificate; though it appear that, by a private arrangement, the party sued was to derive no benefit from the suit, in respect of prosecuting which the *qui tam* action for the penalty is brought. ¶ The consequence is, and it has accordingly been determined, that two attorneys or proctors cannot be sued together, as for one offence, for practising without certificate.**

In the fifth and last chapter the legal and equitable principles relating to the dissolution of partnerships are given, and the subject is divided into four sections. 1. The cause of the dissolution of a partnership. 2. The general consequences of a dissolution. 3. The particular consequences of a dissolution by bankruptcy: And, 4. The consequences of a dissolution by death. We shall give a short portion of the last section, with which we must conclude our extracts.

'It seems to be doubtful whether the *good will* of a *commercial trade*, carried on in partnership *survives*, or forms a portion of the partnership stock. Lord *Rosslyn*, on the one hand, has determined* that in such a case the good will of a trade carried on without articles survives, and is not to be considered partnership stock to which the representatives of a deceased partner have any right. On the other hand, Lord *Eldon* has expressed his doubts of the propriety of that determination, considering it difficult to draw any solid distinction between the lease of the partnership premises, which is clearly a part of the joint stock, and the good will, which consists in the habit of the trade being conducted on those premises. † But whatever doubts may, in this respect, exist as to the good will of a mercantile trade, a very intelligible distinction has been suggested between a commercial and a professional association. Sir *John Leach* has intimated, that where a partnership is formed between professional persons, surgeons for instance, and one dies, it would be difficult to maintain that the other is obliged to give up his business, and sell the connexion for the joint benefit of himself and the estate of his deceased partner. His Honor added, that when such partnerships determine, unless there be stipulation to the contrary, each must be at liberty to continue his own exertions; and where the determination is occasioned by the death of one, the right of the survivor cannot be affected.' ‡

We must now take leave of this very excellent work, which we can safely recommend as the best treatise on the important subject of which it treats.—*Legal Obs.*

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* Green v. Deakin, 2 Stark. N. P. C. 347. In Henderson v. Wild, 2 Campb. 561., Lord *Ellenborough* held that if two persons are in partnership, and a third individual owes them a sum of money on the partnership account, a receipt for this given by one partner upon setting off a private debt due from himself to that third person will be a bar to an action by the partners for the debt due to the partnership. See Skaif v. Jackson, 3 B. & C. 421.

† Mitchell v. Tarbutt, 5 T. R. 649. Where damages are sought to be recovered against partners for an injury sustained through the negligent conduct of their servant, the proper remedy is an action on the case. Morley v. Gaisford, 2 H. Bl. 442. Hugget v. Montgomery, 2 N. R. 446.; and, if the cause of the mischief be negligence, such an action will lie against all the partners, although one of them be personally present and acting in that which occasions it. But where the injury is inflicted by the wilful act of one of the partners, tresspass is the proper form of action against him; and if under the circumstances any action will be against the other partners, case only can be sustained. See Leame v. Bray, 3 East, 593. Ogle v. Barnes, 8 T. R. 188. Rogers v. Imbelton, 2. N. R. 17. Moreton v. Harden, 4 B. & C. 223.

* Weyland v. Elkins, Holt's N. P. C. 227. S. C. 1 Stark. N P. C. 272.

† 4 Instit. 317, Com. Dig. Tit. Trespass, C. 1. And see Nicoll v. Glennie, 1 Mau. & Selw. 588.

‡ Attorney-General v. Burges, Bund. 223. See also Rex. v Manning, Com. Rep. 616.

§ Rex. v. Almon, 5 Burr. 2686 Rex. v. Pearce. Peak's N. P.C. 75. Rex. v. Topham, 4. T. R, 126. Per *Littledale* J., Rex v. Marsh. 2 Barn. & Cres. 723.

‖ See 37 G. 3. c. 90. s. 26.

¶ Edmonson v. Davis, 4 Esp. N. P. C. 14.

** Barnard v. Gostling, 1 New Rep. 245. S. C. 2 East, 569.

* Hammond *v*. Douglas, 5 Ves. 539.

† Crawsha *v.* Collins, 15 Ves. 227. If partners become bankrupts, the good will of their trade passes to their assignees, who may sell it for the benefit of the creditors. Such a sale, however, will not operate to prevent the partners setting up the same trade again, and in the same place. Crutwell *v.* Lye, 17 Ves. 335. S. C. 1 Rose, 123.

‡ Farr *v.* Pearce, 3. Madd . 74.

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*Memoirs of Charles Macklin*, 1804, p. 308.

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VOL. I. BOSTON, SATURDAY, JULY 16, 1831. NO. LI.

## MEDICAL JURISPRUDENCE.

### PRESUMPTION OF SURVIVORSHIP.

Concluded.

We now pass to the decisions of our tribunals at home, whom we shall find treating this subject in a much less fanciful manner. The disquisitions of the ingenious Fearne have given vast celebrity to the Stanwix case, in itself both interesting and affecting. The details of the misfortune, would however, be out of place here. It is sufficient to mention, that General Stanwix and his daughter were cast away in their passage from Ireland to England, and the question of survivorship was argued by counsel for the heirs of either party before the Court of Chancery, in the year 1772. For the succession being in the daughter's representative, her maternal uncle; it was contended, that the General was old and feeble, while the daughter, though of a weaker sex, was of a hale constitution, and in the prime of life, and would therefore probably struggle much longer against drowning. On behalf of the father's representative, his nephew, it was urged, that the ship being lost in tempestous weather, the daughter who was most likely in the cabin, the usual place for ladies on such occasions, and would therefore sooner perish from the waters rushing in, than the general, who, as a man of courage, and used to exposure to the elements, was probably on deck, and might have been sustained some time on some floating portion of the wreck.

A separate claim was brought forward by the representative of a second wife of General Stanwix, who also perished with him. The court finding the arguments on all sides equally solid and ingenious, waived giving any decision, and advised a compromise, to which the several claimants afterwards agreed.

This intricate and subtle question naturally engaged the attention of that most acute of lawyers, Fearne. He composed arguments on both sides, as far as the father and daughter were concerned, of a nature entirely different from those employed on hearing of the cause, quite neglecting the facts and physical probabilities, and discussing the merits of the rival claims, solely as an abstract proposition. He divides the subject into three heads; the priority of death on the one, or on the other side, or the simultaneous decease of both. With a great deal of metaphysical subtlety, he demonstrates the extreme improbability of the last event, ridiculing the dogma, that as the two former presumptions are balanced, and negative each other, the third of necessity survives. His main argument, on the daughter's side, is grounded on the old rule of civil law, that the child shall be presumed to have survived the parent; and he rebuts the objection, that this is a general principle, drawn from cases to whose class this one cannot be referred, by analysing its particular nature. On the father's side, he proffers the more simple reason, that the probability of survival being equal as between the parties, to the parent's chance ought to be added the fact, that he was possessed and died possessed. To his advantage should also be placed the improbable, but possible circumstances of contemporaneous dissolution. The reader will find this dissertation at length in Mr Fearne's posthumous works. It will well repay perusal, from its elegant and amusing form, but it must be regarded rather as sportive than serious, and is at best, perhaps, but a fruitless waste of profuse ingenuity. It was however, turned to some account in the later case of Mason v. Mason, which deserves some notice.

Bryant Mason and his son Francis perished together on a voyage to India. The father had previously made a will bequeathing to each of his children male and female, in all nine, 5000*l.* and the residue of his estate to be divided equally among his sons with the exception of Francis. The question of survivorship arose, because on the presumption that the father first died, the sisters as well as brothers were entitled to equal shares of the 5000*l.* bequeathed to Francis, but if the son was first drowned, his legacy lapsed and fell into the general residue to be divided among the sons only. The cause was brought before Sir William Grant in 1816. The arguments in favor of the daughters' claim were merely those of Fearne in the previous case, and more especially that founded on the rule of civil law. Whetherall, who appeared for them, quoted also the Code Napoleon, Art. 722. For the other side Pigott, Shadwell, Romilly, and Cooke, relied chiefly on the circumstances, that at best there was but a *presumption* of survivorship in the legatee, and that those who claimed under him ought to *prove* that he survived. The master of rolls granted an issue to try the question, but we have been unable to find the result. Probably this also was compromised.

It is surely to be regretted that our courts of justice have not hitherto established any settled rules for deciding on these intricate subjects. At the same time it cannot but be perceived that no rules could be framed so perfect as not sometimes to appear absurd, and even unjust. Amid a choice of difficulties it might perhaps do least harm to appoint, that in the absence of proof of survivorship for either party, he who was possessed at the time, shall always be deemed to have survived, so that the property in dispute shall pass to *his* heirs in all cases. A more uncertain system of practice may certainly be advantageous to lawyers, but it inflicts vexatious doubts on the parties interested, and has been a source of unsuccessful speculation to medical jurists down to the present hour, from the golden time when the Caliph and Zobeide sat by the couch of Abou Hassan and his wife, and offered a hundred sequins to any who would inform them which died first.

We have hitherto neglected to notice the not unfrequent occurrence, where mother and infant expire together during parturition. The fact is, that on this topic nothing satisfactory can be found in the best medical writers. Dr Beck gives the presumption of survivorship in favor of the mother, observing that the child's life may be early endangered by a slow or difficult delivery, by the hæmorrhage consequent on a detachment of the placenta, by a parturition complicated with convulsions, or if very large or prematurely born. On the other hand he admits many cases in which the child may outlive the mother, as if she labor under acute disease, or be in a state of extreme weakness. In short, the probability seems to lean either way according to the comparative strength or weakness manifested by the parent, supposing no accidents to intervene.

Intimately connected with this subject is the inquiry so frequently instituted in our courts both civil and criminal, where the object is to ascertain whether life was present at the moment of birth in a new-born infant, who either sank immediately, or is discovered dead under circumstances leading to suspicion of murder. To constitute a tenant by the courtesy there must, as our readers well know, be issue born alive to the husband by the heiress. It has sometimes happened that the proofs of this fact have been most equivocal, and suits in consequence have been maintained between the alleged tenant and the heir at law. The case of Fish and Palmer tried in the Exchequer, in 1806, is a well known illustration of this fact. It then appeared that Mr Fish's wife had been delivered of an infant supposed to be still born; that she had never bore him other children, and in consequence on her death he resigned her property to the right heir, but was afterwards induced to attempt this action on the presumption that the child was born alive. The evidence in support of this was a declaration of Dr Lyon, then deceased, who had announced an hour before the birth that the child was alive; he had also directed a warm bath to be prepared, and gave the child when born to be immersed. It did not cry or move, or shew any symptoms of life; except that in the water there twice appeared a twiching and tremulous motion of the lips. Some of the physicians examined, gave their opinion that this muscular motion of the lips could not have taken place, had the vital principle been quite extinct. Dr Denman maintained the contrary. He drew a distinction between uterine and extra-uterine life, and attributed to the remains of the former these appearances. The jury found that the child was born alive, but the discoveries of modern science place almost beyond a doubt, that such symptoms of pretended life may be produced by the relaxation of a contracted muscle, or the stimulus of atmospheric air on a body newly exposed to it. We shall proceed then briefly to enumerate those surer tests by which it may be ascertained that life has been present in an infant after birth, which are rendered so painfully important by those trials for child-murder of which every county in England, presents annual instances, when woman are placed at the bar charged with the destruction of their illegitimate offspring; their lives frequently depending on the nature of a surgeon's evidence, after due examination of the body.

To prove that a child was born alive, it is necessary to shew that it has exercised the sanguineous and respiratory functions. Circulation does indeed exist with uterine life, but of a charac-

ter easily distinguishable from that which follow birth: respiration commences only at parturition. In cases of infanticide, therefore, investigation must be mainly directed to these two points. And the first, of the appearance of the blood. According to the experience of scientific observers, during fœtal life, the blood of the arteries and of the veins, exhibits no difference of color. After birth, as is well known, a great dissimilarity exists, provided circulation has taken place. This is a delicate, but striking test. Again, the presence of much blood in the pulmonary vessels, which is only possible when respiration has taken place,—and on the other hand, its absence from the *ductus venosus*, a vessel running from the umbilical vein, from *ductus arteriosus*, which joins the pulmonary artery and the aorta, and from the *foramen ovale*, which unites the two auricles of the heart, are all proofs of extra-uterine life. Ecchymosis, as our readers will remember, can only take place in the living subject, and is therefore a valuable test, where the marks of blows and injuries are observable on the body. These are the appearances dependent on the blood, which deserve especial notice.

The symptoms indicative of respiration are too well known to need much comment. One word, however, we would say on the mode in which some judges are wont to deal with them. So much compassion is felt on trials of unhappy mothers for infanticide, that the great object pursued seems generally to shake as much as possible the evidence of the medical witness, who, on examination of the body, has formed conclusions that it was alive at birth. It is presumed that a learned Judge was under the influence of this feeling, when he not long ago declared in the hearing of the writer to a surgeon, who stated his conviction, 'that an infant was born alive, from the floating of the lungs in water;' that such an opinion had been exploded and ridiculed for the last twenty years. This (usually termed) hydrostatic test is undoubtedly deceptive now and then, but there is no fact more certain, or more clearly proved by experiment than this, that the lungs will generally float when respiration has taken place, and generally sink when it has not. The conclusion of this unlucky practitioner was not then wholly absurd, but the merciful dispositions of a court of justice, are always well pleased to believe it so—to dismiss the evidence as unimportant, and to find the wretched mother guilty of the minor offence of concealment only. There seems, however, great reason to believe, that the lungs of a still-born child might be inflated, so as to float in water, by artificial means, such as blowing into the mouth; which might be done maliciously, with the design of injuring an innocent parent, or by maternal tenderness endeavoring to resuscitate a lifeless child. It has been proposed to distinguish between the natural and artificial inflation by various means, and more particularly, by weighing the lungs, and thus to bring the hydrostatic test to perfection, but the experiments on this subject do not seem to us so satisfactory as to constitute fit evidence for legal tribunals, or fit matter for prolonging this article.—*Law Mag.*

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THE LATE LORD ELLENBOROUGH,

who was a ripe and a good scholar, was peculiarly happy in his Latin quotations, an instance of which occurred one day in the court of King's Bench. It is well known to the senior members of the profession that *Erskine* was a great favorite with Lord Kenyon, who, though a rigid moralist himself, and accustomed to treat with severity the slightest deviations from rectitude in others, always looked upon *Erskine's* failings (for he, too, had some of the leaven of human nature in his composition,) with great tenderness and forbearance, apologizing for them whenever they were mentioned, by observing, in his rapid manner, 'Spots in the sun! spots in the sun!' But that he had not the same kindly feeling towards *Law* is also well known. One day *Erskine* and *Law* were warmly opposed to each other in discussing some matter before the judges of the court of King's Bench, when Lord *Kenyon* appearing to lean in favor of *Erskine*, and the puisne judges seeming disposed to side with their chief, *Erskine*, in anticipation of victory, became more glowing and animated than usual, which so irritated *Law*, who thought that the justice of the case was with him, that, at the conclusion of his speech, turning towards his opponent, he in ignantly poured forth, in his deep and manly tone, the following quotation from the 12th Æneid of Virgil:

* * * * non me tua fervida terrent
Dicta, ferox, Dii me terrent et Jupiter hostis.

Those who remember *Erskine* in his best days will feel that the epithet 'fervida' was as characteristic of glowing eloquence, as 'ferox' was foreign to his kind and amiable disposition, and that whilst 'Dii' was a suitable appellation of the puisne judges (who may be considered as a sort of dii minores, or terrestrial), 'Jupiter hostis' was powerfully descriptive of the omnipotence of their chief, and of his dislike of *Law*; in fact, a quotation so apt in all its points (except the one alluded to) to the occasion and the persons, very rarely occurs.

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From the Legal Observer.

## WESTMINSTER HALL AND LORD CHANCELLOR BROUGHAM.

LETTERS OF A HEIDELBURG STUDENT ON THE JURIDICAL INSTITUTIONS OF GREAT BRITAIN.

My Dearest Friend—I arrived in the Thames last week and should have written sooner to you, but that I have since that time been constantly engaged in seeing the most striking wonders of the great city in which I have now the good fortune to reside. According to my promise, I propose to give you from time to time some account of the Juridical Institutions of this country and of the learned men who now preside over them. We have often attempted together to gain some precise intelligence on those subjects; but although there is no want of information on the earlier history of the English laws, thanks to German* industry, you will remember that our information as to the present state of her institutions remained extremely scanty and deficient. I now hope to be able, my dearest Charles, to supply you with abundant information on the subject. Thanks to my letters, I have already made the acquaintance of several English advocates and other eminent persons connected with the law, and I am promised by them not only ample instruction on this important subject, but a personal introduction to most of the great men who now preside over the courts and all other persons from whom I can obtain the proper information.

Your heart will rejoice when I tell you that I have met the kindest reception from those gentlemen to whom I carried introductions; and they all declare the utmost willingness to serve me and to enable me to prosecute my inquiries with vigor. You shall be my judge whether I am successful in them, for I shall detail them, all to you. Instead of filling my letters with useless or insignificant descriptions, I shall devote them to this interesting subject; and I have the satisfaction of knowing that this will be as agreeable to you to read, as it will delightful for me to write.

I will forthwith tell you then, my dearest friend, my first day's adventures in the courts of law in London. Accompanied by a friend who undertook to be my guide, I soon approached the great Hall of Justice which is called Westminster Hall. It is admirably situated for the purpose: being close to both Houses of Parliament, and the venerable Abbey of the same name. I entered Westminster Hall with a certain feeling of awe which was greatly heightened as I contemplated its majestic proportions. When the courts are sitting the scene which it presents is extremely lively and interesting. It is crowded with persons whose hasty steps and anxious faces show at once that they are not there as mere spectators. In another part of the Hall you will see some leading advocate slowly pacing its whole length, his client following his steps and detailing the merits and the demerits of his cause.—A little further on may be observed a group of persons disputing some matter with the greatest earnestness; on approaching nearer to them you will find that they are the parties in a cause which has just been tried and are now fighting the battle over again. The smiling countenance and joyful demeanor of those who have succeeded are here not attempted to be disguised, for the victory is too recent not to be proclaimed. Distress is also sometimes painted on the countenance of those you meet; frequently heightened by the gloom occasioned by a positive defeat. Westminster Hall, is, indeed, a highly interesting scene, on more accounts than one. I will venture to say from what I have seen, that man appears more as he is within its walls than in any other place in London. The stake which is here hazarded is so important that the chance of losing it arouses all the feelings. The scene is so agitating that they cannot be concealed, and they frequently burst forth in angry execration or tumultuous joy.

The courts of equity and of law are all newly built and are ranged on one side of the Hall. The other side of the Hall is occupied by new wooden sheds which greatly offend the eye and suit the general character of the building extremely ill. I fancied that these sheds, which are made of common deal boards, which seem hardly to have gone through the process of planing, were the temporary sheds erected for the convenience of the workmen who have been recently employed in fitting up the courts. My friend informed me however, that in them are actually deposited the records of the court! He must surely be mistaken in this, however; I cannot believe that these miserable hovels can contain such important documents; for it is not credible that a great nation should be at an immense expense to erect Courts of Justice and give every facility for the hearing of causes; and should provide no place

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* The most learned work on the Anglo Saxon laws is written by a Gottingen student. It is entitled, 'Versuch einer Darstellung der Geschichte des Angelsächsischen Rechts Von George Philips, Beider Recte Doctor Gottingen, 1825.' Nor is this the only work to which we are indebted from the same author and other Germans on the subject of our laws.—*Translator.*

for the preservation of their decrees. My friend, however, assures me that this is positively the case.

The first court at the top of the Hall is the High Court of Chancery: the first in dignity and importance in the country. It is perhaps the most convenient of the whole, but, although light, spacious, and handsome has too much of the air of a theatre, and is contrasted very disadvantageously with the solemnity of the Hall.

And who do you think presides in this great court, my friend? The change is so recent that you may not have heard it; although report with eagle-wing, has probably long ago spread it through Europe. It is the well known Henry Brougham who here presides. How often have we drank this name at Prince Karle's*! How long and long continued have been the shouts when the health of this great man, to whom we looked up as a deliverer from tyranny, was proposed! I remember translating his great speech against the Holy Alliance and reading it amidst the most enthusiastic cheering to the assembled *burschen!* † Each brother fervently blessed the the eloquent statesman, and his name was again shouted forth with a vehemence sufficient to hurl down the remaining fragments of the castle.

This man, then, is now High Chancellor of England. This office is judicial‡, as well as political, and is the most exalted station in the empire.

When I was told that this was his court, I own, my dear friend, I could not keep my feelings perfectly composed; and I entered it with the deepest emotion of reverence. It was crowded with advocates and attorneys, and also with spectators. He sat on a bench slightly elevated from the floor; fronted by a desk. He is tall and thin; and his face pale and colorless: his features taken separately, might be thought unpleasing: but there is something thoughtful and commanding in his brow; there is a lustre and variety of expression in his eye, that arrest the attention and are strikingly impressive. All his actions and expressions prove to the conviction of him who looks upon him that he is no ordinary man. He is original in all his ideas; and he enters into the business of his court with great energy. He seems fully to be aware that all eyes are upon him, but at the same time he is perfectly careless of it. He is familiar almost to vulgarity in some of his phrases. The idea in his mind is frequently expressed in language the most homely; but it always conveys the exact meaning which he is desirous to express, and he seems perfectly satisfied to prefer sense to sound. He does not suffer himself simply to listen to the addresses made to him by the advocates. He frequently interrupts them, sometimes a little impatiently, but never unkindly. He has, however, been involved in two or three little *scenes* with some of the most eminent of the counsel; but he is so used to wordy warfare of a more fearful nature that it must be mere child's play to him. He has already shown his contempt for useless forms and unmeaning ceremonies. It was the duty of certain officers to attend him at the sitting of the court. This was not only an idle form, but diverted the attention of these persons from their own duties. The present Chancellor, greatly to the scandal of the old ladies of his court, has dispensed with their attendance entirely. He has also directed an extensive inquiry as to the present state of the law with a view to reforming its defects, and much benefit to the country is expected from it. He has hitherto been bold even to rashness in his decisions; he looks steadfastly into the merits of the cause to be decided, and will not suffer his judgment to be led away by authoritative declarations of what the law is: he inquires into it himself, and if he thinks that, either that or the facts of the case will authorise a particular decision, he will make it; and fearlessly reverse the judgment of the court below, although that judgment may have been pronounced by a man who has been all his life employed in the Courts of Equity. There have been many men exalted to the situation of Chancellor from the courts of common law; but no man so exalted ever showed himself so unembarrassed and fully at his ease as Lord Brougham. He now exerts all his best energies to the duties of his office and to diminish the arrears which preceding Judges have left. He has already displayed great talent and industry in this point, and generally delivers his judgment soon after he has heard a cause. He is not therefore exposed to the painful task of hearing applications from suitors imploring an early decision of their case. His great occupations in his own court have had an evident effect on his labors elsewhere. It is said that he has declared, 'he was never more at leisure.' This however, if he said it, I consider a mere *bon mot*, because if so in fact, I am told it ought not to be. His time doubtless must be fully occupied. It is true that many of his former occupations have ceased; he is no longer the political journalist; he has probably ceased to edit scientific *brochures*, but he must still find enough and more than enough to employ him in the multitudinous duties of Lord Chancellor; and if proof were wanting of this, it may be found in the few addresses which he makes on any other than legal subjects in the House of Lords.

On leaving the Lord Chancellor's Court, I proceeded with Mr B., the gentlemen who had accompanied me, to the other courts. On entering them we met Mr ———, the well known advocate, to whom Mr B. was known. After the usual ceremonies of introduction were over, he asked us both to dine with him that day, and assured us that we should meet some eminent persons in the course of the evening. We accordingly accepted his invitation and met some other barristers at his table, and passed a delightful evening; but imagine my joy and surprise, when soon after we went up stairs, in came the great person whom I have just been describing. Lord Brougham and our host were intimate at the bar, and his Lordship had waived all ceremony, and we thus found him among us. Nothing I assure you can be more delightful than his society. He is the most unassuming as well as intelligent man I ever knew. He allows every one to have his share in the conversation, to tell his story, or add his illustration. He laughs heartily and unaffectedly at anything which is ludicrous, whether said by himself or another. He has an infinite fund of humor and anecdote, and is most ready to communicate them. He has not the slightest shade of mystery or pretence about him, he seems to have no ill feeling or jealousy, and in listening to his conversation, you cannot believe that you hear the man who, in the House of Commons, could hardly speak without bitterness or sarcasm; but thus he is in private life; lively, amusing, and kind hearted. After cheering and delighting the whole circle (which was composed of some other distinguished persons) for about an hour, he left us full of admiration and pleasure. Thus is he in the habit of keeping up his old friendships, and is the last man to forget any one he formerly knew. You will be able to conceive that I soon afterwards left the party, anxious not to disturb the feelings which his company had occasioned.

Farewell, my dear friend, you shall soon hear again from yours most heartily and sincerely.

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* A tavern frequented by the Heidelburg Students.

† Students.

‡ The Germans merely associate political functions with the name of the Chancellor.

## DIGEST OF ENGLISH CASES.

### COMMON LAW.

ARREST.

One foreigner may arrest another in England for a debt which accrued while both were resident in a foreign country, though the laws of that country do not allow arrest for debt. For though the *contract* is to be interpreted according to the law of the country where it was made, the *remedy* must be pursued according to the law here, the parties being resident here.—*De la Vega* v. *Vianna*, 1 B. & Adol. 284. (affirming the opinion of Heath J. against Eyre C. J. and Rooke J. in *Melon* v. *Duke de Fitzjames*, 1 B. & P. 138.)

ASSUMPSIT—CONSIDERATION.

An undertaking to pay the plaintiff's attorney, in an action still pending, his costs, in consideration that the plaintiff will, with the attorney's consent, authorize the defendant in the action to pay over the debt sued for to a creditor of the plaintiff, is not binding; for there is no sufficient consideration moving from the attorney.—*Taylor* v. *Watson*, 4 M. & R. 259.

ATTORNEY.

An attorney who has given notice that he will not go on with a cause unless furnished with funds, has a right to desist, and may recover for the business done up to that time.—*Rowson* v. *Earle*, 1 M. & M. 538.

BILL OF EXCHANGE.

Defendant accepted a bill drawn on him by one of two partners in his own name only, for a debt due to the partnership: Held, that he was liable to an indorsee; for that the acceptance would have been an answer to an action by the partnership for their debt, until the bill was due and dishonored.—*Tomlins* v. *Lawrence*, 3 M. & P. 555.

CHAMPERTY.

An agreement to communicate information to a party which shall enable him to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, in consideration of receiving an eighth of the sum recovered, is illegal and void—*Stanly* v. *Jones*, 7 Bing. 369.

CONFESSION.

A statement made by a party charged with administering poison with intent to murder, to a surgeon, after he had said to her, 'you are under suspicion of this, and you had better tell all you know:' Held, not receivable in evidence.—*Rex* v. *Kingston*, 4 C. & P. 387.

EJECTMENT.

Possession for twenty years forms a presumptive title, which cannot be countervailed in ejectment by subsequent possession for any shorter period.—*Doe d. Harding* v. *Cooke*, 7 Bing. 346.

FUNERAL EXPENSES.

As against a creditor, an executor is allowed for funeral expenses only what is absolutely necessary, regard being had to the degree and condition in life of the deceased. 79*l.* was considered too much, the deceased being a captain in the army on half pay; the Court thought 20*l.* a reasonable sum.—*Hancock* v. *Podmore*, 1 B. & Adol. 260.

INSURANCE.

A life insurance is, by the general policy of the law, avoided by the execution of the assured for felony. *Amicable Assurance Society*, app., *Bolland and others*, resp., 2 D. & C. 1.

LIBEL.

In an action for a libel on the plaintiff in the way of his trade, where the declaration contains an averment by way of inducement, that it was carried on in an honest and lawful manner, the defendant may give evidence under the general issue to show that the trading was dishonest or illegal; although the effect of such evidence is to prove the truth of the imputations in the libel. —*Manning* v. *Clement*, 7 Bing. 362.

LIMITATION, STATUTE OF

Payment by the executor of one of two makers of a joint and several promissory note will not take the debt out of the statute of limitations as against the surviving maker.—*Slater* v. *Lawson*, 1 B. & Adol. 397.

A letter from the defendant to the plaintiff respecting the debt, containing in the introductory part of it these words, 'which is not to be used in prejudice of my rights now, or in any future arrangement that may be made,' is only a conditional statement, and not sufficient to take the debt out of the statute of limitations.—*Cory* v. *Bretton*, 4 C. & P. 462.

MEDICAL PRACTITIONER.

A medical practitioner, whether licensed or not, is guilty of manslaughter, if the death of a patient be caused by his treatment, and he have shown gross ignorance of his art, or gross inattention to his patient's safety, or gross rashness in the application of a dangerous remedy.—*Rex* v. *Long*, 4 C. & P. 398, 423.

On an indictment for manslaughter, where the death was occasioned by the application of a lotion to the skin by a medical practitioner, held that the prisoner might give evidence of the effects of the lotion on other persons.—*Ibid.* 4 C. & P. 398.

MILL.

By a mortgage of a mill, the stones, tackling, and implements necessary for working it, pass to the mortgagee.—*Place* v. *Fagg*, 4 M. & R. 277.

MORTGAGOR AND MORTGAGEE.

The mortgagee, by applying to the tenant for rent to pay the interest of the mortgage money, recognises his possession as lawful, and cannot afterwards eject him on a demise anterior to that application. *Doe d. Whitaker* v. *Hales*, 7 Bing. 322.

PARTNERSHIP.

On a plea in abatement to an action on a bill of exchange, it was proved that two persons named in the plea were in fact partners with the two defendants sued; but the jury were directed to find for the plaintiff, if they thought upon the evidence that the plaintiff had reasonable ground to think that the defendants alone constituted the partnership. Held, (over-ruling *Dubois* v. *Lubert*, 5 Taunt. 609.) that this direction was right: for the only question on such a plea is, with whom the plaintiff contracted.—*De Maulort* v. *Saunders*, 1 B. & Adol. 398.

Where a bill, accepted by one partner in the partnership name, is applied, with the knowledge of the party taking it, in part only to the separate use of the partner accepting, a secret partner is not liable in respect of that part, but he is liable in respect of the residue which was not so applied *with the knowledge of the taker.*—*Wintle* v. *Crowther*, 1 C. & J. 316.

[Bayley B., in delivering judgment, said that *Lloyd* v. *Ashby* 2 C. & P. 138, which was cited for the defendant, was re-considered in *Vere* v. *Ashby*, 10 B. & C. 288: the former case was not, however, so far as appears by the report, mentioned on the discussion of the latter.]

Persons trading abroad in such manner as would constitute a partnership in this country, may sue here as partners for goods consigned to this country, though they could not sue at the place of trading by the law of that country.—*Shaw* v. *Harvey*, 1 M. & M. 526.

PLEADING.

The plaintiff agreed to let the defendant land on building leases, and to lend him a sum of money to assist him in erecting twenty houses, to be repaid at a specified time. When six of the houses had been built, part of the money having been advanced, the defendant, by the plaintiff's request, proceeded no further in the undertaking. The time for payment of the money having elapsed, Held that the plaintiff might recover the sum advanced on a court for money lent, and need not declare specially on the agreement. *James* v. *Cotton*, 7 Bing. 266.

A party cannot show, under the plea of *non est factum*, that he was misled as to the legal effect of the bond, if he was at the time competent to execute it: he must plead it specially.—*Edwards* v. *Brown*, 1 C. & J. 307.

A declaration in assumpsit must set forth *the whole* of the consideration for the defendant's promise; therefore, where the plaintiff alleged that in consideration that he would deliver a horse to the defendant, and pay him a sum of money, in exchange for a mare of the defendant's, the defendant undertook that she was sound; and to prove the warranty, put in a receipt given by the defendant for the money, which stated that *both the horse and mare* were warranted sound; the declaration was held bad, for not alleging that the plaintiff had warranted his horse sound.—*Cross* v. *Bartlett*, 3 M. & P. 537.

A replication to a plea of discharge under the insolvent act, that the defendant was not duly discharged, puts in issue the discharge only, and the petition need not be produced.—*Andrew* v. *Pledger*, 1 M. & M. 508.

RESTRAINT OF TRADE.

An agreement, by which A., who had been employed by B. and C. in their business, agreed to work, during their joint lives, for B. and C. in and for no other person without their written consent, and B. and C. agreed, in consideration thereof, and subject to the other provisions of the agreement, to employ A. as theretofore; providing also that B. and C. should be at liberty, if they found it necessary or as thought fit, to employ other persons besides A., without his being released from his agreement, and allowing A. to work for persons within six miles of London; was held void, as being in partial restraint of trade, and not supported by an adequate consideration. And a promissory note, given by A. in consideration of breaches of the agreement, was held void also and incapable of being set off to a claim by A. against B. and C. for work done.—*Young* v. *Timmins*, 1 C. & J. 331.

SLANDER.

Words imputing that a plaintiff is unfit for an office of profit which he holds, by reason of his immorality, are not actionable *per se*; but only words which are spoken of him in reference to his character or conduct in such office; which impute the want of some necessary qualification for or misconduct in it.—*Lumby* v. *Allday*, 1 C. & J. 301.

TROVER.

A refusal by a bailee to deliver goods to the real owner without the authority of the bailor, who has in fact no lien, is sufficient evidence of a conversion.—*Wilson* v. *Anderton*, 1 B. & Adol. 450.

WARRANTY.

A party who sells a horse, saying that he is sound to the best of his knowledge, 'but he will not warrant,' is liable in *assumpsit* on a promise that the horse is sound to the best of his knowledge.—*Wood* v. *Smith*, 1 M. & M. 539.

WITNESS.

Ejectment against a party claimed to retain the lands as heir at law to his father. Held, that his mother was a competent witness for him, though her testimony went to show a seisin in law in her husband, which would entitle her to dower: for the judgment in the action would be no evidence of the husband's seisin.—*Doe d. Nightingale* v. *Maisey*, 1 B. & Adol. 439.

A defendant who has suffered judgment by default is a competent witness, where he is disinterested.—*Warrel* v. *Jones*, 7 Bing. 395.

## ENGLISH CASES.

COURT OF CHANCERY—APRIL, 1831.

*Thomson* v. *Barclay and co. and Powles and co.*

The LORD CHANCELLOR, having taken his seat, commenced his judgment in this case, which was one of great importance, and had been argued, his Lordship added, with great learning and distinguished ability. It came into this court by way of appeal from a decision of his honor the Vice-Chancellor, upon a demurrer put in by the defendants to the plaintiff's bill, which demurrer his honor allowed. Mr Alderman Thompson (the plaintiff), in his bill charged that he had paid various sums of money to the defendants, in consequence of fraudulent representations made by them respecting a contract for a loan to be made to the Government of Guatemala, in South America. —The defendants, Barclay and Co. were charged in the bill with putting themselves forth as agents for the said loan on the part of the Government of that State, which was formerly a colony of Spain, but then revolted from the dominion of the mother country, and her independence not recognised by the Government of this country. The bill also charged the defendants, Powles and Co., with having represented themselves not to be parties to the said contract of the loan. By those representations the plaintiff was, as it was stated, influenced to make purchases of scrip of the loan, and was also influenced as to the price

he should pay for that scrip.—The bill further charged those representations to be untrue, and that the defendants, who put themselves forth as unconnected with the loan, were actually connected with it, and did not give for their shares of the scrip the price which was alleged by them to have been given, and that both parties (defendants) had agreed among themselves, without the knowledge of the plaintiff, that Messrs Barclay and Company should hold a larger proportion of scrip than was then given out. Among the frauds charged by the bill was, that Messrs Barclay and Company had not rendered an account to the Guatemala Goverment of the sums of money they had received on account of the loan; in consequence of which, that Government refused to ratify the contract of loan. By all these means, the plaintiff complained that he was trepanned into advances of large sums of money in the purchase of scrip, which turned out to be of no value. The plaintiff, upon these grounds, sought relief in this court. The defendants demurred to his title to relief upon several grounds. But it was upon the first ground stated, that the demurrer could operate as a bar to relief, because whatever might have been the conduct of the agents, the principal could not be justified in refusing his assent to the acts done by the agent, in virtue of his authority. The ground of fraud then, if the fraud could be established, was the only one on which a claim to equitable relief could be founded. The transactions, as stated by the plaintiff, were marked by gross fraud; and the alleged circumstance that no money had been transmitted to the Guatemala Government out of the proceeds of this loan, was as liable to censure as the other changes made by this Bill. If such a fraud as in this Bill charged were in fact committed—if the defendants had thus practised upon the credulity of the people of this country, and had obtained possession of large sums of money on account of the Government of Guatemala, and then refused to account for the sums received by that Government, it was a case of aggravated fraud and glaring wrong. It was a most melancholy reflection, that a spirit of speculation could arise in any country which could create so much cupidity on one side, and such credulity on the other. This was most disgraceful; but it would be still more disgraceful if the law were not strong enough to give relief from such a wrong.

Sir Edward Sugden observed that the statements in the bill were quite unsupported, and were wholly denied by the defendants.

The Lord Chancellor said that he had not yet done—far from it. He was only stating what the allegations in the bill were previous to his pronouncing his judgment. He was aware that these were *exparte* statements, to which the defendants did not put in an answer, but thought proper to demur. It was not, however, to be asserted by every one, nor to be understood by every one, that the defendants, by their demurrer, admitted the truth of the aggravated and disgraceful statements in the plaintiff's bill. His Lordship could not for a moment suppose that any men, who had a regard for their character as merchants or as men, would so far disgrace themselves as to admit themselves to be guilty of the offences charged by this bill. He did not understand the defendants by demurring to the bill, to admit the truth of those charges. All the defendants had a right by law to say that, in the case brought against them, there was no law; and if in law they could support such an answer, they had a right to avail themselves of the benefit to be derived from it. All that a demurrer amounted to, in its strictest sense, was, that the party putting it in said in effect thus—'If I admitted, as I do not, that all you have said were true, yet still you have no case against me.' When parties at law acted upon the advice of professional men, they relieved themselves from observations which might otherwise apply to them; and if professional men thought their clients had good ground of demurrer, and did not advise them to demur, they did not advise them properly. He, therefore, would never allow it to be said, without contradiction, that a party by demurring to charges on allegations in a bill admitted them to be true. He was the more anxious to be most distinctly understood in this, because the judgment which he was going to give in affirmance of the decision of his Honor the Vice-Chancellor would preclude the defendants from the opportunity of denying the charges made in the bill in the present stage. All that he understood them to say by their demurrer was, that there were such defects apparent upon the face of plaintiff's bill as rendered it quite unnecessary for the defendants to say—indeed, prevented them from saying—whether the grounds upon which the plaintiff rested his bill to relief were true or not. Several arguments were made in defence of the case of the defendants. First, it was contended that the transaction was usurious; secondly, that there was a want of equity; and, lastly, that, from the peculiar situation of the Guatemala Government for which this loan was said to be contracted, the plaintiff was not entitled to the relief he sought. As it was upon the third of these grounds that he was bound by former decisions of this Court to rest the decision in this case, he would not go at length into the two former grounds. He agreed with the Vice-Chancellor, that the argument upon the ground of usury failed, but he came to that conclusion upon reasons different from those which seemed to have influenced his Honor. He would advert to the two first points, as the parties would have an opportunity, if he was wrong, of carrying this matter before another tribunal. It was contended, that the loan was usurious, because '6 per cent loan was mentioned at the head of the scrip receipts.' The words might indicate a loan at 6 per cent, but the Court would not be justified in applying to the whole transaction the enactments in the Statutes of usury. The ground upon which the Vice-Chancellor thought the loan not usurious was, that it did not appear the interest was to be paid in this country—that his Lordship thought quite immaterial, and the position was calculated to mislead, as laid down. If the contract was made in this country for payment of higher interest than the laws of this country allowed, a contract so made was clearly tainted with usury. But as the bill did not state with sufficient precision that the contract was of such a nature, or for such a purpose, he did not take it to be made out to be usurious. With respect to the second ground of demurrer, that of a general want of equity, he admitted that he was under some difficulty. The cases chiefly relied upon were those of Colt v. Wollason, 2 P. Williams, and Green v. Barrett, which was decided by the present Master of the Rolls, upon the authority of the former case. His Lordship stated the case of Colt v. Wollason, which arose out of a speculation to extract oil from radishes, in 1720, but which turned out to be a mere bubble. The facts were, that an estate was bought in Lincolnshire for 31,000*l* and vested in trustees for the shareholders, subject to pay off a mortgage of 28,000*l*. and after that 5700*l*. more to Wollason, the proprietor; the surplus to be divided among the shareholders. A bubble so apparent could be thought of only in delusions like those of 1720 and 1825, in this country, and the Mississippi scheme in Paris. Sir Joseph Jekyl, who decided that case, called it 'mere moonshine,' the security being as bad as that upon lands in the *terra incognita*, between 50 and 57 degrees of south latitude, where no land lay. Sir J. Jekyl, indignant at the grossness of the fraud committed and moved with pity for the persons duped, decided that relief ought to be given them. Lord Eldon, in the case of Kemp v. Prior, 7 Vesey, made a similar decision, after some difficulty, and with a leaning against the decision of the case of Colt v. Wollason, as far as it went. By these cases the present Master of the Rolls was bound in the decision of the case of Green v. Barrett. Upon the strength of these cases his Lordship said he would rest the second point of this case.

As to the third point, upon which his decision was to be founded, he had in view the cases of of Jones v. Garcia, and Thompson v. Beering. The principle of the decision in these was, that the contract was made for the benefit of States not recognised by our government, and that principle applied to the present case. The plaintiff's claim here rested upon the ground that Messrs Bentley and Co. were agents to the Guatemala Government, and the defendants said no relief could be afforded by this Court to a person who complained that the parties against whom they asked redress had used the name and authority of that Government, and put themselves forth as its agents; that British subjects could not complain that by such means a fraud was committed on them, or that they had been by such means induced to give away their money. Had this point been now raised for the first time, he confessed he should not have any doubt about it, but should think that the condition of the Guatemala Government was no answer to the case. He could not here concur in the reasoning of Lord Eldon in the case of Jones v. Garcia, when that Learned Lord said that it was known in this country that the State in question in that case had been part of Peru, which belonged to the King of Spain, and that it was impossible in this Court to recognise as independent a State which was part of a country in peace with us, and the independence of which was not acknowledged by this country; and if men would lend their money under such circumstances, they should get it back as they best could. Now, with respect to how far Courts in this country could be called upon to aid a party who made a loan to a foreign State, revolted from the parent country, which was at peace with us, and which loan would be aiding the rebellion, was not the question here; and if it were, he would be disposed to concur in the view taken by Lord Eldon, and say this Court could not grant relief. But if a person came here as agent of a foreign State, and obtained money from the subjects of this country, by issue of scrip receipts worth nothing, or by entering into a secret contract with the confederates, in order to get a higher price for the scrip, the case was different. To say that, because this was a loan to a country which this country had not recognised and that, therefore, the plaintiff had not a *locus stendi in judicio* would be going farther than the principle of non-recognition. These words

'recognise,' 'acknowledge,' &c, were too general, and the use of them brought some confusion on the subject. He would liken this to a case at the Admiralty Sessions, where, if a Plymouth cruiser, having fitted out a ship, had attacked and taken the mariners of a ship beloning to the Guatemala Government, he would, if, the facts were proved, be hanged for it, although the Guatemala Government had not been recognised by ours. His Lordship, after referring to the case of Kender v. Everetts, and others of recent decision, which decisions were grounded upon the principle of the non-recognition of her States; and, after repeating that he was bound by former decisions, said, that he affirmed the order of the Vice-Chancellor, and allowed the demurrer. But, in dismissing the appeal, he was glad of the probability that this judgment would undergo the revision of another tribunal, where the advantage of the learning of the other Judges could be had.

The decision of the Vice-chancellor affirmed, and the appeal dismissed, but without costs.

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### COURT OF KING'S BENCH.

(Sittings in Banco.)

*Barber, executrix of Barber, v. Morris.*

Mr POLLOCK moved for a rule to show cause why the verdict for the defendant in this case should not be set aside, and a new trial granted, under the following circumstances:

The defendant had lent 700*l.* to a person named Hornby, repayable after three months' notice.—As a collateral security, he insured the life of Hornby, in the Pelican Office. Subsequently Hornby gave the defendant notice that at the expiration of three months he would repay the 700*l.* The defendant then directed the policy of insurance to be sold by auction, and Mr Barber purchased it for 64*l.* The Learned Counsel now contended that as the defendant knew that his interest in the life of Hornby was about to determine, and that as the policy was, of course, worth nothing, he was now liable to be called upon to refund the money. It was certainly true that a clerk from the Pelican Office had given evidence on the trial to the effect that the office generally paid those policies without inquiry as to the assurable interest in cases where they were not legally liable, but this was no answer to the action, for, if the policy was legally bad, the concealment, on the part of the defendant, that the assurable interest was about to determine, was sufficient to entitle the plaintiff to recover.

LORD TENTERDEN said he had left it to the Jury to say whether they believed any concealment was practised by the defendant, and, in the absence of all evidence of concealment, the Jury found that there had been none. Under these circumstances it must be presumed that Mr Barber bought with the determination to take his chance of the money being paid by the Pelican Office. There was, therefore, no ground for disturbing the verdict of the Jury, the defendant, in the absence of fraud or concealment on his part, not being liable to refund the money.

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During the early part of this week, when Chief Commissioner Reynolds, in the Insolvent Court was interrogating a person then before the Court, as to whether he was a *shoemaker*? he replied, 'No, I am a *cordwainer*.' Upon which the Commissioner desired him to explain the difference between the two terms; which he did in the following laconic manner:—A *cordwainer* is a person who makes *shoes* for Ladies and Gentlemen; but a *shoemaker* is one who makes *shoes* for *horses!*—*Lancaster Gazette.*

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### LEGAL REMINISCENCES.

'Celâ sedet Œolus arce,
Sceptra tenens, mollitque animos et temperat iras.'
*Æn.* i. 56.

The ancients appear to have almost invariably dedicated some particular spot to the administration of justice; and from the fact of the *Hebrew* Judges sitting at the gates of cities, they obtained the name of 'Elders of the Gate.'* In Zechariah† the Jewish people are commanded, upon their restoration, to execute the judgment of truth and peace 'in their gates.'

The *Athenians* selected a small eminence near Athens for the seat of the 'Areopagitæ.' It was termed Ἄρειος Πάγος, 'the hill of Mars,' because Mars was supposed to have been tried there for the murder of Hallirothius.

At *Granada*, in Spain, the street 'Calle de los Gomelles ‡' leads to a massive gate at the entrance of the magnificent palace of Alhamra, or Alhambra.§ Over the gate is a large tower, called the 'Gate of Judgment,' the 'Gate of Justice,' the 'Gate of the Law;' and upon which there is the following inscription in Arabic;—'Turn pale, O wickedness! Wheresoever you go, I will follow! Punishment always speedily follows crime. Draw near, come without fear, ye deserted orphans; here shall ye find the father ye have lost.'

In *China*, there is an old willow, celebrated from the fact of the Emperor Kang Vang having sat under this tree when he gave judgment upon the differences of the laborers in agriculture. Out of respect to the Emperor, its branches were cut. St Louis often used to sit under the shade of an oak in the wood of Vincennes, when all who had any complaint freely approached: at other times he seated himself upon a carpet spread in a garden, and heard the causes which were brought before him.‖

In the vicinity of *Scone* there is a tumulus, where the stone chair removed by Kenneth II. from Argyle was placed; and in which the kings of Scotland were crowned in the more ancient times. Upon this hill the King held his court of justice, and promulgated laws. From the 'pleas of the barons' being determined here, it was called 'Mons placiti de Scona omnis terra,' or 'the Mote hill of Scone:' but among the common people it bore the name of 'Boothill,' from a tradition that, 'at the coronation of a king every man who assisted brought so much earth in his boots, that every man might see the King crowned, standing upon his own land.' The 'Hill of Strife¶,' at Uliuish**, and the hills called 'Laws,' as 'Kelly Law North Berwick Law,' were places probably devoted to the seat of jurtice.

What a source of gratification must the scientific always discover in the contemplation of sites which have been thus dedicated to, or have formed the scene of, some great and important historical event. Take, for instance, the White House* on the river Tay. in Dyved.† Here Howel, the good son of Cadell, and King of all *Cambria*, in the tenth century, upon his return from Rome, which he had visited with a view of improving the laws of Cambria, and obtaining a knowledge of the laws of other countries, and of those the emperors of Rome put in force in the isle of Britain during their sovereignty, summoned all the chiefs of the tribes, the family representatives, and all the wise and learned men, both of the clergy and laity, to a collective convention. The laws of Dionwall Moehund being found superior to the whole, were systematised by Blegwryd, and, after the approval of the convention, constitutionally established over all Cambria.

The ruins of *Iona*. Her monastery and cathedral recall to mind the learning and superstition of even classic ages; while her cemeteries of the Kings of Scotland, Ireland, and Norway, painfully remind the traveller of the short but momentous passage between life and death.

The island of *Runeymeed*, or Runeymead, where the brave English barons forced from the reluctant Plantagenet the great charter of English liberties, and the charta de foresta.

The ancient and stately hall of *Eltham*, first built by Edward I. ‡, and the chief residence of Edward II., and where probably the famous statutes, 'De Officio Coronatoris,' 'Of Mortmain,' and Prerogativa Regis,' were enacted. The hall is approached through a long vista of wide-spreading trees; and the picturesque scenery of the spot, the gorgeous roof of the building, and castellated remains, all remind the beholder of historic times, and hours of regal grandeur.

The parliament chambers in the old palaces of Scotland, and particularly *Linlithgow* and *Stirling*;§ the latter of which presents a fine view of the river Forth, to Alloa, the once famed residence of the chieftains of Mar; the age of Wallace and Bruce are remembered, and the eye of sympathy sorrows for their fate, and finds a melancholy reflection, that these patriots, born in the land of chivalry, became worthy sons of Caledonia.

The site *Fotheringay* which holds a prominent place in our annals as the birthplace of Richard III., and the place where the beautiful and accomplished Mary Queen of Scots suffered! Filial piety removed every vestige of its castle, but the name and site still exist. Westminster Hall, where the fatal judgment was given against *John Hampden!* and, lastly, the rocks in Switzerland, where *William Tell*, clinging to the crags, braved the abyss, and escaped from his tyrants.

I shall conclude my present observations with the words of our great moralist; 'that man is little to be envied, whose patriotism would not gain force upon the plain of Marathon, or whose piety would not grow warmer among the ruins of Iona.'

TEMPLARIUS.

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* Deut. xxii. 15, xxv. 7.; Ruth, iv.; Prov. xxi. 23.; Lament. v. 13.

† Chap. viii. 16.

‡ So called from an ancient Moorish family.

§ The red city.

‖ Joinvill, Hist. de. St Louis, p. 13. ed. 1761.

¶ The signification of the Erse word.

** In the island of Sky, or Skye.'

* 'Gwyn,' so called because it was made by a wattling of white rods, for the convenience of hunting.

† This spot is still recognised in the ruins of Whitland Abbey, above Tenby, on the small river Tay, in Carmarthenshire.

‡ The present hall was probably built in the time of Edward IV.

§ Barr. Obs. Stat. 41.

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### STATUTE OF FRAUDS.

Assumpsit on a promissory note made by the defendant, who was administratrix of her husband's effects. The note was in these terms. 'Twelve months after date I promise to pay Mr. J. Rydout,

or order, the sum of 100*l.* value, received by my late husband.' A verdict was taken for the plaintiff, but leave was reserved by Mr Baron *Bolland*, who tried the cause, to the defendant to move to have it set aside, and a nonsuit entered, if the court should be of opinion, that, as this was a promise to pay the debt of a third person, the consideration should have been more fully expressed on the face of the instrument.

The *Court*, under the circumstances of the case, thought the consideration sufficiently expressed. The defendant was an administratrix and having on the face of the note expressed that it was given for value received, must be taken to have known that such was the fact. The consideration might have been forbearance to sue her husband in his lifetime, or perhaps even forbearance to sue her for a debt contracted by her husband.

Rule for nonsuit discharged. Exchequer, M. T. 1830.

**THE JURISPRUDENT.**

BOSTON, SATURDAY, JULY 16, 1831.

## SPECIAL PLEADING.

The Legislature of New Hampshire, among other things, at its late Session, passed an act, similar to that of the state of Maine, abolishing the system of Special Pleading altogether. The effect of this measure may not turn out to be quite what those who advocated it intended. It will relieve the Members of the Profession from a good deal of unprofitable labor, without deducting a groat from their pay. In New Hampshire, especially, is this the case, where nothing useful was ever gained by skill in this respect, beyond a little delay or temporary convenience to the party. Neither is it likely to prove of any great advantage to the community; since, after all, it is not quite so deadly a thrust at the business of the Profession as the advocates of Reform believe. Besides, that Lawyers are very willing to part with the trouble, the substitute provided, in the nature of a brief statement, will be found quite as likely to make business for them and their clients.

Those who imagine that, because every case can be tried under the general issue, every person can prosecute and defend his own suits, will find themselves deceived. The battle is often hardly begun when the pleadings are closed.

If the necessity for the employment of lawyers is to be done away, not only must legal proceedings be simplified so as to require no professional skill, but the laws must be so plain as to need no interpretation or comment, and evidence so clear as to be aided by no illustration.

Let those, who are ignorant, and those, who are interested or dishonest, sound the alarm as they may, and encourage and propagate the spirit of radical reform; while those, who make laws are human, and those, for whom they are made, are perverse and faithless, there will be men, whose business it is to expound and enforce them, and whom the public will be glad to employ and compelled to pay.

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QUERE.—*A.* employs *B.* to saw timber at *B.*'s mill. *A.* fails and assigns his property to *C.*—*B.* has a lien for sawing the timber. Neither *A.* nor *C.* discharges such lien, but suffer the timber to remain at the mill. What shall *B.* do to get his pay? A.

## IMPRISONMENT FOR DEBT.

It is understood that the Law, on this subject, has been so changed in New Hampshire, as to extend the prison limits to the lines of the counties. If so, imprisonment for debt, in that State, is virtually abolished.

At the recent Session of the Legislature of Maine, also, an act was passed, entitled '*An act for the abolition of Imprisonment of honest debtors for debt.*'

This act provides, generally, that no person shall be arrested or imprisoned, otherwise than is therein provided, in any suit, founded on any contract made or entered into after the act takes effect, or on any former judgment rendered in any suit founded on any such contract. The 3d Section of the act is as follows.

Sec. 3. *Be it further enacted*, That the creditor or creditors, in any execution, issued as aforesaid, wherein the debt exclusive of costs is not less than five dollars, may at any time notify, as is hereinafter provided, any debtor, named in said execution, to appear before two Justices of the Peace, each of whom shall be of the *quorum*, a freeholder and disinterested, there to disclose the actual state of such debtor's business affairs, and of all and every description of property, real and personal, which such debtor may have in severalty, or in common with others, or in reversion, or remainder, together with a particular description thereof, and where and with whom the same is in keeping, or deposit; said notification to be issued, on application being made therefor by the creditor or creditors, his or their attorney, by any Justice of the Peace in and for the County where such debtor shall reside, in writing under the hand and seal of said Justice, signifying to the debtor the desire of such creditor, or creditors, to have the disclosure aforesaid made, and the time and place appointed for the making thereof, and said notice shall be served by giving the debtor a true and attested copy thereof in hand or by leaving an attested copy thereof at his or her usual place of abode twenty days at least before the time appointed as aforesaid. And in case any debtor notified as aforesaid, shall neglect to appear as notified, and to make the disclosure aforesaid, and to make answers to such interrogatories, pertinent to the matter, as the execution creditor or creditors, his or their attorney, may see fit to propound in writing, and to make oath to the truth and justness of the said disclosure and answers; or in case any such debtor shall so appear, and comply with the foregoing requisitions of this act, in making said disclosure and in answering said interrogatories. all of which shall be reduced to writing by the Justices, and signed and sworn to by the debtor in their presence and it shall not clearly appear to the said Justices, upon the disclosure, interrogatories and answers in the case, and the other evidence produced by the parties, each of whom shall have a right to produce such other evidence that said debtor has conducted honestly, without collusion, fraud, or intentional concealment, respecting his property, and that said debtor is unable to satisfy said execution, without the aid of property exempted by law from attachment and execution;—then, and in either case, said Justices shall certify on the back of such execution, in writing, under their hands and seals, that due notice had been issued and served upon the aforesaid debtor, to appear before them, the said Justices, for the purpose aforesaid, naming the time when and place where, such appearance was required, and that said debtor did not appear and disclose, and answer interrogatories, and make oath as is herein required; or, as the fact may be, that said debtor did so appear, and disclose, and answer interrogatories, and make oath thereto, as is in and by the act provided, but was adjudged by said Justices not to be entitled to the privilege and benefit allowed by this act, and that said debtor did or did not, as the case may be, appeal from their said adjudication. And it shall be the further duty of said Justices, to annex said disclosure, interrogatories and answers, if there shall be any, to said execution, and return each and every of them into the office of the Clerk of the Court, or unto the Judge, or Justice, from whom said execution may have issued, within twenty days next after their said adjudication, together the original notice and the evidence of the service thereof; and thereupon said Clerk, Judge, or Justice, may issue another execution, on application, the creditor or creditors, his or their attorney, for that purpose, and shall renew it from time to time, as is now allowed by law, running against the body of such debtor in the form of executions issued before the passing of this act; and upon all executions which shall be so issued, the body of such debtor shall be liable to arrest, and commitment to prison, without the benefit of bail thereafter; Provided, however, that if the certificate of said Justices shall in any case show that their decision was appealed from by either party, a new execution shall not be issued, as aforesaid, by the Clerk, Judge, or Justice, until notice of the termination of such appeal shall have been given to said Clerk, Judge, or Justice, in the manner provided in and by the eighth section of this act.

The 4th section provides that where it appears to the Justices, upon such disclosure, and proof that the execution debtor has conducted honestly and without fraud, and that he is unable to satisfy the execution, without the aid of property exempted by Law, and such as is disclosed by him, they shall administer the oath as prescribed by law, unless the creditor appeal from their adjudication; which oath, with the disclosures &c, the original notice and evidence of the service, is to be returned, within 20 days, to the Court from which the execution issued; and thereupon the body of the debtor is forever discharged from liability to arrest or imprisonment for said debt.

The 5th section provides that, whenever the debtor shall, in any such examination or disclosure, disclose, describe or offer to the creditor, any and all the estate belonging to him, not exempted by law, so that it may be taken in execution, he may be admitted to the oath, and the creditor may have a lien on such property, for the term of 30 days thereafter. In case of appeal, the lien continues 30 days after final decision.

Any debtor, committed according to the provisions of the act, may make a new disclosure, by giving notice to the creditor, signifying his desire to that effect, and appointing the time and place, ten days before the day appointed for that purpose.

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ERRATUM.—The heading of the article, in our last, under *Medical Jurisprudence*, should have been thus—*Identity, and Presumption of Survivorship.*

VALUABLE ENGLISH BOOKS, recently received from Europe, and for sale by *GRAY & BOWEN*, No 141 Washington street.

Browne's Self Interpreting Bible, with notes, references, illustrations, reflections, and a memoir of the author; in one large quarto volume.

The Mirror of Parliament, edited by John Barrow Esq. This work contains a complete account of the doings and debates in the British Parliament, during the last December session ; in eight parts, folio.

Select Views on the River Clyde, engraved by Joseph Swan, with historical and descriptive illustrations; in one quarto volume, with *fortytwo* splendid engravings.

Select Views of the Lakes of Scotland, from original paintings ; in two parts.

Hinton's History and Topography of the United States. This work will be completed in thirty numbers, quarto, with *ninety* engravings; *eight* numbers are already received.

History of the sufferings of the Church of Scotland, from the restoration to the revolution ; by Rev. Robert Wodrow; 4 vols. 8vo.

History and Antiquities of the Doric Race ; by C. O. Müller ; 2 vols. 8vo.

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# THE JURISPRUDENT.

PUBLISHED BY GRAY AND BOWEN, 141 WASHINGTON STREET.

VOL. I. BOSTON, SATURDAY, JULY 23, 1831. NO. LII.

## MEDICAL JURISPRUDENCE.

### MEDICAL EVIDENCE.

Trials of John Davis ;—of Donellan, for poisoning Sir Theodosius Broughton ;—of Donnal ;—of Cowper.

It is not a little surprising, that so intelligent and respectable a class of men as the medical profession should make so poor a figure in the witness-box. In our own experience, we have known so many gentlemen of this profession 'break down,' as it is called, that we have a great distrust of this kind of evidence. We have frequently seen a medical witness called into the box, and positively swear to a certain fact as the result of his experience, and then suffer himself to be completely driven out of his opinion. Take, for instance, the evidence of tests of poison : we have repeatedly heard a doctor declare that he had on analyzation discovered poison—arsenic, for example—in a particular vessel, or in the stomach of a deceased person, and, when asked his reason, he has stated that the existence of a particular fact, or a certain test, was an infallible proof of the presence of the poison ; on cross-examination, this statement had been closely sifted, and he has been forced to admit that the appearance on which he relied is by no means infallible, and might have been produced by other substances : and that, in fact, although the life of the prisoner has been depending on his testimony, he has been guided by mere inference and supposition. We have seen this repeatedly happen : we have alluded to evidence of the presence of poison ; we recollect one recent and remarkable instance on another point, which, as it has never been in print, we shall mention.—At the autumn great Sessions, 1829, John Davis was tried at Carmarthen for the murder of a young woman, who had been his sweetheart. The evidence was entirely circumstantial, and was of the faintest kind ; a bloody hatchet had been found near the young woman, which was, to a certain extent, brought home to the prisoner. This circumstance was the most important proof against him. A medical witness was called, and was asked, by the counsel for the prosecution, his opinion as to the instrument by which the young woman had been murdered. He answered, 'that in his opinion it was either with a hatchet *or* a billhook.' On cross-examination by the prisoner's counsel, the following questions were asked. Q. 'You said that the wounds were inflicted with a hatchet or a billhook ?'—A. 'Yes.' Q. 'You think they could have been committed with no other instrument whatever ?'—A. '*Yes.*' Q. 'You are ready to swear that these were the only two instruments that could by possibility have been used ?'—A. '*I am ready to swear it.*' Q. 'You think, then, that precisely the same effect would be produced by a hatchet and a bill-hook ? A. '*I do.*' Q. 'The one having a concave, the other a convex edge ?' —A. '*I am of that opinion.*' Q. 'These were the only two instruments that could have been used ?'—A. '*I think so.*' Q. 'Now, Sir, might not these wounds have been inflicted with a sword ?' —A. '*They could not.*' Q. 'Why could they not ?'—'*Because the prisoner* HAD NO SWORD.' Thus this person's evidence was given throughout on the presumption that the prisoner was actually guilty.

These observations have been suggested by reading a lecture lately delivered by Mr Amos at the London University, reported in the Medical Gazette of the 12th of February, 1831. It will supply us with some further instances of the truth of our opinion on this subject ; and we shall, therefore, quote the most interesting part of it.

'A medical man who has not seen a patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by them, and its probable consequences in the particular case. Thus, in prosecutions for murder, medical men have been allowed to state their opinions, whether the wounds described by witnesses were likely to be the cause of death ; or, in another description of cases, whether such and such appearances are symptoms of insanity ? So a medical man may be asked his opinion upon many hypothetical points, not proved in evidence, but suggested by the ingenuity of counsel : as, for example, where the strangulation of a new-born infant is charged, whether the swollen and red appearance of the head might not have been occasioned by its being born some time before the body, or been produced by the accidental ligature of the navel-string.

'It is part of the business of a course of lectures upon Medical Jurisprudence, to inform the medical student, when you are summoned upon a trial of this or that description, besides any *facts* which you may have witnessed, upon what points is the counsel on one or the other side likely to call for your *opinion* ?

'You will say, it is easy enough to give an *opinion*. I may answer, that lawyers have the advantage of medical men in this—that the opinions of medical men are submitted to a much more severe ordeal. Having given your *opinion*, you will be asked, what are the *grounds* of your opinion ? If you say, *your own experience*, the extent of this will be narrowly investigated. If you say, from analogical experiments, which you have made upon the lower animals (as it is very frequent that horses and dogs, and cats, and other animals, are drowned or poisoned with a view to throw light on the manner of death of a person supposed to have been murdered), you will be required to give a satisfactory answer to the questions : for example, whether any certain analogy is to be drawn from the effects of any given species of poison upon an animal of the brute creation, to that which it may have upon a human subject ; and whether particular substances, which would kill animals instantaneously, would have no noxious effect, or at least much less immediate effect upon the human subject ?

'I will give some extracts of examinations, where analogy has been stated as the ground of medical opinion.

'[Here the Professor read some passages from the direct and cross-examination of Dr Rattray —and then the following passage from the evidence of John Hunter on the memorable trial of Donellan.]

Mr John Hunter examined by Mr Newnham.

'Q. Is any certain analogy to be drawn from the effects of any species of poison upon an animal of the brute creation, to that which it may have upon the human subject ?—A. As far as my experience goes, which is not a very confined one, because I have poisoned some thousands of animals, they are very nearly the same. Opium, for instance, will poison a dog as well as a man ; arsenic will have very nearly the same effect upon a dog as it would have, I take it for granted, upon a man ; I know something of the effects of them, and I believe their operations will be nearly similar. Q. Are there not many things that kill animals almost instantaneously, that will have no detrimental or noxious effect upon a human subject ; spirits, for instance, occur to me ?—A. I apprehend a great deal depends upon the mode of experiment. No man is fit to make one, but those who have made many and paid considerable attention to all the circumstances that relate to experiments. It is a common experiment, which I believe seldom fails, and it is in the mouth of every body, that a little brandy will kill a cat. I have made the experiment, and have killed several cats ; but it is a false experiment. In all those cases where it kills the cat, it kills her by getting into her lungs, not into her stomach ; because, if you convey the same quantity of brandy, or three times as much, into the stomach, in such a way as that the lungs shall not be affected, the cat will not die. Now, in those experiments that are made by forcing an animal to drink, there are two operations going on ; one is a refusing the liquor, by the animal kicking and working with its throat to refuse it ; the other is a forcing the liquor upon the animal ; and there are very few operations of that kind but some of the liquor gets into the lungs. I have known it from experience. Q. If you had been called upon to dissect a body suspected to have died of poison, should you or not have thought it necessary to have pursued your search through the guts ?—A. *Certainly.* Q. Do you not apprehend that you would have been more likely to receive information from them than from any other part of the frame ?—A. *That is the track of the poison, and I should certainly have followed that track through.*'

'Nay, more : you will not always be let off with stating your *own opinion*, and giving some *ground* for it, but you will be expected to know something about the opinions of others ; or at least you will appear very ignorant if you do not. And it may be observed, that perhaps lawyers, whose freedom of intellectual inquiry is fettered in the closest and most servile manner by authority, are apt to lay too great stress upon authority in medical matters. You must constantly, therefore, be expected to be taxed with such questions as these : —What are Hunter's opinions upon such or such a subject ? Was Haller, was Dr Mead, of the opinion you are now giving ?

'I remember a medical man, at Lincoln, endeavoring to give the go-by to such questions, by slighting the information which was to be obtained from medical writers ; answering, that "the

writers of books would advance anything." Chief Justice Dallas severely reprimanded the witness, observing, that he would not sit in a court of justice and hear science reviled, and the recorded researches of the medical world represented by ignorant tongues as leading only to uncertainty.

'It has been a great reproach to the medical profession, that, on the occasion of celebrated trials, the medical witnesses on the one side and the other have contradicted each other in such a point-blank manner in their opinions delivered upon oath.

'Thus in the case of Donnal, tried at Exeter, in 1817, for poisoning his mother-in-law with arsenic, Dr Edwards, for the prosecution, is asked —What is your opinion, from the appearance of the deceased on dissection, as to the cause of her death ?—A. From the appearance of the stomach and intestines, independently of the examination and analysis of their contents, I have no doubt that the death was produced by arsenic. And, in re-examination, you have stated your opinion that the death was not occassioned by cholera morbus, and have been asked several questions upon the nature of cholera : do you change your opinion ? A. I do not.—When Dr Adam Neale is called for the defence, he is asked—Did you hear distinctly the description Dr Edwards gave of the appearance of the stomach after it was opened ? To what should you, independently of other circumstances, have attributed that appearance ?—A. To no cause but disease. Q. What disease ?—A. Cholera morbus.—In this he is followed by two or three more doctors. Dr Edwards spoke also as to the certainty of two tests he had employed—blue vitriol and lunar caustic; and that the circumstances of Mrs Donnal having eaten onions shortly before her death, could not have affected the tests. The doctors for the defence denied the sufficiency of the tests, and deposed that the test would very probably be affected by the onions.

'So, in Donellon's trial, the doctors for the prosecution were particularly asked as to their opinion upon the symptoms described by Lady Boughton, and which I read on the last occasion ; and they say that they are of opinion, from the symptoms described, that the cause of the death was laurel water. Q. Is the heaving of the stomach a circumstance which attends epilepsy, or apoplexy ?—A. It is not.—Now, when John Hunter is called, he is asked—Are the symptoms that appeared after the medicine was given, such as necessarily to conclude that the person had taken poison ?—A. Certainly not. Q. If an apoplexy had come on, would not the symptoms have been nearly or somewhat similar ? - A. Very much of the same. Q. You have heard of the froth issuing from Sir Theodosius' mouth, a minute or two before he died ; is that peculiar to a man dying of poison ?—A. No ; I should rather suspect an apoplexy. You recollect the circumstances that was mentioned of a violent heaving of the stomach? —A. All that is the effect of the voluntary action being lost, and nothing going on but the involuntary.

'Again, the doctors for the prosecution swore that it was their opinion, from the *appearances of the body on dissection*, that Sir Theodosius had been poisoned ; and that those appearances could not arise from putrefaction. John Hunter said, that, in his judgment, the appearances were entirely the result of putrefaction, and that they did not afford the least suspicion that Sir Theodosius died of poison.

'But the most remarkable of a multitude of instances of cross-swearing by doctors, with regard to medical opinion, was in the case of Cowper, afterwards a Judge. He was tried for the murder of Mrs Stout, a Quaker lady, whose body was found in a river near Hertford, during the time Cowper was attending the Hertford assizes as a counsel, and who had fallen in love with Cowper. She had also written some love-letters to another swain, signed 'Your loving duck.' The charge against Cowper was, that he had strangled the woman, and then had thrown her body into the river, in order to give a color to the charge of suicide. At the time this happened, Cowper's father and brother were sitting members for Hertford, after a recent election, which had been strongly contested ; and the irritation occasioned by it was still active. Accordingly, a long list of Tory doctors were summoned for the prosecution, and an equally long list of Whig doctors for the defence. The contest was upon a point of medical opinion with regard to bodies found *floating, without water in them*—how the deceased came by their death. Mrs Stout was found at the top of the water the day after she was missing ; but her body was not opened till six weeks afterwards, when no water was found in it.

[The contradictions of the medical witnesses in this case were very remarkable indeed. We may refer the reader to them in Gordon Smith's Analysis of Med. Ev. pp. 274. 275. 281. 283.]

'I shall have occasion frequently, in the course of my lectures, to advert to the subject of the demeanor of medical witnesses. The hour will just allow of me, this evening, adverting to one piece of advice ; which is, in the witness-box to drop as much as possible the language which is known only to scientific men, and to adopt that which is in popular use. If you have occasion to speak of a person fainting, do not say, as I have heard it said, that you found the patient in a state of *syncope* ;—and you must not expect a court of justice to understand you if you talk of a person being *comatose*, or of the appearance of his stomach after death being *highly vascular*, or of your having discovered poisonous ingredients in his intestines by means of a *delicate* test. The Judge and counsel are generally very shallow men of science, and it is a great advantage for them to raise a laugh at persons whom they would represent to be using hard names for common things. Veterinary surgeons are a great game for counsel ; as I remember, in particular, a veterinary surgeon, who, when cross-examined by Serjeant Vaughan, was so unfortunate as to make use of the term "suspensary ligament," which the Serjeant interpreted "a hangman's noose." I should guard you also against the use of metaphorical expressions, of which I will give you an example.

'In the examination of Mr Tucker, in Donnall's case, the witness is asked Have you seen the prescription which Mr Edwards wrote that night? No I have not ; but I could wish to see it. (Here the prescription was shown to the witness). Now, supposing a person to have retchings and purgings for several hours, and that you found these attended with frequent and fluttering pulse, in that state of the illness what should you have prescribed ?—A. *I should have prescribed diametrically opposite to the prescription of Dr Edwards ; I should consider that prescribed by Dr Edwards as adding weight to a porter's back.* Mr Justice Abbott, (to the witness), Don't speak metaphorically : you are speaking just now of a gentleman of experience and respectability ; I don't wish you to conceal your opinion, but only to speak it in different language.

'And considering that, when you are giving testimony in a witness-box, you are discharging a most responsible duty upon your oaths, I should recommend you, even if you should meet with rude and unbecoming treatment from an advocate, that you should not vie with him in a dexterous use of what my Lord Bolingbroke calls "the flowers of Billingsgate." A short extract from a scene in the Oldham Inquest will illustrate my meaning.

'Mr Simmons, a surgeon of Manchester, in undergoing a cross examination by Mr Harmer. "I think," says Mr S., "I am more capable of forming a correct opinion on the subject than Mr Cox." "The jury, Sir," replies Mr H., "will no doubt duly appreciate the value of that self-opinion." *Mr Ashworth.*—Really, Mr Coroner, I must interpose to protect the witness from this sort of attack. *Witness.*—Oh ! Mr Ashworth, let me go on, I will teach him surgery ; I am anxious for a little more discussion ; he is not the first lawyer I have taught surgery. *Mr Harmer.*—Perhaps not ; but notwithstanding the opinion you entertain of your own skill, I should be very sorry to be under your hands. *Witness.*—Oh ! I'll teach you surgery, Sir. As you have challenged me with a castigation from different medical opinions, I hope you will bring down Dr Cline, Sir Everard Home, and the other leading members of the faculty. I shall be very happy to see them. *Mr A.*—I will ask you, Mr Coroner, whether the witness is to be attacked in this kind of way. *Witness.* I am sorry you should interrupt the gentleman, Mr Ashworth ; I am anxious for a little more discussion with him. (Here much clamor ensued, and different gentlemen addressed the Coroner together.) *Witness.*—I want a little more discussion ; don't interrupt the gentleman ; I should like a little more discussion with him. *Mr H.*—I beg you will hear Mr Simmons ; he says he wants a little more discussion. *The Coroner.*—I have exhausted all my patience,' &c.'—*Legal Obs.*

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## ON THE STUDY AND PRACTICE OF THE LAW.

In a Letter addressed to a Gentleman intended for the Bar, passing through a Solicitor's office.

Before I proceed to point out the course of study which I advise you to pursue, and the elementary works which I recommend you to consult, I consider it useful to commence with some preliminary instruction regarding your *general conduct in the transaction of business*, the best means of obtaining a *practical knowledge* of the routine of professional duty, and the details which will enable you to combine the skill of a man of business with the learning of a lawyer.

You will do well to avail yourself of all leisure hours to understand and make yourself master, as soon as possible, of those elementary books to which your attention will be directed. When tolerably well understood, they will enable you to comprehend the details of business in the office, and elsewhere, with much greater facility than the mere routine of such details alone could otherwise afford. But though elementary knowledge and elementary books are absolutely essential in the commencement of your studies, you must never forget that it is detail, and *detail alone*, that must ultimately be the business of your life, the source

of your professional gains and professional honors; and that even elementary knowledge is by far the most valuable, the best understood, and the most lasting on the memory, when it is acquired through the medium of detail.

In this office you may see a certain routine of business, which, after you have left it for the Bar, you will have no further opportunity of observing. During the period that you are here therefore, consider the detail, the practice and the routine, that are passing before your eyes, as the primary objects; and do not esteem anything as too insignificant for your attention. Having observed it, endeavor, by research, and by inquiry and conversation, to trace its meaning, its history, and use, in all the ways that occur to you. You will often find those who know the routine without the least apprehension of its principles; but it should be your anxiety never to rest satisfied with such a state of information. You will find, hereafter, that it will be of the very essence of your profession to pass beyond the surface into the elements and foundation of these uninteresting minutiæ. To pursue the same observation: whenever an instance of business occurs in the office which engages your attention, or becomes a part of your duty, do not be satisfied with the particular part which you are to transact,—trace it from the beginning, unravel its complexities, pursue it watchfully to its termination, endeavor to throw an interest around it, and, as much as you can, to make it your own. You may often, in this way succeed in suggesting something material, that, others have not observed: you may prevent mistakes, and guide the affair to a more useful or more advantageous conclusion. Your own experience is, in the mean time, growing with your labors: not to mention in how high a degree your zeal and industry may be cultivated by habit, and how firm and how warm it makes those friends on whose behalf they are exerted.

Let it be therefore your first care always to master the principles of that which immediately engages your exertions; next to this, pass two or three hours daily in reading the elementary books which I shall hereafter recommend. There are various others to be afterwards read, but those I refer to will suffice for the present. Do not be alarmed at their number. Three hours a day, for a year, would make you thorough master of them all, without trenching upon more active labors; and a man who would devote that time steadily to reading in his profession, would become, in seven years, one of the first lawyers in the kingdom.

I add but a word more on your ulterior pursuits. When you have acquired as much as will be useful to you here, you will find the same observation applicable, in another shape, to your subsequent studies. You will go to a Pleader's office: when there, attend, as the first object, to the details of that office; collect, from the business of the office, and at your leisure, from books, the precedents and forms of pleading; and not merely collect, but observe and understand them, with all the attention of which you are master. Disentangle the obsolete and tautologous language of which they are made up. Observe the points they put in issue—the strictness and logical accuracy with which they bring out the matters to be tried in the cause, and with which they reject and cut off the extraneous and collateral confusion that belongs to all questions in dispute. Observe the evidence, and the rules of evidence, as applied to those forms of pleading. And afterwards, those forms of records which follow upon the verdict and the judgment, till the suit is terminated.

The reading of Cases, and search after them, will be the ultimate stage of your professional studies. This, again, is but the detail of that study which you will never relinquish while in the profession. The sooner you are in a situation to give up elementary reading, and devote yourself to these details and practical researches, the better. Lastly, remember that yours is a profession of incessant competition. Your competitors are daily and nightly at their labors in the closet; and it may be stated, as a proposition true, as a general one, that professional diligence, and professional honor and profit are corresponding and co-equal.

I now proceed to enumerate the several departments of study and practice, which it will be your duty to pursue, in order to obtain a thorough knowledge of your profession.

1. Deeds and Agreements, noticing their forms, and particularly the forms of covenants and agreements, and of the mode of deducing titles to estates. You will have an opportunity of seeing deeds, agreements, and abstracts; and while directing your attention to this subject, you should read and digest the second volume of *Blackstone; Watkins'* Principles of Conveyancing; *Watkins* or *Scriven* on Copyholds; *Littleton's* Tenures; *Preston* on Estates and Abstracts; *Sugden's* Law of Vendors and Purchasers; *Coke* upon *Littleton*; *Sanders* on Uses; *Shepherd's* Touchstone; *urton's* Compendium; and *Platt* on Covenants. The references in these and the other books, after mentioned, should be consulted.

2. Suits in Chancery, the forms of pleadings, and the jurisdiction and practice of that court, will next deserve your attention, particularly as regarding Injunctions, which connect themselves with Actions at Law. You will also have an opportunity of seeing bills, answers, and proceedings in Chancery; and while directing your attention to this point, you should read *Mitford's, Cooper's,* or *Lube's* Pleadings; *Van Heythuson's* Forms, a Synopsis of the Practice of the Court; and *Maddock's* Principles of Equity.

3. Acquire correct knowledge regarding Actions at Law, and their different sorts, the modes of prosecuting and defending them, and particularly of the pleadings and the practice of courts of King's Bench, Common Pleas, and Exchequer. You will also have an opportunity of seeing proceedings in actions, and you will be materially assisted by reading the third volume of *Blackstone; Boote's* Suit at Law; *Stephen* on Pleading; *Tidd's* Practice; and *Chitty's* Pleadings. You will do right, if, in term time, you go through the different offices, and make yourself well acquainted with the business transacted at each, take as much responsibility upon yourself as you are able, and copy all forms, adverting particularly to the number of days necessary to be observed in the different proceedings, on which the practice wholly depends.

4. Observe the Trials of causes, study the rules of evidence, and the minor points necessary to be attended to in preparing for trial. This you will obtain by attending to causes as they proceed,—by a close consideration of the pleadings, and of the precise facts, and the exact evidence necessary to be, and which can be adduced,—and of the notices proper to be given; and, by reading *Peake's, Phillips',* and *Starkie's,* Evidence, the Nisi Prius Reports, and *Selwyn's* Law of Nisi Prius. The different text books will materially help you, viz. *Bailey* or *Chitty* on Bills of Exchange, *Ross'* Law of Vendors, *Long's* Law of Personal Property, *Abbott* on Shipping, *Paley's* Principal and Agent, *Lawes* on Charterparties, *Montagu* and *Whittaker* on Lien, *Caldwell* on Arbitrations, *Montagu* and *Gow* on Partnership, *Parke* or *Hughes* on Insurance, *Holt's* or *George's* Law of Libel, *Fell* on Guarantees, and *Adams* on Ejectment.

5. Obtain a knowledge of Bankruptcy. This will be acquired by actual business, and by seeing the proceedings which are kept under all commissions, and by reading and digesting all the bankrupt statutes and general orders in bankruptcy. You will also peruse *Cooke's, Eden's, Montagu's, Christian's, Cullen's,* or *Whitmarsh's,* Bankrupt Laws. The examination of bankrupts and witnesses before commissioners, forms a material part of business in bankruptcy, and deserves particular attention.

6. Acquire a general knowledge of the law relating to executors and administrators. This will connect itself more or less with the foregoing. *Toller's* Law of Executors and Administrators, and *Preston* on Legacies, should be well digested.

7. Acquire a thorough knowledge of merchants, accounts, and of the habits, manner, and forms, of business in general, not only in, but out of the profession, and of every subject connected with the law of merchants. In *Beawes'* Lex Mercatoria, by Chitty, you will find much useful information.

8. The practice of Sessions is very necessary to be attained, and this you will find in the fourth volume of *Blackstone, Nolan's* Poor Laws, and *Chitty's* Criminal Law. Of this practice I profess no particular knowledge, and therefore am unable to promise you any insight into it in our office.

9. The practice in election cases it is also desirable you should be acquainted with, and this you will find in Mr *Roe's* or Mr *Rogers'* publication, and in Sergeant *Peckwell's* cases.

10. The common lawyer may have frequent occasion to be employed in matters connected with the courts of Admiralty, and Ecclesiastical courts. The Admiralty business is divided into that of the Prize court, and that of the Instance court. The general forms of proceedings in both are to be collected from *Clarke's* Practice, and *Marriott's* Formulary. The forms of proceeding in the Admiralty court are those of *Robinson, Edward,* and *Dodson*; in the Ecclesiastical courts, those of *Phillimore* and *Haggart.*

11. Some knowledge of the law of Scotland may be desirable in the more advanced periods of study with a view to practising before the House of Lords.

12. The law of nations is incidentally touched upon in many courts; on this subject, *Vattel's* Law of Nations is the most approved authority.

In the hope that these suggestions, which are of a practical description and the result of experience, may be of use to you in your professional career, I remain, &c. &c.—*Legal Obs.*

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### VALUE OF A DOCTOR'S EVIDENCE.

It is, perhaps, not generally known, that the evidence of a physician is, in some cases, twice as good as any other person; as, although it is settled that the declarations of the deceased servants and acquaintances, however intimate, are not admissi-

ble in questions of pedigree, *Johnson* v. *Lawson and another*, S. C. Bing. 86., 9 Moore, 183., yet the mere conversation of a deceased doctor with a deceased barrister, although related by the doctor to a third person, is a good evidence! Thus, when the question was, whether a barrister or a packer was heir to an estate, and for the packer a witness was called to give evidence of what he had heard a deceased physician of the packer say as to declarations made by the barrister, who was also dead, the evidence was admitted; viz. that the physician had said that he had gone to his chambers and asked him whether he had *any relations*, to which he answered that he *believed not*, and that if he had, they must be very distant. M. S. E. T. 1776, 9 Moo. 187.

The answer of the barrister to this Paul Pry of a doctor reminds us of the conversation between Lord Thurlow and the officer of the Herald's College. When Lord Thurlow's patent of peerage was registered by the herald, he begged to know the name of his Lordship's mother? The reply was delivered in a voice of thunder,—'I cannot tell!'—*Ib.*

## AMERICAN DECISIONS.

### Nuisance.

If one discharges a gun at wild fowl, with knowledge and warning that the report will affect injuriously the health of a sick person in the neighborhood, and such effect is produced by the discharge, he is guilty of an indictable offence. *Commonwealth* v. *Wing*, 9 *Pick.* 1.

### Sale of Ship.

Where a vessel is sold while at sea, it is sufficient for the vendee in order to maintain his title against a subsequent purchaser or attaching creditor, to take possession of her without any unreasonable delay after her arrival.

Whether the purchaser has taken possession of the vessel within a reasonable time after her arrival, is a question to be decided by the jury upon the circumstances of the case.

One eighth of a vessel at sea belonging to Hyannis, was sold to a person residing in Nantucket, on August 11; she arrived at Hyannis August 22, and sailed from there August 29, on a new voyage, and returned there again September 16, and was attached as the property of the vendor September 17. The vendee came from Nantucket by the first packet after receiving news of her arrival, and arrival at Hyannis September 23, and on that day replevied the vessel. It did not appear that the vendee knew of the vessel's being at Hyannis in August, while she was there. *Held*, that the vendee's title should prevail against the attachment. *Joy et al.* v. *Sears*, *Ib.* 4.

Where H purchased three quarters of a vessel, two quarters for himself and one quarter for C. according to a previous agreement between them, and had the bill of sale of three quarters made to himself alone, and agreed to make a bill of sale of one quarter to C. but when C. applied for a bill of sale afterwards, refused to deliver it; *held*, that H could maintain no action against C. for the price of one quarter without first tendering a bill of sale.

H, in his life-time, made a bill of sale to C, but did not deliver it, and his executrix more than two years after the original purchase, tendered this bill of sale to C. which he refused to accept. *Held*, that the executrix could not maintain any action against C. for the price of the one quarter.

A certificate signed by C. that he had purchased one quarter of the vessel of H, is not conclusive evidence of a sale to C. and the property is not transferred to him, if it was understood by the parties at the time the certificate was given, that a bill of sale was to be given in order to complete C's title. *Higgins, Ex.* v. *Chessman.* *Ib.* 7.

### New Trial.

In an action on the case to recover damages for the breach of a contract, a new trial may be granted because the damages found by the jury are too small. *Taunton Manufacturing Co.* v. *Smith*, *Ib.* 11.

### Trustee Process.

Where G. being summoned as trustee of B. disclosed an indenture of two parts, between B. on the one part, and the respondent of the other part, whereby all the goods and chattels of B. were assigned to the respondent in trust to pay B's creditors, and it did not appear that any creditor had signed or assented to the indenture, the respondent was adjudged trustee. *Vial* v. *Bliss and Tr.* *Ib.* 135.

A general assignment of a debtor's property, real and personal, in trust for the payment of debts, containing a covenant on the part of the trustees, that the debtor shall be permitted to use and occupy the property, committing no waste thereon, until it shall be sold or disposed of in the due execution of the trust, is not *per se* fraudulent as against creditors not parties to the assignment. *Baxter* v. *Wheelor and Tr.* *Ib.* 21.

### Larceny.

Doves are animals *feræ naturæ*, and cannot be the subject of larceny, unless when they are in the custody of the owner; as, for example, in a dove-house. *Commonwealth* v. *Chase*, *Ib.* 15.

### Statute of Limitations.

In the case of a joint and several note made by two promisors, a partial payment made within six years by the administrator of one of them will not take the note out of the statute of limitations as against the surviving promisor. *Hathaway* v. *Haskell*, *Ib.* 42.

### Officer's Return.

In trover by an officer against a stranger, for a chattel seized on execution, the officer is not required to prove the seizure by a return on the execution, but he may prove it by parol evidence. *Hovey* v. *Lovell.* *Ib.* 58.

### Promissory Note.

Where a sale of chattels is made by A, and he receives the purchaser's note for the price and negotiates it, or obtains payment upon it, and the chattels are afterwards attached as the property of A, in an action of replevin brought by the purchaser against the attaching officer, A is not a competent witness to prove that the sale was fraudulent.

But if it be doubtful whether the note is negotiable or not, and if it is negotiable, whether it has been in fact negotiated, or still remains in the hands or control of A, he is a competent witness.

A judgment in the replevin suit in favor of the officer, would be a bar to an action on the note by A. *Bailey* v. *Foster.* *Ib.* 189.

In an action by the indorsee of a note against the maker, it is no defence that in consequence of the insolvency of the maker, the payee sold it to the plaintiff for much less than the sum due upon it, and upon a verbal condition that the plaintiff would exact of the maker only about as much as the plaintiff gave for the note. *Babson* v. *Webber*, *Ib.* 163.

### Trustee Process.

Where one summoned as trustee in a process of foreign attachment, discloses a conveyance of land to him from the principal defendant, he may be interrogated whether there was any agreement in writing or by parol, that he should dispose of the land and account to the defendant for the proceeds.

If such respondent admits that he held the land in trust to sell and account for the proceeds, he may be further interrogated as to the time of the sale and disposition of the proceeds.

Where one summoned as trustee owes the principal defendant a debt which is barred by the statute of limitations, he may rely on such bar, in his answers. *Hazen* v. *Emerson*, *Ib.* 144.

### Amendment of Officer's Return.

An amendment made by leave of court, by an officer, to his return on a writ, cannot affect the rights of persons not parties to the suit, acquired before the amendment is made.

An officer returned on a writ, that he had attached a piece of land of the debtor on a certain day. Before that day a mortgage made by the debtor had been placed on record. The officer afterwards, by leave of court, amended his return so as to date the attachment before the recording of the mortgage, though not before before its delivery; and the land was seasonably set off to the creditor on an execution issuing in the case. *Held*, that the title of the mortgagee should prevail over that of the judgment creditor. *Emerson* v. *Upton*, *Ib.* 167.

### Contract.

A person entering into a contract is not bound to the usage of a particular business, unless it is so general as to furnish a presumption of knowledge, or it is proved that he was acquainted with it.

It was a rule in a woollen factory in Andover and some other neighboring factories, that no person employed should leave their service without giving a fortnight's notice of his intention to quit. A weaver, who did not know of this rule, worked in the factory without any agreement as to the terms of service, but was paid by the yard for the work which he turned out. He left the factory without giving any previous notice. *Held*, that the rule was not binding on him, and that he therefore was not liable to an action for damages by the owner of the factory, for thus leaving. *Stevens* v. *Reeves*, *Ib.* 198.

### Corporation.

The by-laws of a corporation required that all transfers of shares should be made in a book to be kept by the treasurer. *Held*, that an assignment of shares by the deed of the vendor, accompanied by a delivery of the certificates to the vendee, was valid, without any transfer on the books of the corporation, not only between the vendor and vendee, but against a creditor of the former who attached the shares before any notice of the sale had been given to himself or to the treasurer of the corporation.

It seems that the vendee could not compel a payment of dividends, or claim a certificate from the corporation, without first applying to have the

transfer made according to the by-law. *Sargent* v. *Essex, M. R. Corp.* *Ib.* 202.

FRAUDULENT CONVEYANCE.

A, being the owner of a factory and the machinery in it, gave a bond to S, conditioned that he would convey them to S, when certain negotiable notes given as the consideration, should be paid, and that S should have the possession of the property, so long as he continued to pay the notes as they become due, and no longer, and possession was delivered immediately pursuant of the bond. Before the first note became due, the machinery was attached as S's property, and was removed from the factory by the officer, who, before the removal, had full notice of A's title, and the machinery was afterwards sold on execution. A then brought an action against the officer, in which the declaration contained counts in trover and case. *Held*, 1. That A might maintain case for the injury done to his reversionary interest in the machinery: 2. That the proceeds at the sheriff's sale were not the measure of damages in the action: 3. That the measure of damages was the value of the machinery as it stood in the factory, before its removal.

The court refused to set aside the verdict in this case on the ground of excessive damages, though the amount was nearly three times as much as that produced by the sheriff's sale.

Whether the count in trover could be supported, *quære.*

It *seems* that if S himself had removed and sold the machinery, A might have brought trover against the vendee. *Ayer* v. *Bartlett*, *Ib.* 156.

PLEA OF NOLO CONTENDERE.

The plea of *nolo contendere* to an indictment, has the same effect as a plea of *guilty*, so far as regards the proceedings on the indictment; and a defendant who is sentenced upon such a plea, to pay a fine, is convicted of the offence for which he was indicted.

But a plea of *nolo contendere*, with a protestation of the defendant's innocence, will not conclude him in a civil action from disputing the facts charged in the indictment.

A statute directs that a penalty recovered upon an indictment shall go to the county. The record of a conviction under the statute, which stated, that the court directed the fine 'to be disposed of according to law,' was *held* sufficient. *Commonwealth* v. *Horton*, *Ib.* 206.

ASSIGNMENT.

Where a debtor assigns property to a creditor in payment of a debt, with a covenant of general warranty, and the same property is attached by another creditor, the debtor is a competent witness to support the title of the assignee, in an action between him and the attaching creditor, the witness standing neutral in regard to interest.

Where a point in a cause is clearly proved by competent evidence and found by the jury, a new trial will not be granted because of the incidental admission of improper and not very important evidence tending to prove the same point.

Where property is assigned by a debtor to two persons by one instrument, to 'hold to them respectively in the proportions which the debts due to them respectively bear to each other,' and the assignment is proved to be fraudulent and void as to one of the assignees, it is nevertheless valid in respect to the other who is innocent of the fraud; their interest in the fund being several, though if the instrument were valid in the whole they would take as tenants in common.

As the *bona fide* assignee in such case takes only an undivided portion of the property, he cannot maintain trespass, trover, or replevin, against an officer who attaches the property on a writ against the assignor, but the officer can legally sell on execution only the part which was fraudulently assigned, and the *bona fide* assignee will hold as tenant in common with the purchaser: or if the whole shall be sold and such assignee elects to affirm the sale, he will be entitled to a share of the proceeds, having given notice to the officer before they have been paid over.

But where it was agreed by such assignee and the attaching creditor, that a third person should take possession of the property and sell it, and retain the proceeds subject to the legal rights of all persons interested therein, and should pay over the same to such persons and in such proportions as it should be decided judicially they were entitled to, and the property was sold accordingly, it was *held*, that such assignee might maintain an action against such third person to recover his share of the proceeds. *Prince* v. *Shepard.* *Ib.* 176.

CONTRACT.

Where individuals, having a design to be incorporated for the purpose of creating a water power, cause surveys and estimates to be made of the water power which can be created, and thereupon represent it to be greater than it really is, but without any intention to deceive, persons who subscribe for stock in the corporation upon the faith of such representation and agree to be personally liable for assessments, cannot avoid the contract on the ground of the mistake.

Where an act of incorporation required that the capital stock should consist of 5000 shares, and that the whole number should be subscribed for before an assessment should be laid, and 30 of the 5000 shares were subscribed for by A on account of B, but without authority, it was *held*, that the capital stock was not all taken up in such a manner as to authorize the corporation to lay an assessment; the effect of A's subscription being not to make him a member of the corporation, but only to subject him to a special action of the case for damages.

If all the shares in such a corporation are taken up by solvent persons, the unexpected insolvency of some of them, whether before or after the corporate powers have been exercised, will not deprive the corporation of the power to lay assessments.

But where only a part of the shares were originally taken up, and some of the subscribers became insolvent, and in laying an assessment to defray preliminary expenses, (which was allowed by the act of incorporation,) the insolvent subscribers were not assessed, and afterwards additional subscribers were obtained, it was *doubted* whether the corporation could consider the insolvent persons as stockholders.

Whether in a case where by an act of incorporation the shares in the capital are made liable to be sold for non-payment of assessments, and the subscribers to the stock sign an agreement making themselves liable personally to a certain amount, a vote of the corporation, that the subscribers shall be liable personally for only a part of such amount, will have the effect to discharge a dissenting subscriber entirely from his personal liability, *quære.* *Salem Mill-Dam Corp.* v. *Ropes.* *Ib.* 187.

## ENGLISH.

COURT OF COMMON PLEAS.—APRIL.

*Burrells vs. Smith.*

This action was tried at the sittings after last Term. It was one of many actions of a like nature which arose out of the failure of the London Western Hospital, a charitable speculation of Dr Sleigh and several other physicians, and an undertaker. The question involved in the cause is one of considerable interest, being, whether or not subscribers to charitable or other institutions, who may act as committee men, are liable for the debts contracted in the undertaking. The present action was brought by a baker for bread supplied to the Hospital, against the defendant, a subscriber and committee man, and a verdict for 52*l.* the amount of his claim, was given by the Jury.

Mr Sergeant SPANKIE now moved for a new trial contending that gentlemen who subscribed to charities of this or any other description, and devoted part of their time to superintending the proper application of their money, could not be considered answerable for demands of tradesmen for goods supplied to the charity. In this instance Mr Smith had given a sum of money, and there his interest and concern in the undertaking ceased—he not considering himself as acting for his own benefit in sitting on the committee. If gentlemen in the situation of Mr Smith were to be made liable for the supplies of tradesmen, there would be a very natural check to the flow of benevolence in the country.

The court admitted the hardship of the case, and expressed a wish that the whole question of liability could be canvassed, although they were of opinion, from the nature of the evidence in the present case, defendant would not receive much benefit from it.

Rule granted.

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COURT OF KING'S BENCH.

Sittings in Banco.

*Hoby vs. Pitt.*

Mr Sergeant Russell moved for a rule to show cause why the verdict in this case for the plaintiff should not be set aside, and a new trial granted, under the following circumstances:—

The plaintiff employed the defendant as his attorney in two actions, which had been brought against him by two different individuals. The defendant, not having much Common Law practice, went with the plaintiff to an attorney named Wodehouse, who acted as Mr Pitt's agent in actions at Common Law, on the Saturday before the opening of the Commission of Assize, which was on the Thursday following. Mr Wodehouse undertook to have the briefs delivered to Counsel, if the plaintiff would bring him the money on the Monday. The plaintiff brought some witnesses on the Tuesday when Mr Wodehouse informed him that others were necessary, upon which he said he would bring them on the ensuing day, together with the money for the briefs. He did not come, however, and, as the briefs were not delivered, he lost both actions. He then brought an action against Mr Pitt, to recover from him the costs and damages which he had sustained in both actions. This action was tried at the last Assizes for Hereford, when a verdict was returned for the plaintiff, with damages, 166*l.* 19*s.*

The Learned Counsel now moved for a rule to set aside the verdict, on the ground, first, that the plaintiff was himself the cause of his own loss, in

not having furnished the money, which it was contended that the attorney was not bound to supply; and, secondly, on the ground of excessive damages, inasmuch as in one of the actions Mr Hoby had no good ground of defence.

The Court granted a rule to show cause, a case having been cited in which it had been held that an attorney was not bound to proceed if his client did not furnish him with the means of doing so.

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*The Apothecaries' Company vs. Ryan.*

This was an action tried at the last Assizes for the county of Kent, for the purpose of recovering from the defendant, who is a member of the Royal College of Surgeons, certain penalties for having practised as an apothecary, he not being a licentiate of the Apothecaries' Company. The Jury found for the plaintiff, on the ground that in one of the cases adduced there was no external injury, such as constituted it a surgical case, according to the direction of the Learned Judge, Mr Baron Bayley.

Mr Platt now moved for a rule to show cause why the verdict should not be set aside, and a new trial granted, on the ground of misdirection on the part of the Learned Judge, in stating that, unless there was some external injury or disease, the case could not be considered as surgical; and, secondly, on the ground that the evidence of the principal witness, who was a member of the Apothecaries' Company, was inadmissible, he being an interested witness, inasmuch as the penalty went one half to the informer, and the other half to the Company.

The Learned Judges, after hearing the Counsel at considerable length, gave their opinions *seriatim*. Though they were unanimous in thinking that the line laid down by Mr Baron Bayley as to the limit of a surgeon's practice was too narrow, yet they felt equally certain that one of the cases adduced against the defendant could not be construed into a surgical case. The patient was laboring under consumption and the defendant sent him medicine. It was true he also bled him; but the mere circumstance of its being necessary to bleed the patient was not sufficient to make the case a surgical one, for it was well known that every apothecary in the kingdom was in the habit of performing that operation; besides which it was equally well known that consumption was a medical, and not a surgical, complaint; while also the defendant had sent medicine,w hich clearly did not come within the province of a surgeon. Upon the other point, however—namely, the admissibility of the evidence of the witness alluded to—the Court had great doubts; and upon that ground and that alone, a rule was granted to show cause.

Mr Platt said that Mr Ryan had displayed so much talent and skill in his profession, in the treatment of the very cases which had been adduced against him, that the gentlemen who heard the trial thought the Company ought at once to have made him a member of their fraternity—(a laugh.)

Lord Tenterden (laughing)—Perhaps so; but you cannot make that part of your motion—(a laugh). We have no power to issue a *mandamus* to compel them to do so.

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LEGAL CHRISTMAS BOXES.

In the report of the Commissioners for inquiring into the duties, salaries, and emoluments of the judges, &c of the courts of justice in England, it appears that the Lord Chief Justice of the Court of King's Bench, 'according to ancient usage, receives annually at Christmas four yards of broad cloth from Blackwell Hall, and thirtysix loaves of sugar presented to him by particular officers on the plea side of the Court; and that each *Puisne* judge receives annually from the same officers a small silver plate and eighteen loaves of sugar.—*Literary Panorama, Dec.* 1818.

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FEME COVERT.

On shewing cause against a rule, calling on the plaintiff to show cause why the bail-bond should not be delivered up to be cancelled on filing common bail, on the ground that the defendant had been arrested on a promissory note given by her when a married woman, the following facts appeared: The defendant had gone to the bankrupt, of whom the plaintiffs were assignees, and told them that she was a married woman, but that she was about to be divorced. She had some time afterwards gone again, and producing a piece of parchment, which she declared to be an Act of Parliament divorcing her from her husband, and empowering her to marry a banker in Pall Mall, ordered some clothes for her wedding. A few days after she gave a promissory note for the amount and on this instrument she was arrested. It was contended, that as she had represented herself at the time of getting credit to be unmarried, she must be left to her plea, and could not be relieved on motion.

In support of the rule it was submitted, that as it was not negatived by the bankrupt, that he knew she was a married woman at the time the note was given, the defendant was entitled to be discharged. If the arrest had been for the goods, and not on the note, it would have been different.

The *Court* was of opinion, that the defendant ought not to be discharged on motion, as she had clearly obtained credit by a fraudulent representation of her circumstances. Rule discharged, with costs. *Littledale, J. Simon and others*, assignees of *Rogers*, v. *Winnington*, M. T. 1830.

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SIR WILLIAM BLACKSTONE.

In the Oxford collection of verses, on the birth of the prince of Wales, (George the Fourth,) there is the following elegant compliment to this learned commentator, on the Laws of England, in a copy of Latin verses, insribed to the celebrated Dr King, principal of St Mary Hall, by the Hon. Thomas Fitzmaurice, brother to the marquis of Lansdowne, at that time a gentleman commoner at Oxford, and who was attending Sir William (then Dr) Blackstone's lectures:

——Me spinosa morantur
Sed jucunda simul Juris documenta Britanni
Deflectuntque alio, nam quis salebrosa locorum
Respuat, atque *illo* comes ire *docento* recuset,
Cui Musa, eloquii grato moderamine, legum,
Enodare dedit laqueos, et pandere jussit
Perplexos æditus et cæca retexere fila?

*European Mag.* Sept. 1793.

Should the contemplated changes of the law take place, Blackstone's admirable work will fall into practical oblivion. It will cease to be useful as an initiatory work for the legal student, and will be consulted only by the curious, who desire to learn what the law once was, and by the general reader who wishes to peruse a fine specimen of didactic composition. Some lively observations on the effect produced on the law in his time, by tampering and botching, are to be found in the original letter of the learned commentator, published in the Jurisprudent, No. 50.

THE JURISPRUDENT.

BOSTON, SATURDAY, JULY 23, 1831.

The present number completes the first volume of the Jurisprudent. The experience of a year had satisfied us, if not our readers, that the materials for such a Journal are abundant, and that, with proper management, it may be made profitable to the Publishers, and instructive and acceptable to the Profession. How far we have succeeded in making our Paper of the latter character, it is for others to judge.

The project of a weekly Legal Newspaper, was, we believe, entirely new in this country and in England, when we commenced our undertaking. Since then one or more publications of the kind have been started in London and have met with great success. Although we are not permitted to say quite as much for ourselves touching the patronage we have received, we can, in truth, say, that it has been equal to our expectations.

Circumstances, however, exist, which render it expedient to suspend the publication of our paper for a few weeks, at least.

Should our old subscribers, after that, see fit to continue their patronage, and the public afford us reasonable ground of encouragement, we shall recommence the Jurisprudent, under more favorable circumstances, and in another (octavo) form.

Should such be the event, we shall be glad to receive aid from our friends, and shall hope to convince them, at the end of another volume, that our wisdom has grown with our experience, and to find ourselves, that our list of subscribers has grown with both.

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SALVAGE.

The *City of Edinburgh* steam vessel of 450 tons' burden, with 50 passengers and a cargo from Leith to London, in the beginning of January last met with foul weather off Flamborough Head; and, after reaching the Humber on the 12th, she took shelter under a shoal at the mouth of the river. The gale increasing, she was driven from her anchor, and proceeded towards Blakeney, on the coast of Norfolk, but was unable to cross the bar. On the 13th she anchored about three miles from the coast, in nine fathoms' water. Here the circumstances took place which formed the subject of the suit. On the part of the salvors (boatmen in Blakeney, twenty-five in number) it was alleged, that the steam vessel, when first seen, was in great distress, driving towards a lee shore, the wind E. N. E.; that she made signals of distress; and the salvors, after endeavoring in vain to get out the lifeboat, kept watch all night on the deck; that the steamer manifested an intention of running on the lee shore, which would have been certain destruction, but the salvors, by waving a jacket, warned her off; that the weather continued extremely boisterous after the vessel had got off Blakeney bar, the salvors still endeavoring to get to her assistance, and the steamer still showing signals of distress, night and day; that on the 15th they succeeded in getting to her, and found that a boat from Wells had reached her; that the mate of the *City of Edinburgh* had admitted that her engine was ruined, that she was strained to pieces, and that her seams were so

open that you might see the green sea through the engine room ; that the master told the salvors the vessel and cargo were worth 33,000*l.*, and that they would be well rewarded for their trouble ; that they exerted themselves at the risk of their lives, and got her into Blakeney harbor that day, and continued on board till the 17th, when the storm had abated ; that the master (Fraser) refused then to make any remuneration beyond the sum of 10*l.* for pilotage, which had since been increased to a tender of 15*l.*

On the part of the ship and cargo it was alleged, in the first place, that when they were approaching Blakeney the wind was not E. N. E., but E. by S., which did not blow direct upon the land : and further, that upon nearing Blakeney, the flag was hoisted on the church, to denote that there was sufficient water, but being unable to see the buoy, owing to a sudden fall of snow, the master was obliged to haul off, and remained all the ensuing day, (the 13th) within three miles of the shore; that the only color shown was the union jack at the foretop-mast head, the usual signal for a pilot, which in the evening (as was customary) was exchanged for a light ; that on that and the following day no pilot came out (though a boat might have come with the greatest safety,) notwithstanding an additional (customary) signal shown in the mizen rigging ; that at daylight on the 15th, the vessel having rode out the gale during the night, a boat from Wells came to the vessel, and tendered aid; that the master was warned of the extortionate character of the Blakeney men ; that the only engagement made when the Blakeney boat came up (which claimed the right of piloting) was for piloting the steamer into Blakeney harbor ; that when in the harbor the master was informed, that during the gale some sailors had volunteered to man the life-boat, to go to the assistance of the vessel, but the Blakeney men had taken it from the sailors, saying it would not pay them for their trouble, but, if the storm increased, the vessel would go on shore, and then they should get well paid ; that the master never stated the value of the ship and cargo was 33,000*l.*, or any other amount ; that it was in fact only 13,000*l.*; and he denied that he had promised any remuneration beyond the pilotage.

Dr *Adams*, for the salvors, contended that a fair claim for salvage was laid in the whole of the conduct of the salvors' from the time of waving the jacket, which saved the vessel from destruction, to the salvors going off, at the imminent peril of their lives, as soon as it was practicable, and bringing the vessel into Blakeney harbor. He contended, that it was not the duty of a pilot, for mere pilotage, to risk his life by going in bad weather to a vessel which wanted a pilot. Attempts had been made to put off the life-boat, which was found to be impracticable ; and with respect to the extraordinary statement alleged on hearsay, that the salvors had prevented others from going to the vessel's relief, he would only say, that if these men had so misconducted themselves, they should have been proceeded against before the local magistrates, under an act of parliament (57 G. 3. c. 70.) for improving Blakeney harbor, and which inflicted penalties on pilots refusing to go out. He contended that the charge should have been differently made ; and that it was only set up to detract from the merit of the service, and to injure the present benefit and the future prospects of the men by unfounded and cruel allegations.

The *King's Advocate* (with whom was Dr *Phillmore*) said, that in a claim for salvage the first merit was promptness in rendering service, and contempt of danger ; but he looked in vain for one circumstance to show such merit in this case. The utmost service was one of pilotage. As to the assertions respecting the state of the vessel and its open seams, it was strange that she had actually undergone no caulking since, and had yet performed thirteen voyages. Giving to the salvors the whole benefit of their plea, there had been no salvage service rendered. But when the evidence of the owners was examined, the case assumed a character of importance to the interests of navigation, which the court was bound to protect against extortionate demands of this nature.

Sir *C. Robinson* proposed to the two Trinity Masters by whom he was assisted the following questions :—First, whether, regard being had to the state of the wind and weather on the 13th and 14th of January, it was in the power of the salvors to go off to the vessel as pilots, and bring her into the harbor ; secondly, whether their services on the 15th were so enhanced by the danger as to establish a claim to a reward, in addition to their pilotage, on that account.

The two gentlemen declared their opinion to be, that, allowing there was difficulty and danger in getting off on the 13th and 14th, there had been a want of exertion on the part of the salvors ; and that they had made no fair trial, which it was their duty to make, as pilots ; and that there was no danger whatever on the 15th ; and that all the service rendered that day was simple pilotage, the weather being moderate, and the wind fair for the harbor.

Sir *C. Robinson* declared that such was his opinion : and he therefore pronounced against the claim for remuneration. With regard to the charge against the salvors, of refusing to go out, in expectation of reaping an advantage from the expected augmented peril of the vessel, he observed, that the charge ought to have been more specific, and brought in a different form. As to the cost, he was not, under all the circumstances, disposed to give them against the salvors. He could not by any means extenuate their conduct. It was wrong, it was foolish ; but it was the way in which persons in their situation were too apt to act, and he could not put such interpretation upon it as to say that it was malicious. On the other hand, the master's conduct had been negligent, to say the least of it, in not bringing the charge in a more specific shape, and not making any complaint upon the subject in his protest. By giving costs against the salvors, he should throw upon these poor people a burden greater than their pilotage. He should pronounce for the tender, and decree all the salvors' expenses. —*Admiralty Court, H. T.* 1831.

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### LAW AGAINST A MAN SPENDING MORE THAN HE HAS.

During the protectorate of Cromwell (1657) an act of parliament was passed, entitled 'An act for punishing of such persons as live at high rates, and have no visible estate, profession, or calling, answerable thereto.' The preamble recites, that 'divers lewd and dissolute persons in this commonwealth live at very high rates and great expenses, having no visible estate, &c to maintain themselves in their licentious, loose, and ungodly practices, but make it their trade and livelihood to cheat, deboyst, cozen, and deceive the young gentry and other good people of this commonwealth.' The authority given to magistrates under this act was curious. Every justice of the peace, mayor, or head officer, might issue his warrant to bring such persons before him, and require bail for their appearance at the next general session, and in default of such bail commit them to prison. They were then to be indicted at the said sessions 'for living at high rates and great expenses, having no visible estate,' &c ; and upon conviction they were commited to hard labor for three months. Upon a second conviction they were to be committed as aforesaid, and detained until discharged by the jnstices in open sessions. If this law were now in force, how crowded would be the House of Correction ! How constantly would the treadmill be kept in motion ! How would the company at our fashionable hotels, theatres, and promenades, be thinned ! The revival of the law would excite as great a commotion in Bond Street and Brighton, as Lord Wynford's bill is likely to create 'on the other side of the water.'

*Literary Panorama, July*, 1819.

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### A ROYAL OUTLAW.

The king of Spain was outlawed in Westminster hall, I being of counsel against him. A merchant had recovered costs against him in a suit, which because he could not get, we advised to have him outlawed for not appearing, and so he was. As soon as Gondemar heard that, he presently sent the money, by reason, if his majesty had been outlawed, he could not have had the benefit of law, which would have been very prejudicial, there being then many suits depending betwixt the king of Spain and our English merchants.—*Selden's Table Talk.*

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